No. S077166

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CRANDELL MCKINNON,

Defendant and Appellant.

(Riverside County Superior Court No. CR-69302)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE PATRICK F. MAGERS

MICHAEL J. HERSEK
State Public Defender

C. DELAINE RENARD
State Bar No. 169893
Deputy State Public Defender

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

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INTRODUCTION

Appellant, Crandell McKinnon, was convicted of the unrelated murders of Perry Coder and Gregory Martin, with a sole special circumstance of multiple murder, and sentenced to death. The convictions were based on the testimony of a motley assortment of drug-addict felons, some of whom were high on crack cocaine when they claimed to have witnessed what they did, an informant who regularly sold information to local police in exchange for crack cocaine funding, a jailhouse snitch who was promised – and received – extraordinary benefits in exchange for his testimony, a suspect who was told to "choose" between being charged with one of the murders or identifying McKinnon as the killer, and a police officer whose testimony was facially incredible and inherently improbable. Their accounts of the crimes were inconsistent with each other, with their own prior statements, with the physical evidence, and, in some cases, with physical possibility.

Into this astonishingly close case was injected a series of errors which, individually or collectively, tipped the balance in favor of conviction and the ultimate verdict of death, which was based largely on the bare commission of the crimes themselves. Perhaps the most important of these errors, and certainly one that had a profound impact on all of the others and the trial as a whole, was the court's refusal to sever the charges although the murders were unrelated, the cases were weak, and they involved no duplication or cross-admissibility of evidence. The remaining evidentiary and instructional errors cut straight to the heart of the critical credibility issues that sealed McKinnon's fate, serving both to bolster the credibility of the state's otherwise incredible witnesses – and thus its entire case – and to undermine the defense of innocence and evidence fabrication.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of death following a trial and is authorized by Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

On October 21, 1996, the Riverside County District Attorney filed a four-count information against appellant, Crandell McKinnon, charging the following:

1) Count one charged a January 4, 1994, violation of Penal Code section 187 (murder of Perry Coder);
2) Count two charged a January 4, 1994, violation of Penal Code section 12021.1 (ex-felon in possession of firearm);
3) Count three charged a February 12, 1994, violation of Penal Code section 187 (murder of Gregory Martin); and
4) Count four charged a February 12, 1994, violation of Penal Code section 12021.1 (ex-felon in possession of firearm).

(1 CT 161-163.)[1]

As to counts one and three, the information added allegations that

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[1] "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript.

Several volumes of augmented Reporter's Transcripts and supplemental Clerk's Transcripts were filed. "ART" refers to the Augmented Reporter's Transcript, preceded by the date of the reported proceeding (e.g., "1 /16/96 ART".) "SCT' refers to the supplemental Clerk's Transcript, preceded by the volume number (e.g., "1 SCT"). Finally, one volume of Reporter's Transcript was filed with the original record and entitled "Pre-Trial Volume," but was not sequentially paginated with the main volumes. That volume is designated "Pre-Trial RT."

All statutory references are to the Penal Code unless otherwise noted.

McKinnon personally used a firearm in the commission of the offenses within the meaning of section 12022.5. Finally, the information alleged a "multiple murder" special circumstance within the meaning of section 190.2, subdivision (a)(3). (1 CT 161-163.)

On October 22, 1996, McKinnon pleaded not guilty and denied the special allegations. (1 CT 166.) On December 10, 1998, trial commenced with jury selection. (3 CT 833.)

On January 4, 1999, the fourth day of their deliberations, the jurors indicated that they were deadlocked on counts three and four. (13 CT 3810, 4098.) The court directed the jurors to continue deliberations on those counts; on January 5, 1999, the jury found McKinnon guilty as charged and found true the gun use and special circumstance allegations. (14 CT 4018-4019.)

On January 6, 1999, the penalty phase commenced. (14 CT 4037.) On January 13, 1999, the jury fixed McKinnon's punishment at death. (14 CT 4091.)

On March 5, 1999, the trial court denied McKinnon's motions for new trial and to modify the death judgment pursuant to Penal Code section 190.4, subdivision (e). (15 CT 4156.) On the same date, the court imposed the judgment and sentence of death. (15 CT 4154-4155.)

This appeal is automatic.

STATEMENT OF FACTS

The Guilt Phase

A. The January 4, 1994 Homicide of Perry Coder

On January 4, 1994, at about 11:00 p.m., Banning Police received a call that a body had been found behind the Desert Edge Motel in Banning, California. (4 RT 517, 531.) The Desert Edge was a high crime area

frequented by drug addicts, drug dealers, and prostitutes. (4 RT 518-519, 532, 548.) The denizens of the motel funded their drug habits in a variety of ways, including selling information to local police for cash, theft, prostitution, and bartering various items for drugs. (4 RT 674; 5 RT 741-742; 6 RT 811-812, 815.)

When police arrived on the scene, they found the body of Perry Coder. (4 RT 520-521.) According to the medical examiner, Coder had been shot once to his head. (4 RT 520-521, 5 RT 716, 718.) The fatal gunshot wound was a "tight contact wound," meaning that the gun's muzzle had been pressed tightly against Coder's skin when the gun was fired. (5 RT 718-719.)

Coder's body was found at the edge of a field behind the motel. (4 RT 518-519; 7 SCT 21 [People's Trial Exhibit 1]; People's Trial Exhibit 6.) The field was very dark and often used by drug addicts and as a dumping ground for debris. (4 RT 527-530, 532, 536-538, 594, 598-599, 601; People's Trial Exhibits Nos. 6-10.)[2] Police found no relevant evidence at the scene, such as bullets or shell casings. (4 RT 524, 534-537.)

The motel and surrounding area were immediately cordoned off to ensure that any witnesses remained at the scene and were available for questioning. (4 RT 535-536.) However, the police did not find any witnesses among the people they questioned at the motel that night. (4 RT 536, 539-540.)

The murder was reported in the local newspaper. (6 RT 804, 837, 840, 845.) In the months that followed, rumors and speculation regarding

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[2] Police needed to illuminate the scene with flashlights, which is reflected in the photographic exhibits. (4 RT 530-531.)

the identity of the killer spread through the small town. (13 CT 3588-3589, 3591.) According to some rumors, the killer was a "white boy" named Hank who knew Coder, was said to have had a "falling out" with him, was at the motel on the night he was killed, and had even admitted to the crime. (13 CT 3588-3589, 3591.) According to others, appellant, Crandell McKinnon – a local man and small time drug dealer with a history of frequent, petty skirmishes with members of the small Banning Police Department – was the killer. (13 CT 3583, 3588, 3592, 3613-3614, 3771-3773, 3775; 6 RT 940; see also 1 RT 74.)

Several months after Coder's death, Banning police obtained information from three witnesses who claimed to have been behind the Desert Edge Motel on the night of the shooting and to have witnessed it – Kerry Don Scott, Gina Lee, and Orlando Hunt. All three had felony records and were admitted crack cocaine addicts or heavy users. (4 RT 547-548, 561-562, 571-572, 644-645, 672-675; 6 RT 775, 808-809, 811-812, 815.)

1. Kerry Scott's Eyewitness Account of the Shooting.

Kerry Scott had long been a paid informant for the Banning Police Department, usually for Detectives Paul Herrera and Bill Caldwell. (6 RT 776-777, 811-812.) Scott told police, and initially claimed at trial, that the money he received paid for medication. (6 RT 777.) However, he eventually admitted that the money Banning police paid for his information went towards funding his "hundreds of dollars a day" crack cocaine habit. (6 RT 811-812, 815.)

Banning is a very small town with a low homicide rate; police estimated that perhaps three or four homicides were committed there each year. (6 RT 875.) Scott claimed to have been a percipient witness to three

separate murders in Banning – committed at different times and places and by different people – including the Coder murder. (6 RT 813-814.) He claimed to have witnessed all of the killings while he was receiving crack cocaine money from the police, and indeed testified in the trials relating to all three cases. (6 RT 814-815.)

Although the Coder homicide occurred on January 4, 1994, Scott did not inform his police contacts that he had witnessed it until eight months later, in September 1994. (6 RT 817.) Scott admitted to having read about the killing in the local newspaper in the eight-month interim between the crime and reporting it to his police contacts. (6 RT 804, 837, 845.)

According to Scott, on January 4, he had been up for two days smoking crack. (6 RT 802-803, 824.) Sometime that night, he walked from a nearby town to his Banning home. (6 RT 792-794.) Along the way, he passed by the Desert Edge Motel and saw Gina Lee standing in front of the motel, outside one of the rooms. (6 RT 792, 821-823.) Scott decided to walk around the motel and through the darkened field. (6 RT 819.) For no particular reason, he stopped in the middle of the field and stood under a tree for some period of time. (6 RT 796-797, 819-820, 824; see also People's Exhibit 1 [diagram of scene on which Scott's location was designated with letter "S"]; 4 RT 518.)

While Scott was standing under the tree, he observed a white man about 50 yards away walking through the darkened field. (6 RT 795, 818.) He then saw McKinnon, whom he knew by his nickname "Popeye," approach the white man. (6 RT 796-797.) McKinnon pulled out a chrome gun and cocked it to the side "gangsta style." (6 RT 833-834.) Although the medical examiner testified that Coder had been shot only once and that the muzzle of the gun had been pressed tightly against Coder's skin, and

although no bullets or shell casings were found at the scene to suggest that the gun had been fired more than once, Scott testified that McKinnon pointed the gun two to three feet from the man's head and fired *four* shots. (6 RT 796, 837, 847.) The man immediately fell to the ground. (6 RT 800.) McKinnon simply walked away; Scott was certain that McKinnon did not run. (6 RT 825.)[3]

Scott was equally certain that he did not see anyone other than McKinnon and the white man behind the motel or in the field that night, including Gina Lee or Orlando Hunt. (6 RT 799, 820-821, 823.)

Scott did not tell his police contacts about the murder until either Detective Herrera (6 RT 801, 837) or Detective Caldwell (6 RT 803-804, 817-818, 828-829) approached him eight months later, in September 1994, and asked him if he had any information about any cases. (6 RT 814-818.) At that time, Banning police were still giving money to support Scott's daily crack habit. (6 RT 814-818.) Although he frequently and willingly provided information to police in exchange for crack money – including information about murders – Scott explained that he did not tell his contacts about the Coder murder until eight months later because he did not "want to get involved in it." (6 RT 801.) Scott denied that he ever actually received any money for the information he provided regarding the Coder murder. (6 RT 844.)

Shortly after telling his story to the police, Scott moved to Arizona. (6 RT 776-777.) Sometime thereafter, he committed a series of violent

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[3] At trial, Scott testified that he did not see where McKinnon went. (6 RT 830.) However, he curiously told police that McKinnon walked over to some apartments "to get us a beer." (6 RT 828-829.)

crimes and was convicted in separate cases of aggravated assault, aggravated robbery, attempted burglary, and theft, and incarcerated in an Arizona prison. (6 RT 775.) Although the convictions arose in separate cases, Scott's sentences were ordered to run concurrent to each other, so that his total sentence was only three years. (6 RT 775, 808.) He denied that his information and testimony against McKinnon had "anything to do with" his light sentence. (6 RT 776-777.)

In August of 1997, Scott admitted to a defense investigator that he had lied to police and did not, in fact, witness the Coder homicide. (6 RT 802.) At trial, he claimed that he had lied to the investigator, not to police, because someone had told him that his life would be in danger if he ever returned to California. (6 RT 802.)

2. Gina Lee's Various Accounts of the Shooting and the Conflicting Accounts of Johnetta Hawkins and Jesse Brown

Gina Lee lived at the Desert Edge Motel in January 1994. (4 RT 646.) By her own admission, she was a prostitute and hardcore crack cocaine addict who used the drug all day, every day. Indeed, it was the "main focus" of her life. (4 RT 644-645, 672-675.) She had a series of prior felony convictions and was in custody at the time of trial. (4 RT 644-645.) Lee knew both McKinnon and Orlando Hunt, also known as "Poony." She and Hunt had had a romantic relationship and both considered him to be the father of her child, who bore Hunt's last name. (4 RT 550, 606, 698; 13 CT 3583-3583 [People's Trial Exhibit 33].)

On the night of the shooting, Lee was at the motel with her cousin, Johnetta Hawkins, high on crack cocaine. (4 RT 647, 664, 687-688.) After the shooting, Detective Caldwell interviewed Lee, but she told him that she did not know anything about it. (4 RT 649-650, 678.)

Eight months later, in September 1994, Detective Caldwell picked Lee up and again questioned her about the Coder shooting. (4 RT 665, 679.) Again, she was high on crack. (4 RT 680.) Caldwell took her to the police station and recorded the interrogation. (People's Trial Exhibit 33, 13 CT 3580-3596; 4 RT 665-666.)[4] The interrogation was an intense one in which Caldwell repeatedly demanded information about McKinnon's role in the murder and yelled at Lee that she had better not "lie" to him. (13 CT 3581, 3583-3584, 3596.)

Lee told Detective Caldwell that she was high on crack cocaine and alcohol on the night of the shooting. (13 CT 3585.) At some point that night, she and her friend, Chester Norwood (also known as "Hoss Collins"), were walking through the darkened field behind the motel, on their way to purchase more drugs. (13 CT 3580, 3585-3586, 3590, 3593-3594.) Although it was so dark behind the motel that she "could barely see," Lee saw McKinnon and Hunt drive up to the motel in a blue Cadillac, get out, and run behind the motel. (13 CT 3580, 3583, 3585.) She and Norwood continued walking through the darkened field when she heard a gunshot or "gunshots" (plural). (13 CT 3580, 3587, 3593-3594.) She turned and, "in the distance" (13 CT 3581), saw "two people running" (13 CT 3583, 3590), and a white man on the ground (13 CT 3580). She identified the running people as McKinnon and Hunt. (13 CT 3580, 3592.) However, when pressed about what she was actually able to see, she replied, "I don't know . . . I only seen two people running." (13 CT 3590; see also 13 CT 3584-3585.)

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[4] The recording (People's Trial Exhibit 32) was played for the jurors and a transcript thereof was distributed to them (People's Trial Exhibit 33). (5 RT 757-759.)

At various points in her police statement, Lee said that McKinnon and Hunt ran directly to McKinnon's car immediately after the shots were fired and drove away. (13 CT 3580, 3587.) At other points, she said that she saw McKinnon and Hunt in her motel room immediately after the shots were fired but before police arrived. (13 CT 3581, 3584, 3587, 3590, 3592.) When she saw McKinnon, his eyes were big and she asked him what was "up"; he put his fingers to his lips and said "shhh." (13 CT 3581, 3594.) He was acting like "when you don't like if you gone did something or scared of something you know how you act." (13 CT 3587.) At yet another point in her statement, Lee said that she did not return to her room immediately after the shooting. Instead, she continued through the field and purchased more drugs before returning to her room to find McKinnon alone, not with Hunt, and that he left before police arrived. (13 CT 3594-3595.)

However, at another point, Lee told Detective Caldwell that the police arrived immediately after the shots were fired and she saw the body. (13 CT 3589.) At yet another, she agreed with Detective Caldwell that the police arrived 10 to 15 minutes after the shots were fired. (13 CT 3590.)

Lee did not see anyone else (such as Kerry Scott) behind the motel at or near the time of the shooting. (13 CT 3589.)

Detective Caldwell repeatedly demanded to know if Lee had seen McKinnon with a gun or pull the trigger, yelling warnings not to lie to him. (13 CT 3581, 3583, 3584.) Lee initially replied that she had not seen him with a gun. (13 CT 3581, 3583.) Eventually, she agreed that she had seen him with a gun earlier in the day. (13 CT 3584-3585.) Although Kerry Scott claimed to have seen McKinnon shoot Coder with a chrome gun (6 RT 833-834), Lee described McKinnon's gun as black. (13 CT 3584.)

When pressed to describe the gun, or even to say whether it looked anything like Detective Caldwell's gun, Lee eventually said that she just saw "part of a gun." (13 CT 3584.)

Detective Caldwell asked Lee why McKinnon and Hunt had killed Coder. (13 CT 3588.) Lee said that there were "a lot of rumors," one of which was that Coder owed McKinnon money for drugs. (13 CT 3588.) However, Lee, who knew both Coder and McKinnon, had never seen them together or known McKinnon to deal drugs to him. (13 CT 3588.) At the close of the interrogation, Detective Caldwell again warned Lee that she had better not be "lying" to him. (13 CT 3596.)

Over a year and a half after that interrogation, Lee testified at the preliminary hearing that she did not remember anything about the night of the shooting. (4 RT 647, 694.) As discussed in more detail in part 3, below, following her \preliminary hearing testimony, the prosecutor and District Attorney Investigator Gaylen Buchanan directed Orlando Hunt to tell Lee that they would "mess with" her if she did not "come clean" and say that she had lied at the preliminary hearing. (13 CT 3626, 3629.) In addition, Investigator Buchanan spoke to her. (4 RT 646-647.) Thereafter, Lee appeared at trial and testified that she had lied at the preliminary hearing because she was "scared." (4 RT 647.)

According to her trial testimony, Lee was with her cousin, Johnetta Hawkins, and her friend, Chester Norwood, on the night of the shooting, high on crack. (4 RT 650, 667, 680-681.) She and Norwood decided to purchase more crack and left Johnetta behind in Lee's motel room. (4 RT 648, 676, 667-668, 680-681.) As they were walking through the darkened field behind the motel, Lee saw McKinnon and Hunt drive up to the motel in a blue Cadillac. (4 RT 648, 667, 680-681.) She heard a single "gunshot,

turned, and saw two people running away. (4 RT 650, 652.) Due to the fact that it was dark, she could only make out their "shadows" or silhouettes. (4 RT 683.)

Lee acknowledged that she told Detective Caldwell that the two men were McKinnon and Hunt. (4 RT 695-696.) However, she explained that she had just assumed that it was them, since she had seen them together just moments before the shooting. (4 RT 683-684, 695.) In truth, it was simply too dark to identify either of the men. (4 RT 683.)

On a diagram, Lee marked the location from which she heard the shot and saw the two men running, a location where Kerry Scott specifically testified that he saw no one. (4 RT 651-652; 6 RT 823; see also People's Exhibit 1 [diagram on which Lee's location marked with letter "L"].) Nor did Lee see Scott or anyone else behind the motel or in the field when the shot was fired. (4 RT 683.)

At trial, Lee provided yet more conflicting accounts regarding the events following the shooting. According to her trial testimony, after hearing the shot, she and Chester Norwood completed their drug run, consumed more crack, and returned to the motel about 30 minutes later, at which point police still had not arrived. (4 RT 657, 664, 685-687.) She went to her room and smoked more crack with Johnetta Hawkins. (4 RT 687-689.) About 10 to 20 minutes later, she and Hawkins went to *someone else's* room, where they encountered McKinnon. (4 RT 687-689.) He had grass or leaves in his hair, looked "kind of strange," and seemed upset. (4 RT 658.) Lee asked him what was wrong and he put his finger to his lips and told them, "shhh. . . . somebody's dead outside." (4 RT 659.) Although by Lee's estimate, it was now nearly an hour after the shooting, and although she had told Detective Caldwell that police arrived

immediately after the shots were fired (13 CT 3589), and that they arrived no more than 15 minutes after the shooting (13 CT 3589-3590), she testified that police still had not arrived when she and Hawkins had this encounter with McKinnon. (4 RT 664, 687, 690.)

Lee did not see a gun at that time. (4 RT 659, 691.) However, earlier in the day, McKinnon was in her room with a black gun. (4 RT 655-656.)

Lee acknowledged that she had given several different versions of what she witnessed, or did not witness, on the night of the shooting. (4 RT 671.) She explained that she had not tried to lie, but the inordinate amount of drugs she consumed on a daily basis had impaired her memory and distorted her perception of reality. (4 RT 671-674.)

Lee's cousin, Johnetta Hawkins, was also questioned by the police sometime after the shooting. (5 RT 731.) She told them the truth when she denied having any knowledge of the crime. (5 RT 731.) However, after trial commenced, and while she was in custody on another matter, Investigator Buchanan interrogated Hawkins again, at which time she changed her story and told him that Lee had made some statements to her about the shooting. (5 RT 726, 732, 735-737.)

Hawkins, like Lee, was a crack cocaine addict with a number of felony and petty theft convictions. (5 RT 726-727, 740-743.) On the day of the shooting, she and Lee had been up for two days consuming crack and were "real high." (5 RT 727-728, 753.) While Hawkins agreed that she and Lee had been together throughout the night of the shooting, her account of the events surrounding the shooting differed dramatically from Lee's.

Hawkins did hear the gunshot from Lee's motel room. (5 RT 729-

730.) However, she was certain that Lee was not in the field behind the motel at the time. (5 RT 751, 754.) According to Hawkins, they were together in Lee's motel room just before the shot was fired. At one point, Hawkins testified that Lee had just stepped out the front door, which opened onto the *front* – not the back – of the motel, to look for someone to give them a ride to obtain more crack, when she heard the shot outside. (5 RT 729-730, 754.) At another point, Hawkins testified that she and Lee were together in Lee's room when they both heard the shot, at which point Lee opened the front door and looked outside. (5 RT 749-750, 754.) In either event, Hawkins was certain that Lee was not in the field *behind* the motel at anytime before or after she heard the shot. (5 RT 751, 754.) When Hawkins asked Lee if she had seen anything in front of the motel, Lee replied that she saw McKinnon and Hunt running. (5 RT 732-733, 754.)

Contrary to Lee's trial testimony but consistent with at least one of her statements to Detective Caldwell, Hawkins testified that police arrived "pretty quickly" after the shot. (5 RT 751.) Hawkins and Lee walked out of the motel room; when they tried to leave the motel grounds, police stopped them and told them that they could not leave. (5 RT 751.) Nevertheless, when another Desert Edge resident, Jesse Brown drove by in his car, they got a ride from him, and obtained more drugs at another location. (5 RT 731, 748, 751; see also 4 RT 675.)

Contrary to Lee's testimony, Hawkins did not see McKinnon anywhere at the motel at any time that night, before or after the shooting. (5 RT 732-733, 747-748.) Although by her own account she was continuously with Lee after the shooting and they never encountered McKinnon, Hawkins testified that, while they were riding in Brown's car, Lee told her that at some point that night, McKinnon had threatened to kill

her "if she said something." (5 RT 736-737.)[5]

Consistent with Lee's testimony, Hawkins explained that prolonged crack cocaine use seriously affects the user's memory and distorts her perception of time. (5 RT 744-745.) For instance, an addict might believe that an event which occurred a day ago had occurred only an hour ago. (5 RT 744.)

Despite Lee's accounts that McKinnon had arrived at the motel in a blue Cadillac and remained there for over an hour after the shooting, Hawkins was sure that his blue Cadillac was not at the motel after the shooting. She was certain of that fact because if his car had been there, they would have found McKinnon and asked him for a ride instead of Jesse Brown. (5 RT 747-748.)

Jesse Brown's account of the events surrounding the shooting conflicted with both Lee and Hawkins's accounts. According to Brown (also a heavy crack user with a felony record), he was in his motel room with several people, including Chester Norwood, when he heard the gunshot. (8 RT 1065-1066, 1068-1069.) He was certain that Norwood was inside with him – not outside in the field, as Lee had testified – when the shot was fired and that Norwood remained there for another 15 to 20 minutes. (8 RT 1069-1070.)

Sometime after the shot, Brown and a friend did attempt to drive off of the premises. (8 RT 1071.) However, contrary to Hawkins's testimony, the police stopped them in the parking lot and arrested them for "possession." (8 RT 1071-1072.)

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[5] Although Hawkins did see McKinnon earlier in the *afternoon*, she never saw him with a gun that day. (5 RT 729.)

Brown was also familiar with the blue Cadillac that McKinnon often drove, but, like Hawkins, did not see it at all in the parking lot that night. (8 RT 1072.) The police, who cordoned off the area and interrogated the people at the motel, never indicated that McKinnon was among them or that the blue Cadillac was at the motel when they arrived.

3. Orlando Hunt's Accounts of the Shooting.

Like the other prosecution witnesses, Orlando Hunt was an abuser of crack cocaine and other drugs with a felony record, which included a prior conviction and prison sentence for assault with a firearm. (4 RT 547-548, 561-562, 570-572, 574-575.) In January 1995, a year after the Coder murder, the police questioned Hunt about it. (4 RT 573-574.) He told them that he had been with his mother that night and did not know anything about the crime. (4 RT 558, 575-576.)

Sometime thereafter, Hunt was arrested for spousal abuse and incarcerated. (4 RT 577.) In December 1995, nearly two years after the Coder murder and while he was in custody, the trial prosecutor, Deputy District Attorney John Davis, and Investigator Buchanan again approached him and questioned him about the shooting and McKinnon's role in it. (4 RT 559, 567, 577, 612, 629-630.) Again, Hunt disavowed any knowledge of the crime or McKinnon's involvement in it. (4 RT 559, 577, 612.)

Hunt took a polygraph test and was informed that its results proved that he was lying. (4 RT 613-614.) Thereafter, Davis and Buchanan again interrogated Hunt about the murder and McKinnon's role in it. (4 RT 629-630; 13 CT 3598-3632.)[6]

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[6] The interrogation was recorded (People's Trial Exhibit 34); the tape was played for the jurors and a transcript was distributed to them. (4 (continued...)

Davis commenced the post-polygraph interrogation by impressing upon Hunt that it was his (Davis's) "decision what's appropriate to do to you, for you, with you, whatever. " (13 CT 3599.) He told Hunt that he had a choice: "you're either a defendant or you're an eye witness [*sic*] . . . . [T]hey aren't good choices. There's no good choice. . . . [I]f you're ready now or whatever, to tell me the truth 'cause I know what the truth is but I've gotta be able to hear from you and either use you or do you, one of the two. You understand?" (13 CT 3599.)

Hunt responded that he and McKinnon drove to the motel on the night of the shooting, nearly two years earlier. (13 CT 3599.) He did not see McKinnon with a gun. (13 CT 3600.) They got out and McKinnon took "off around the building." (13 CT 3601.) Hunt heard gunshots and feared that someone was shooting at McKinnon. (13 CT 3601.) He saw McKinnon emerge from behind the motel and run away. Hunt ran to his mother's house. (13 CT 3601.)

Buchanan pointedly reminded Hunt, "wasn't one of the questions on the polygraph uh, were you there when uh, Popeye shot the victim?" (13 CT 3601.) Davis told Hunt that they were going to charge him with the murder. (13 CT 3602.) He said that he had "four witnesses" who had reported that Hunt "was standing right by" McKinnon when he (McKinnon) shot Coder. (13 CT 3602.) Buchanan added that if he denied actually witnessing McKinnon shoot Coder, they "knew" that was not the truth. (13 CT 3603.) He asked Hunt how he could expect them to "help" him if he did not tell them "the truth." (13 CT 3603.) Davis added, "I try to protect

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[6] (...continued)
RT 589; 5 RT 757-760; People's Trial Exhibit 35 at 13 CT 3598-3632.)

people that I think are cooperating with me and I try to screw people that don't, you understand?" (13 CT 3610.) Hunt then changed his story.

According to this new version, he and McKinnon were in front of the motel talking to Gina Lee when McKinnon told Hunt to follow him behind the motel. (13 CT 3611, 3613.) McKinnon ran up to a white man walking through the field. (13 CT 3611, 3613, 3620.) No one else was behind the motel, including Kerry Scott or Gina Lee. (13 CT 3618.) McKinnon pulled a gun out of his waistband and pointed it at the man in the standard position. Hunt was certain that McKinnon did *not* cock it to the side, "gangsta-style," contrary to Kerry Scott's account. (13 CT 3611, 3613, 3620-3621.) Contrary to the physical evidence that established that the gun had been pressed tightly to Coder's skin when it was fired (5 RT 718-719), Hunt said that McKinnon shot the man from a distance of *three to four feet.* (13 CT 3611, 3613, 3620.) Hunt and McKinnon then ran away in the same direction. (13 CT 3615.) Contrary to Gina Lee's statements that Hunt was in her motel room after the shooting (13 CT 3581, 3584, 3587, 3590, 3592), Hunt said that he ran directly to his mother's house. (13 CT 3615.)

Hunt did not know why McKinnon shot the man. (13 CT 3617.) The two did not exchange any words or otherwise have any kind of altercation before McKinnon shot him. (13 CT 3619.)

Davis asked Hunt if he ever saw McKinnon again, impressing upon him that McKinnon "must have said something." (13 CT 3623.) Hunt replied that two or three days later, he awoke to find McKinnon in his bedroom. (13 CT 3623.) McKinnon told him, "it can happen again if somebody opens their mouth." (13 CT 3623.)

Davis then asked Hunt if he had "any control over Gina" [Lee]." (13 CT 3626.) Hunt replied that he did. (13 CT 3626.) Davis said, "she's

being real hard-ass with me," and Davis asked Hunt to "give her the word." (13 CT 3626.) Hunt assured Davis, "don't worry about it," he was "gonna let her know." (13 CT 3626-3627.)[7]

After discussing the fact that Lee was in custody, Davis continued, "Well but right now before trial um, see I don't want to mess with her time. . . . I don't want to mess with her if she cooperates with me. If she doesn't cooperate with me, I'll just grab her down there and she can lie. . . . You'll talk to her. . . . I need to interview Gina and have her come clean and say, 'Yeah, I was lying on the prelim 'cause I was scared and I was trying to support ___ and whatever,' whatever her trip was. . . . And um, so uh, so long as you uh, work with me, I'll work with you, okay? You understand?" (13 CT 3627-3629.)

Hunt stuck to this last story at trial with some variations. Contrary to Lee and Hawkins's accounts, Hunt testified that he and McKinnon spoke to both women immediately after McKinnon parked his blue Cadillac in front of the motel. (4 RT 550-551, 604, 621.)[8] After the women walked away, Messrs. McKinnon and Hunt walked around to the back of the motel. (4 RT 551, 595-596.) Hunt saw a white man walking through the darkened field. (4 RT 551, 594.) Although Coder was nearly six feet tall (5 RT 724), Hunt described him as "kind of short." (4 RT 552.)

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[7] This interrogation occurred after Lee appeared at the May 1, 1995, preliminary hearing and testified that she could not recall anything about the shooting. (1 CT 14, 19-38.)

[8] While Hawkins testified that she had seen McKinnon and Hunt at the motel earlier that morning, she did not see the men on the night of the shooting. (5 RT 731-732.) According to Lee, she did not speak with the men when they arrived at the motel that night. (13 CT 3580, 3585; 4 RT 648-649, 667, 680-681.)

McKinnon approached the man, pulled a gun out of his coat, and shot him once "for no apparent reason." (4 RT 551-552, 556.) When the man fell, McKinnon ran away and Hunt ran to his mother's house. (4 RT 556-557.)

Hunt marked the location from which he had witnessed the shooting on a diagram, a spot where Kerry Scott testified that he had seen no one. (4 RT 553-554, 821; see also People's Exhibit 1 [diagram of scene on which Hunt's location was marked with letter "H"].) For his own part, Hunt did not see anyone else behind the motel or in the field, including Scott, Lee, or Norwood. (4 RT 594-595.) At trial, Hunt claimed that it was the next day that he awoke to find McKinnon in his room, who told him that if he said anything, "this could happen to you." (4 RT 557.)

Finally, Hunt admitted that he spoke to a defense investigator in September 1996. (4 RT 606-607.) Although he knew that he did not have to consent to the interview, he did so and admitted to the investigator that the prosecutor had pressured him into making his statement. (4 RT 606-609.) He admitted that his police statement was a lie: he was not at the scene of the murder, did not see McKinnon shoot Coder, and did not know who had killed Coder. (4 RT 609.) At trial, however, he claimed that what he had told the investigator was a lie. (4 RT 606-609, 611.)[9]

4. Other Evidence and the Lack Thereof.

On December 29, 1994, Banning Police Detective Caldwell and

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[9] On cross-examination, Hunt denied or claimed not to recall various threats and promises the prosecutor and his investigator made to him during his (recorded) post-polygraph interrogation. (4 RT 580-582, 604-606, 622, 630-634.)

Banning Police Sergeant Marshall Palmer interrogated McKinnon about the Coder murder. McKinnon, who was incarcerated for a parole violation, waived his rights and agreed to speak with them. (13 CT 3766-3767.) The officers clearly knew McKinnon well and the three men discussed a series of prior, petty run-ins between McKinnon and members of their small department. (13 CT 3771-3773, 3783, 3785-3787.)

At the outset, the officers told McKinnon that he was a suspect in a murder that had been committed in Banning on January 4, 1994. (13 CT 3766.) McKinnon initially denied that he was in Banning in January, explaining that he was living in San Bernardino at the time. (13 CT 3768-3769, 3776-3777.) However, he quickly admitted that he had passed through Banning that month to see his daughter, but explained that he was not supposed to be there because he was on parole in San Bernardino. (13 CT 3769, 3779, 3782, 3784.) Sergeant Palmer and Detective Caldwell told McKinnon that they had three eyewitnesses who saw him shoot Coder. (13 CT 3772, 3774.) McKinnon admitted that he knew people at the Desert Edge and sometimes visited them there. (13 CT 3773-3774, 3780-3781.) However, he denied that he had shot Coder or even that he knew him. (13 CT 3772, 3781.) Asked why witnesses would identify him as Coder's killer, McKinnon replied that, given their history, Banning Police blame him for everything that happens in Banning. (13 CT 3772, 3774-3775.) McKinnon said that Banning Police were "always messin'" with him; in fact, two officers had threatened to kill him. (13 CT 3772-3773, 3775.)

No physical or other evidence linked McKinnon to the Coder murder. Although a bullet was recovered from Coder, it was not matched to any weapon, much less any weapon to which McKinnon had ever had access. (4 RT 524-525; 5 RT 721-722.) Nor was any motive ever offered

for the crime. Thus, the only evidence against McKinnon came from the mouths of the above-described drug addict felons, two of whom had been pressured in no uncertain terms to incriminate McKinnon, one of whom regularly sold information to police in exchange for drug money, and all of whom gave accounts that were inconsistent with each other and/or with the physical evidence.

B. The February 12, 1994, Homicide of Gregory Martin

1. The Shooting and Lloyd Marcus's Neutral Eyewitness Description of an Unknown Asian or Hispanic Man as the Killer.

On the night of February 12, 1994, Gregory "Moto" Martin was shot twice in the head in front of the Meadowbrooks Apartments in Banning. (5 RT 766-768, 770; 6 RT 874, 876-877, 881, 883.) His wounds were fatal. (5 RT 767-768.)

Banning Police Sergeant Marshall Palmer was the lead investigator assigned to the case. (6 RT 902.) Upon his arrival on the scene that night, "a large group" of bystanders had already gathered. (6 RT 884.) He had officers immediately cordon off and search the area, but no evidence was discovered. (6 RT 884-885.) Sergeant Palmer also directed two officers to canvass the area for witnesses. (6 RT 910.)

Lloyd Marcus reported to one of the officers that he had witnessed the shooting. (6 RT 885.) Sergeant Palmer interviewed Marcus that night at the police station. (6 RT 892, 895.) He no independent recollection of the interview, but did take notes and prepare a report. (6 RT 891-892.)

According to Palmer's report, Marcus said that he was under a carport at the apartment complex that night. (6 RT 891.) He saw two men about a block away. (6 RT 901.) Marcus was able to see them fairly well because they were standing directly under a street light. (6 RT 919.)

Marcus identified one of the men by name as "Moto" (Gregory Martin). (6 RT 894, 919-920.) He said that he did not know the other man. (6 RT 920.) However, he was able to describe him as an adult Mexican or Asian male, about six feet one inches to six feet two inches tall, 190 to 220 pounds, wearing a red baseball cap, a Pendleton shirt, and black pants. (6 RT 895, 922-924, 947-948.) Marcus could hear the two men arguing over money. (6 RT 919, 925.) When the men started pushing each other, the Asian or Hispanic man pulled out a shiny gun, fired two shots at "Moto," and ran away. (6 RT 925.)

McKinnon is a dark-skinned, African-American man who stands five feet, 10 inches tall. (6 RT 923; see also 7 SCT 10; 8 SCT 13-16.)

2. Discovery of the Martin Murder Weapon in Kimiya Gamble's Purse.

On February 19, 1994, a week after Martin's homicide, Riverside Sheriff's Deputy Peter Herrera stopped a car in Desert Hot Springs for driving too slowly.[10] (4 RT 636-638.) Kimiya Gamble was driving the car; McKinnon was the passenger. (4 RT 636-637.)

Gamble was also a user of crack and other drugs. (7 RT 1037-1038.) Deputy Herrera searched her purse and discovered a loaded gun inside. (4 RT 637-638, 641.) At the scene, Gamble admitted that the gun was hers and explained that she had bought it from "some unknown person." (4 RT 642; 7 RT 1035-1036, 1046.) She was arrested and booked for possessing a concealed and loaded firearm. (4 RT 642; 7 RT 1033-1034, 1049.) McKinnon was also arrested. (7 RT 1035-1036; 13 CT 3788,

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[10] Deputy Herrera was the brother of one of Kerry Scott's primary police contacts, Banning Police Detective Paul Herrera. (6 RT 776-777, 811-812; 13 CT 3771, 3773.)

3794-3795.) On April 1, 1994, Gamble pleaded guilty to possessing the gun. (7 RT 1034, 1036, 1048.)

At least a year after the gun was discovered in Gamble's purse (6 RT 883, 889, 929-930), ballistics testing revealed that it was the Martin murder weapon. (6 RT 849, 851, 857-858, 883.)[11] During that interim, McKinnon had been arrested for the Coder murder. (4 RT 541.) In May 1996, after the ballistics match and about two and a half years after the Martin murder, Investigator Buchanan approached Gamble about the crime and McKinnon's role in it. (7 RT 1049-1050.)

In the years following her arrest and conviction for possessing the gun, Gamble changed her life considerably. (7 RT 1050.) She quit using drugs, had a child, and embarked on a military career as a medical specialist. (7 RT 1028, 1050, 1054.)

When Investigator Buchanan confronted Gamble about the Martin murder and her possession of the murder weapon, he brought a tape recorder with him, but spoke to her for about half an hour before turning the recorder on. (7 RT 1052-1053.) During the unrecorded segment of the interrogation, Buchanan showed Gamble her own police file, a photograph of McKinnon, and a photograph "of two victims." (7 RT 1052.) He explained liability for being an accessory after the fact and told her that if

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[11] While the exact date of the testing was not presented to the jurors, Sergeant Palmer testified that it did not occur until sometime after January 1995, and indeed there was no ballistics report in the murder book, which purportedly contained all of the forensic reports had been prepared up to at least January 1995. (6 RT 882, 929-930.) According to a statement the prosecutor made to the court prior to trial, the testing and match occurred sometime around the first week of May 1996, well over two years after the Martin homicide and over a year after the alleged murder weapon was discovered. (ART 50.)

she had "something to hide," she would "probably" be charged as an accessory after the fact. (7 RT 1051-1052.) After this discussion, Gamble changed her account of the gun found in her purse, but denied that she felt pressured into doing so. (7 RT 1051-1052.)

According to her trial testimony, Gamble was involved in a brief romantic relationship with McKinnon and lived with him and his family in San Bernardino from the beginning of January 1994 to the date of their February 19 arrests. (7 RT 1029, 1039-1040.) That night, she and McKinnon were driving through Desert Hot Springs, on their way home from work. (7 RT 1031, 1041.) McKinnon had a gun, which was sitting between them on the front seat. (7 RT 1032-1033.) When the police stopped them, McKinnon told her to put the gun in her purse, which she did. (7 RT 1032-1033. 1045-1046.) Gamble acknowledged that she had admitted that the gun was hers at the time. (7 RT 1042, 1046.) However, she explained that McKinnon told her to say it was hers, and she only agreed because he was on parole and she feared that he would be sent back to prison. (7 RT 1042.) Her brief romance with McKinnon ended on the night of their arrests. (7 RT 1029.)

Asked why she would be willing to plead guilty and suffer a conviction for possessing the gun a month and a half later if the gun was McKinnon's and she was no longer involved with him, Gamble explained that the judge told her that she would need a lawyer. (7 RT 1036.) Because she could not afford one, she decided to plead guilty. (7 RT 1036.) However, confronted with her signed advisement of rights and waiver form, she admitted that she had been advised that if she could not afford a lawyer, one would be appointed free of charge and that she still pled guilty. (7 RT 1048-1049.) Finally, Gamble admitted that she had been attempting to

purchase a gun at the very time that the gun was found in her purse. (7 RT 1042-1043.)

Detective Caldwell and Sergeant Palmer also asked McKinnon about his arrest when they interrogated him in December of 1995. (13 CT 3788.) McKinnon told them that he was in custody because he had been arrested for having access to a gun. (13 CT 3788.) He explained that he had been in his mother's car with a girl named Kim, who had a gun, when they were stopped and arrested. (13 CT 3794-3795.)

3. Marshall Palmer's 11th Hour Claim That Lloyd Marcus Identified McKinnon by Name as Martin's Killer.

The account of eyewitness Lloyd Marcus's police statement also changed considerably in the months and years following the Martin homicide. At trial, despite Sergeant Palmer's testimony that he had no independent recollection of his interview with Marcus, and despite Marcus's documented description of the shooter as an Hispanic or Asian male who was "unknown" to Marcus, Sergeant Palmer claimed that he "remembered" that Marcus had, in fact, identified "Popeye" *by name* as Martin's killer when Palmer interviewed Marcus on the night of the shooting, and that the identification was simply inadvertently omitted from the report. (6 RT 894-895, 920-921.)

Sergeant Palmer knew McKinnon and that his nickname was "Popeye." (6 RT 926.) There was another person nicknamed "Popeye" in Banning, but he was younger and shorter than McKinnon. (6 RT 923; see also 5 RT 752-753.) Palmer claimed that he knew that the "Popeye" whom Marcus had identified was McKinnon because his description of the shooter "matched" McKinnon. (6 RT 924-925, 938-939.) At the same time, Palmer knew that McKinnon was a dark-skinned African-American (6 RT

923; see also 8 SCT 13-16), not Asian or Hispanic, as Marcus had described, and that McKinnon was neither as tall nor as heavy as the man described by Marcus. (6 RT 947-949.)

Sergeant Palmer apparently made no attempt to obtain an arrest warrant for McKinnon. However, Palmer claimed that, immediately following his interview with Marcus and on the very night of the murder, he "put the word out" to his fellow officers to be on the lookout for McKinnon and bring him in for "questioning." (6 RT 897-898, 927-928.) Once again, he did not document or memorialize that bulletin in any way. (6 RT 928-929.) He knew "several addresses" for McKinnon and had his officers look for McKinnon "for weeks" before discovering that he was in custody for the gun violation arising from his arrest with Kim Gamble. (6 RT 926, 928, 938.) Again, Palmer did not document or memorialize this part of the investigation in any way. (6 RT 926, 928-929.)

According to Gamble, however, she and McKinnon were living at his residence in San Bernardino up to the date of his arrest a week after the murder. (7 RT 1039-1040; 13 CT 3776-3777, 3795-3796.) Moreover, although McKinnon was on parole, Palmer apparently made no effort to find him through his parole officer. (7 RT 1042; 13 CT 3782.)

Furthermore, when Palmer finally did "discover" that McKinnon was in custody and interrogated him along with Detective Caldwell in December 1994 – a full 10 months after Marcus allegedly identified McKinnon by name as Martin's killer and Palmer began his hunt for McKinnon to "question" him about it it – Palmer did not "question" him about the Martin murder at all. Instead, the interrogation focused exclusively on the Coder murder. (13 CT 3766-3788; see part A-4, above.)

Sergeant Palmer also testified that no other witnesses were ever

found and no other leads were ever developed. (6 RT 885.) However, sometime after January 1995, Palmer discovered that the "murder book" compiled in the Martin case had been lost. (6 RT 889.) A murder book documents the investigation in a murder case and includes all police reports, witness statements, handwritten notes, and autopsy and criminalist reports. (6 RT 886-888.) Nevertheless, apart from his handwritten notes, Palmer claimed that he had been able to locate all relevant reports and reconstruct the book in its entirety. (6 RT 889-890, 900, 929-933.) The reconstructed book contained only three police reports, which purported to reflect the entire investigation of the Martin murder over the course of a year: one report detailing what was done at the murder scene; one report of the Marcus interview and statement; and one report about attending the autopsy. (6 RT 929-930.) [12]

4. In-custody Informant Harold Black's Account of McKinnon's Alleged Jailhouse Confession and the Benefits Black was Promised and Received.

Harold Black was also from Banning and knew other residents, including Gregory Martin, and was slightly acquainted with McKinnon. (6 RT 954, 957-958, 960.) Like the other witnesses, Black was a drug abuser with several prior felony convictions for various offenses, including assault with a deadly weapon, assault with great bodily injury, spousal abuse, petit

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[12] Palmer admitted that the police did receive information that someone named Gregory Braswell might have information about the case. (6 RT 929.) He located Braswell and interviewed him, but Braswell told him that he was not at the scene when the murder occurred and otherwise had no relevant information about the murder. (6 RT 936-937.) Palmer's investigation relating to Braswell was never documented in any way. (6 RT 929, 944-945.)

theft with a prior, and giving false information to a police officer. (6 RT 952-954.)

In 1993, Black was arrested for a parole violation and incarcerated. (7 RT 1023-1024.) While he was in custody, friends or family members informed him that Gregory Martin had been shot and killed. (6 RT 962; 7 RT 1014-1015.) Sometime after hearing of Martin's death, Black found himself incarcerated with McKinnon for a brief period in Chino. (6 RT 959-960, 962; 7 RT 1014-1015.) Black was released on April 1, 1994, only to be arrested again for spousal abuse and reincarcerated in September 1995. (7 RT 1023-1024.)

In May 1996 – over two years after the Martin homicide and Black's incarceration with McKinnon – Investigator Buchanan approached Black while he was in Folsom prison. (6 RT 980, 982; 7 RT 1021-1022.) At that time, Black was facing pending criminal charges for spousal abuse and false imprisonment, with a three-year enhancement for the infliction of great bodily injury, a five-year enhancement for a prior felony, and another one-year enhancement. (6 RT 977.) He was aware that one of his pending charges was a second strike and he was concerned that his sentence would be doubled. (6 RT 977.) He was facing a total of approximately 15 years in prison when Buchanan approached him. (6 RT 979; 7 CT 25 [People's Trial Exhibit 29].)

Investigator Buchanan brought a tape recorder with him. (6 RT 991-992.) Before turning it on, the two men discussed Black's pending charges and his concerns about them, the case against McKinnon for the Martin murder, and Investigator Buchanan's promise to have the District Attorney "reevaluate" Black's case. (6 RT 987-988, 991-992.) Although Black initially denied at trial that he understood "reevaluate" to mean "dismiss,"

when confronted with his preliminary hearing testimony, he admitted that he had repeatedly testified to the contrary. (6 RT 988-990.) Thereafter, Black claimed that McKinnon – with whom Black was only slightly acquainted – had made a jailhouse confession to shooting Gregory Martin. (6 RT 992, 960-961.) Specifically, Black told Investigator Buchanan – and so testified at trial – that McKinnon told him that he had spent a night with friends at the Meadowbrooks Apartment complex. (6 RT 963.) He was leaving early the next morning when he unexpectedly encountered Gregory Martin. (6 RT 963.) McKinnon pointed a gun at him, said "this is for Scotty," and shot him in the head. (6 RT 963-964.) Black did not remember how many times McKinnon said he had shot Martin; it could have been once or twice. (6 RT 964.)

Investigator Buchanan asked Black if McKinnon had told him anything else, but Black said no. (7 RT 1018.) Buchanan specifically asked if McKinnon had confessed to any other murders. (RT 1018.) Again, Black said no. (7 RT 1018.) In fact, Investigator Buchanan asked him several times and in several different ways if McKinnon had confessed to killing or shooting anyone else, and even told him that McKinnon was "in custody on another murder case," but Black consistently reported that McKinnon made no other confessions to him. (6 RT 994; 7 RT 1019-1020.)

Nevertheless, sometime after his statement to Investigator Buchanan, Black claimed that during the same conversation in which McKinnon had confessed to the Martin murder, he also confessed to the Coder murder by volunteering, "I shot that white boy down at the Desert Edge Motel." (6 RT 964.) Asked if McKinnon provided any details regarding that shooting, Black replied, "he went on, but I – I couldn't – I didn't – I didn't hear." (6

RT 964-965.) Asked why he had failed to mention this confession to Investigator Buchanan despite Buchanan's repeated requests for information about any other murder confessions McKinnon made, Black explained that he "forgot." (7 RT 1019.)

Although Black initially told Investigator Buchanan that he thought McKinnon was in custody for the Martin murder (7 RT 1020), Black later claimed that McKinnon told him that he was in custody for a parole or probation violation because he had been arrested for putting a gun in Kim Gamble's purse. (6 RT 968-969.) Black did not suggest that McKinnon had ever indicated that the gun was the Martin murder weapon.

Ultimately, Black entered into an agreement with the District Attorney's Office. (7 SCT 22-26 [People's Trial Exhibit 29]; 6 RT 955-957, 975-979, 985.) Under its terms, Black pled guilty to the spousal abuse charge as a second strike and admitted the great bodily injury enhancement allegation. (7 SCT 24; 6 RT 955-957, 975-979, 985.) Following service of the two-year prison term he was currently serving on his parole violation, he would be released on his own recognizance. (7 SCT 25.) The agreement required him to testify against McKinnon and provided that "full performance is required and best effort is insufficient." (7 SCT 23; 7 RT 1004, 1006-1007.) Black understood that the prosecutor would determine whether he had given "full performance." (7 RT 1004, 1006-1007.) In addition, the agreement required Black to remain "crime free." (7 RT 1004-1007.) If he upheld his part of the bargain, Black would receive a two-year sentence on his second strike conviction, to run concurrent to the time he had already served on the parole violation, meaning that he would not have to serve a single day of actual time for his second strike. (6 RT 955-957, 975-979, 985; 7 SCT 25.) In addition, the state would recommend that his

parole be transferred to Utah, where he wished to relocate. (7 SCT 25.) If he failed to uphold his part of the bargain, he would be "subject to prosecution . . . to the full extent possible" and faced a sentence of approximately 15 years in prison. (7 SCT 25; 6 RT 977, 979.)

One month after his release, Black violated the agreement requiring him to remain "crime free" when he was arrested and taken into custody yet again, this time for robbery. (6 RT 953, 970-971; 7 RT 1007-1008.) If convicted, Black understood that the robbery would be his third strike and that he faced "life in prison." (7 RT 1008-1010.)

The same prosecutor assigned to McKinnon's case, John Davis, was assigned to Black's pending robbery charge. (7 RT 1011.) Despite Black's prior record, the seriousness of the third strike charge, and the clear violation of his agreement with the District Attorney's Office, Black was *again* released on his own recognizance. (6 RT 973; 7 RT 1010.) The robbery charge was still pending at the time of trial, having been continued "a year or so." (6 RT 971-973; 7 RT 1008.) Black denied that it was pending because its outcome was tied to his testimony against McKinnon. (6 RT 971-973.) However, when asked why it was still pending, Black repeatedly refused to answer. (6 RT 971-973; 7 RT 1008.) He finally claimed that the outcome of his pending robbery charge was "in the hands of the Lord," *not* of the prosecutor. (7 RT 1008-1011.)

5. The Conflicting Evidence as to Motive and the Lack Thereof.

The prosecution's evidence suggested various and conflicting motives for the Martin killing. According to Lloyd Marcus, the shooting was preceded by an argument and physical altercation over money. (6 RT 919-925.) According to Harold Black's initial statements to the police,

McKinnon and Martin had been "feuding," a statement he initially denied having made at trial and later, after being confronted with that statement, recanted altogether. (7 RT 1011-1014.) According to the prosecution's theory, the crime was gang motivated. That theory was based on Black's testimony that he understood that McKinnon's reference to shooting Martin "for Scotty" was to Scotty Ware. (6 RT 963.) Black, as well as Kerry Scott, testified that Ware, like McKinnon, claimed the Crips gang and that Gregory Martin claimed the Bloods. (6 RT 784, 963.)[13] Also according to both men, Scotty Ware had been killed at a party by a Bloods member. (6 RT 790, 963.)

However, Charles Neazer – Gregory Martin's roommate and a fellow Bloods member or associate – testified that Scotty Ware did not claim full membership in any gang, but was affiliated with the *Bloods*, *not* the Crips. (8 RT 1076, 1078, 1082, 1094.) Furthermore, the only evidence regarding the date of Ware's death came from Neazer, who testified that he had heard about his death at least four years before Martin was killed, near the end of 1989 or the beginning of 1990. (8 RT 1083.)[14] There was no suggestion that Gregory Martin was Ware's killer or that McKinnon and Ware were friends. Rather, the prosecution's theory was that Martin's murder was simply an indiscriminate, retaliatory act of gang vengeance against the Bloods for the murder of a Crip (allegedly, Ware).

Virtually all of the witnesses acknowledged that many people in

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[13] To "claim" a gang is synonymous with belonging, or announcing allegiance, to a gang. (See, e.g., RT 779, 780-784, 881, 958.)

[14] The prosecution offered no evidence regarding the date of Ware's death apart from Kerry Scott's testimony that it occurred sometime before Martin was killed. (6 RT 784.)

Banning "claimed" either the Bloods or the Crips gangs. (6 RT 780-781, 958.) However, virtually all of these same witnesses testified that Banning is such a small town that the traditional enmity between Bloods and Crips simply does not exist. (6 RT 781; 8 RT 1077-1078, 1090.) There really were not any Bloods and Crips "activities," problems, or violent gang rivalries in Banning. (6 RT 781; 8 RT 1077-1078, 1080, 1090; 13 CT 3776.) People who claimed the different gangs often knew each other for years and associated and "got along" despite their membership in the rival gangs. (6 RT 781, 883; 8 RT 1077.) Indeed, Kerry Scott, a self-identified Bloods member, testified that members of his own family claimed the Crips. (6 RT 781.) As McKinnon himself put it when interrogated by Caldwell and Palmer, although he "hung" with the Crips, "as far as I'm concerned, ain't no gangs in Banning." (13 CT 3776.) The prosecutor presented no evidence of a single act of Bloods-Crips violence committed in Banning, other than that alleged to have been committed in connection with this case.

Consistent with the generally amicable relationship between people who claimed the Bloods and the Crips gangs in Banning, Charles Neazer testified that, a few days before Martin was killed, he, Martin, and McKinnon were socializing and drinking together in the park. (8 RT 1081.) Neazer observed no animosity or tension between the two men. (8 RT 1081-1082.)

Finally, according to Lloyd Marcus's description of Martin's killer, he was wearing a red baseball cap. (6 RT 924.) Neazer explained that the Bloods traditionally wear the color red in order to identify themselves as Bloods while members of the Crips (McKinnon's gang) traditionally wear blue. (8 RT 1076-1077.)

The Penalty Phase

A. Evidence In Mitigation

McKinnon's mother, Janie Scott, his sister, Jovina Brown, and his estranged father, Robert Smith, all testified on his behalf. They painted a consistent, powerful, and horrific portrait of a childhood marked by abject poverty and extreme physical and emotional abuse.

McKinnon's father was married to one woman, and had relationships and children with several others, when he met McKinnon's 17-year-old mother. (12 RT 1499-1500, 1534; 13 RT 1576-1577.) They had four children together while living in New Jersey – McKinnon, and his sisters, Robin, Jovina, and Marcina. (12 RT 1499-1500.) Because Smith had other families, he never lived with the one he created with Scott. (12 RT 1500; 13 RT 1577.)

However, by all accounts including his own, Smith did spend enough time with Scott and their children to steal the family's welfare checks, expose the children to his intravenous heroin use, beat the children and expose them to beating their mother, and to otherwise violently control virtually all aspects of their lives. (12 RT 1500-1504, 1511, 1540-1541, 1543; 13 RT 1581-1582.) As Jovina put it, "he would just basically be around long enough to beat my mom and take money and beat us . . . [and be] on drugs." (12 RT 1541.)

Smith was a serious heroin addict who injected the drug several times daily. (13 RT 1578.) As he described it, he funded his habit in various ways, including drug dealing, armed robbery, theft, and "tak[ing] it from women." (13 RT 1579-1580.)

Indeed, Smith was sure to visit Scott and the children at the beginning of every month, when their welfare check arrived. (12 RT 1503,

1512; 13 RT 1586.) His typical visit entailed beating Scott, forcing her to cash her check, and taking her money. (12 RT 1503, 1512, 1541.) He never repaid the money or provided financial or any other assistance. (12 RT 1511, 1541; 13 RT 1586.) The family survived only by borrowing money from family and friends. (12 RT 1512.) It was not unusual for the children to go hungry. (12 RT 1512, 1541.) By all accounts, while Smith was in their lives, the family never celebrated Christmas, birthdays, or any other holidays. (12 RT 1512-1513, 1542; 13 RT 1587.) In fact, Smith admitted did not even know his children's birthdays. (13 RT 1587.)

Also by all accounts, severe beatings were a common occurrence in the household. Both Scott and Smith described beatings to Scott that included being burned with cigarettes, kicked, hit, knocked unconscious, and punched in the stomach when she was pregnant, often in front of the children. (12 RT 1501, 1505-1508; 13 RT 1582.) Scott described a particular incident in which the entire family walked across town to her sister's house, pushing Robin in a stroller. (12 RT 1504.) As she described it, "he beat me all the way from one side of the town to the other. . . . When he got there to the house, he done beat me up more." (12 RT 1504.)

Smith also beat the children, except for the youngest, Robin. (12 RT 1504, 1508, 1540-1541; 13 RT 1582.) The abuse against McKinnon began when he was still in his mother's womb and resumed around the time that he started walking. (12 RT 1509; 13 RT 1582.) As Smith himself described it, he would beat the children, "pick them up and shake them like a rag doll," with their arms, legs, and heads "flinging back and forth." (13 RT 1582-1583.) "If they would cry, it would set me off on a tangent and I would beat them and put them in the closet. Shake them, strike them." (13 RT 1582.) He would often lock the children in the closet for hours at a

time. (13 RT 1582, 1585.)

Smith admitted that he was "insane" and a sadist who took great pleasure in abusing Ssott and the children when they displeased him. (13 RT 1583-1584.) He graphically described "physically having . . .orgasm[s], where I would be wet after I would strike them or beat them up." (13 RT 1584.)

By all accounts, electrical cords and belts were among Smith's favorite weapons. (12 RT 1505, 1542; 13 RT 1583.) According to Jovina, the beatings with the cords were so severe that her mother would have to soak the children in Epsom salt baths in order to close and heal their wounds. (12 RT 1542.) At 34 years old, Jovina still had scars from lashings on her back, legs, and around her breasts. (12 RT 1542.)

On one typical occasion, when McKinnon was about two years old, Smith beat Scott with an electrical cord so severely that it left welts all over her legs. (12 RT 1505.) When he finished with her, Smith picked McKinnon up by one arm, beat him, then threw him into a closet. (12 RT 1505.) On another occasion, he beat Jovina so badly that Scott had to take her to the emergency room. (12 RT 1504.) The children were terrified of their father. (12 RT 1508, 1510, 1540, 1544; 13 RT 1585.)

When McKinnon was about three years old, he began having nightmares so severe that he would awaken his mother with his screams. (12 RT 1510.) Scott would find the child balled up in a corner, crying "Douchy" – the name by which they called Smith – "whooping me." (12 RT1510.) Marcina was so terrified of their father that her hair started falling out in chunks and she would shake during his visits. (13 RT 1585.)

Not surprisingly, McKinnon had a "bed wetting problem" as a child. (12 RT 1508.) When he wet the bed and Smith was there, Smith would pull

him out of bed, beat him, and make him stand in the corner, in his wet underwear, for excruciatingly long periods of time – sometimes for hours. (12 RT 1508-1509; 13 RT 1584.) The child was not permitted to move while he stood in the corner; if he did move, he was hit with a belt while still in his wet underwear. (12 RT 1509.) On more than one occasion, the boy stood motionless in the corner for so long that he fell over. (12 RT 1509.)

For the most part, Smith insisted that the children remain in their room or in the apartment. (12 RT 1502, 1511; 13 RT 1585.) If they emerged from their room while he was there, he beat them. (12 RT 1502, 1511.) Even when he was not home, the children often did not go outside to play because they feared that if their father found out, he would beat them and their mother. (12 RT 1540.)

When McKinnon was about four years old, Scott's dire financial straits forced the family to move into a notorious housing project in New Jersey known as the "Concrete Jungle." (12 RT 1513-1514, 1516.) By all accounts, the project was rife with drug activity and violent crimes, including rape, shootings, and murder. (12 RT 1514-1515, 1539-1540; 13 RT 1587.) Their own apartment was roach-infested. (12 RT 1516.) People used drugs and defecated and urinated in the hallways. (12 RT 1514.) Indeed, Jovina's earliest memory of her own father was in the projects, watching him tie his arm off and shoot heroin into his veins. (12 RT 1538-1539.)

The children were often forced to play in the hallway of their building. (12 RT 1517, 1540, 1543.) They would see people in the hallway shooting up, fighting, and committing other acts of violence. (12 RT 1539-1540.) On one occasion, a friend of the family's was shot in the head and

died in the hallway. (12 RT 1515.)

On another occasion, Jovina and McKinnon were playing outside when a man they knew attempted to break up a fight. (12 RT 1540.) Someone hit him in the head with a baseball bat and "there was blood everywhere." (12 RT 1540.) On yet another, a four-year-old girl was raped and thrown from the rooftop. (12 RT 1515, 1539; 13 RT 1587.) On still another, a drug dealer hung a "kid" and his mother from the rooftop because the kid owed him money. (13 RT 1587.)

The project was like a "prison" from which there was no escape. (12 RT 1514.) Taxicabs would not go to the area. (12 RT 1514.) On one occasion, when McKinnon was five or six years old, he cut off part of his finger while he was playing in the hallway. (12 RT 1517-1518.) Scott called for a taxi to take him to the hospital, but they refused to come. (12 RT 1517.) An ambulance eventually responded and took him to the hospital, where he had to have surgery and remain for a week. (12 RT 1517.)

Smith had frequent troubles with the law. (12 RT 1539.) On one occasion, Jovina recalled that the police "busted in the door with their guns drawn." (12 RT 1539.) The children were terrified and huddled in the corner, attempting to comfort each other. (12 RT 1539.)

Eventually, in 1971 or 1972, Smith was convicted of murder and imprisoned for over 17 years. (12 RT 1518, 1536, 1544; 13 RT 1588.) After his conviction, he became estranged from Scott and the children and had no further contact with them. (13 RT 1588.)

Scott became romantically involved with Troy Scott, whom she eventually married. (12 RT 1520, 1535 .) Initially, the family's relationship with Scott was a good one. (12 RT 1520.) In 1975, they

moved to California. (12 RT 1520-1521, 1545.) A few months after arriving in California, however, Scott changed "drastically." (12 RT 1521-1522.)

Like Smith, Troy became an abusive heroin addict. (12 RT 1521, 1524-1525, 1545, 1547.) Although Jovina did not recall him injecting the drug in front of the children as their father had done, they were intimately familiar with the signs of heroin intoxication, which Troy often displayed. (RT 1547.)

While not as frequent or severe as Smith's beatings, Troy also physically abused the children and their mother. (12 RT 1521-1523, 1547.) For instance, when McKinnon continued to wet the bed, Troy would force him to lay in his waste and forbid him from cleaning himself. (12 RT 1523.) Sometimes, he would make the boy lay in the soiled bed for days. (12 RT 1523.)

As a result of Troy's heroin addiction, he was unable to work. (12 RT 1524, 1546.) The family went on welfare again. (12 RT 1524.) Troy's heroin "habit came first," so the family once again went without Christmas and birthday celebrations. (12 RT 1524-1525, 1546.)

Despite the violence and chaos that surrounded him, McKinnon did very well in school and received good grades. (12 RT 1519, 1526.) He started writing poetry at a very young age and continued to do so throughout his life. (12 RT 1529.)

However, at some point in his teens, McKinnon was shot through his arm, elbow, and leg. (12 RT 1528-1529.) At around 14 or 15 years old, he started to have trouble with the law. (12 RT 1527.) As McKinnon got older, bigger, and angrier, he became "very protective" of his mother and siblings and Troy's abuse diminished. (12 RT 1524, 1548.)

McKinnon had a daughter named Tiera, who was about nine years old at the time of trial. (12 RT 1529-1530.) He was a very good father to Tiera. (12 RT 1530.) He was also a very good son to his mother and brother to his sisters. (12 RT 1530-1531, 1548.)

B. Evidence In Aggravation

Apart from the crimes themselves and their impact on the victims' families, the prosecution offered in aggravation two prior felony convictions and a series of prior, petty "criminal" incidents.

In December 1984, when McKinnon was only 17 years old, he bought some beef jerky at his high school cafeteria. (11 RT 1363-1364; 12 12 RT 1476, 1480.) Discovering that it was stale, he asked for a refund of his money. (11 RT 1364-1365; 12 RT 1476.) When the cashier refused, he threatened to take her money box. (11 RT 1366; 12 RT 1476.) She replied that the box only had $10.00 in it and told him to "go ahead" and take it, but if he did he would "go to jail." (11 RT 1366.) McKinnon took the box and started to walk out of the cafeteria. (11 RT 1366; 12 RT 1477.) A teacher stood in front of the exit; McKinnon either gave the box to the teacher or allowed her to take it without incident, before pushing her aside so that he could walk out. (11 RT 1366, 1369; 12 RT 1477.)

In November 1988, Orlando Hunt was in the park with a group of other men when Banning Police, including Marshall Palmer, caught him with a .357 Magnum. (11 RT 1390-1391, 1393.) The officers arrested Hunt and searched the 10 to 15 other men in the vicinity, including McKinnon. (11 RT 1390-1391.) On McKinnon's person, officers recovered some .357 Magnum bullets and a Tupperware container holding what appeared to be rock cocaine. (11 RT 1391-1393.)

In June 1, 1989, McKinnon was convicted of robbery. (11 RT

1388.) On February 6, 1992, McKinnon was convicted of being an ex-felon in possession of a firearm. (12 RT 1467.)

In August 1992, McKinnon was arrested for battery arising out of a disagreement with his sister, Robin. (13 RT 1559.) According to Robin, she and her brother were arguing – as they frequently did during that time – over her resistence to his attempts to act as a father to her. (12 RT 1486, 1492.) The fight never turned physical. (12 RT 1486-1487.) However, as the verbal fight escalated, Robin became enraged, "hysterical," and called the police. (12 RT 1490-1491.)

According to police, Robin reported that she was standing behind her brother when he swung back his arm, which was in a cast, and hit her. (13 RT 1558.) Then he turned around and, despite his arm being in a cast, somehow managed to start choking her. (13 RT 1558.) At trial, Robin explained that she was "hysterical" and angry at her brother and could not remember exactly what she had told police, but insisted that he never hit or otherwise assaulted her. (12 RT 1486-1487, 1489-1490.)

The argument continued after the police left. McKinnon told Robin that if she was so grown up, he would not give her things. (12 RT 1487.) She called the police again and reported that her brother was "breaking her property." (13 RT 1559.) When the officer returned, he saw McKinnon breaking a small portable television set. (13 RT 1559.) Robin explained that he had given her the set and was trying to take it back when it slipped from his hands. (12 RT 1488.) After her brother's arrest, Robin appeared in court and admitted that he had never hit her. (12 RT 1487-1489.)

In February 1997, Riverside correctional officers searched McKinnon's jail cell. (13 RT 1564-1565.) They found a shank in a small space between the ceiling and a light fixture. (13 RT 1566-1567.) Neither

the shank nor the space in which it was found was visible from external examination. (13 RT 1574.) Officers only discovered its presence by probing the small space between the ceiling and fixture with a long, thin piece of metal. (13 RT 1574.)

McKinnon had occupied that cell for six months. (13 RT 1570.) While cells are usually searched once a week, the prosecution presented no evidence that the small, hidden space where the shank was discovered had been searched or probed at any time during or after a prior resident occupied it. (13 RT 1569.) However, in response to a leading question, one of the searching officers finally agreed with the prosecutor that "part of the standard operating procedure is to check these light fixtures." (13 RT 1575.) At the same time, he testified that gaps between the fixtures and ceilings are not typical and therefore they are only searched when and if they are discovered. (13 RT 1568, 1572, 1574.)

Perry Coder's fiancee, mother, and sister testified to the impact of his death on their lives. (11 RT 1401-1405.) They were all living at the Desert Edge Motel at the time of his death and Coder's fiancee was pregnant with their child. (11 RT 1402, 1404, 1407-1409, 1411.) Coder's death caused his fiancee to have a difficult labor during which the child's heart briefly stopped beating. (11 RT 1404-1405.) She was still grieving over his death five years later. (11 RT 1405.)

Coder's mother and sister were both at the motel when he was shot. (RT 1409, 1411.) The police would not allow them to see his body, which was covered, but both women saw his feet. (11 RT 1409, 1411.) Coder's death exacerbated his sister's thyroid condition. (11 RT 1408.) For some period of time, she was an "emotional wreck" who "mourned his death on the streets." (11 RT 1409.) Similarly, his mother had "fits of depression"

and cried "most of the time." (11 RT 1412.)

Gregory Martin's sister testified that they had another brother who had also been killed within five months of Martin's death. (11 RT 1422.) Her brothers' deaths "totally changed" her and she was unable to trust anyone. (11 RT 1422.)

ARGUMENT

I

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S DENIAL OF MCKINNON'S MOTION TO SEVER THE MURDER COUNTS AND THE RELATED FIREARM POSSESSION CHARGES VIOLATED STATE LAW AND HIS RIGHTS TO DUE PROCESS AND RELIABLE VERDICTS, AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

Over a year after McKinnon was charged with the non-capital murder of Perry Coder, the prosecution was permitted to consolidate that charge with the Gregory Martin murder charge, solely in order to charge a single special circumstance of multiple murder. As will be demonstrated below, the two cases were unrelated, the evidence as to each was not cross-admissible, indeed highly inflammatory gang membership evidence was admissible as to only one of the charges, and the evidence supporting both charges was paper thin. The evidence came primarily from the mouths of drug addict felons who had much to gain by implicating McKinnon in the crimes. Their stories were wildly inconsistent with each other, with the true facts, and even with their own various accounts. The only witness who did not fall within this category was Banning Police Sergeant Marshall Palmer, whose testimony implicating McKinnon in the Martin murder, and undercutting the account of a neutral eyewitness who clearly described someone else as Martin's killer, was so inherently improbable on its face that no rational factfinder could rely on it.

Nevertheless, the court refused to sever the charges. The court did so in large part because it was unfamiliar with the legal principles guiding the exercise of its discretion. Although the court ruled correctly that the

two crimes were not sufficiently similar to prove a common modus operandi and support an inference of identity, the prosecutor repeatedly encouraged the jurors to consider the evidence for just that purpose. As will be demonstrated, the court abused its discretion in refusing to sever the cases and the resulting prejudice violated McKinnon's state and federal constitutional rights to a fair trial and reliable jury verdicts in this capital case. The judgment must be reversed.

B. Procedural History

On February 2, 1995, the District Attorney filed a complaint against McKinnon alleging a single Penal Code section 187 violation for the murder of Perry Coder. (5 SCT 8.)[15] On May 1, 1995, McKinnon was held to answer following a preliminary hearing. (1 CT 14-71; 5 SCT6, 9.) On May 12, 1995, an information charging that single violation was filed. (1 CT 14-71; 5 SCT 10-11.)

More than a year later, on June 21, 1996, the prosecutor moved to dismiss the first information and file a new complaint consolidating the Coder murder allegation with a second allegation of violating section 187 for the murder of Gregory Martin. (Pre-Trial RT 1.) He explained that the consolidation was necessary in order to allege a single special circumstance of "multiple murder" under Penal Code section 190.2, subdivision (a)(3). (Pre-Trial RT 1.) His motion was granted. (Pre-Trial RT 1.)

On the same date, a complaint alleging both Penal Code section 187

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[15] The complaint was dated February 2, 1995, and stamped received on the same date. However, it was file stamped on May 4, 1995. (5SCT 8.) Given that the municipal court minutes for March 1, 1995, reflect that McKinnon was arraigned on that date, and that the preliminary hearing was held on May 1, 1995, it appears that the file stamped date of May 4, 1995 is a clerical error. (1 CT 14-71.)

violations, two section 12021.1 (ex-felon in possession of firearm) violations, and a multiple murder special circumstance under Penal Code section 190.2, subdivision (a)(3), was filed. (1 CT 1-2; "Pre-Trial" 1 RT 1-2.) On October 8, 1996, a preliminary hearing was held on the consolidated complaint in which the transcript of the first preliminary hearing was offered in support of the Coder murder allegation. (1 CT 78-160.) McKinnon was held to answer in both cases and a new information was filed on October 21, 1996. (1 CT 161-163.)

On September 29, 1998, McKinnon filed a motion to sever the Coder and Martin murder charges, and related firearm possession charges, based upon the evidence presented at the separate preliminary hearings. (2 2 CT 301-342.) On December 8, 1998, the prosecutor filed a written opposition. (3 CT 753-757.) On the same date, the court heard and denied the motion. (1 RT 95.)

After the jury returned guilty verdicts on all counts, McKinnon moved for a new trial on the ground, inter alia, that the prejudice he had predicted from the joinder was realized at trial and violated his state and federal constitutional rights to due process. (15 CT 4130-4134; 15 RT 1689-1690.) The court summarily denied the motion. (15 RT 1689-1690.)

C. The General Legal Principles

Penal Code section 954 provides in relevant part as follows:

> An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . 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 . . . .

The purpose of the statute's preference for joint trials is to prevent

repetition of evidence and save time and expense to the state as well as to the defendant. (*People v. Scott* (1944) 24 Cal.2d 774, 778-779.) At the same time, the state and federal Constitutions guarantee criminal defendants the right to a fair trial. (U.S. Const., Amends. 5 & 14; Calif. Const., Art. I, §§ 15 & 16.) "The pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452; accord, *People v. Bean* (1988) 46 Cal.3d 919, 935 [severance "may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial"].) Therefore, in exercising its discretion on a motion to sever, the trial court must balance the potential prejudice against the state's interest in joinder and whether any actual and substantial benefits will be gained from a joint trial. (See, e.g. *People v. Bean*, *supra*, at pp. 935-936; *People v. Smallwood* (1986) 42 Cal.3d 415, 425, 430; *People v. Balderas* (1985) 41 Cal.3d 144, 173; *Williams v. Superior Court*, *supra*, 36 Cal 3d. at pp. 448, 451.)

Of course, the death penalty is a different kind of punishment from any other. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) In light of this qualitative difference, the Supreme Court has repeatedly recognized that the Eighth Amendment demands a "heightened 'need for reliability'" in all phases of a capital trial. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; accord *Lockett v. Ohio* (1978) 438 U.S. 586, 604 ["the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase verdicts in capital cases require heightened reliability].)

For these reasons, "[s]everance motions in capital cases should receive heightened scrutiny for potential prejudice." (*People v. Keenan* (1988) 46 Cal.3d 478, 500; accord, *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431.) This is particularly so where it is the joinder itself which renders the defendant potentially death eligible. (See, e.g., *Williams v. Superior Court*, *supra*, at p. 454 [refusal to sever subject to "great scrutiny" where joinder permitted allegation of "multiple murder" special circumstance allegation, whereas if cases severed, possibility of death penalty would only arise if first trial resulted in murder conviction]; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 425.) Whether the trial court abused its discretion in denying a motion to sever is determined on the record before the court at the time of its ruling. (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 508.)

Importantly, however, even if a motion to sever was properly denied at the time it was made, if the effect of the joinder was so prejudicial as to deprive the defendant of a fair trial or due process of law, reversal is required. (See, e.g., *People v. Harrison* (2005) 32 Cal.4th 73, 120; *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Johnson* (1988) 47 Cal.3d 576, 590; *People v. Grant* (2003) 113 Cal.App.4th 579.) "[E]rror involving misjoinder 'affects substantial rights' and requires reversal . . . [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" (*United States v. Lane* (1986) 474 U.S. 438, 449; see also *Sandoval v. Calderon* (9th Cir.2000) 241 F.3d 765, 771-772; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503.) In this regard, "'[t]he inquiry cannot be merely whether there was enough to

support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."' (*Lane*, *supra,* 474 U.S. at p. 449, 106 S.Ct. 725.) In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts. (*People v. Bean*, *supra*, 46 Cal.3d at pp. 938-940, 251 Cal.Rptr. 467, 760 P.2d 996.)" (*People v. Grant*, *supra*, 113 Cal.App.4th at p. 588; accord, *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083-1086, cert. denied, 528 U.S. 922 [prejudicial effect of state court's denial of severance motion violated defendant's due process right to fair trial]; *Panzavecchia v. United States* (5th Cir. Unit B 1981) 658 F.2d 337, 338, 341[same].)

In determining both potential and actual prejudice from joinder, the trial and reviewing courts should be guided by several well-established criteria, including whether: "(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 the joinder of them turns the matter into a capital case." (*People v. Sandoval* (1992) 4 Cal.4th 155, 173; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Kraft* (2000) 23 Cal.4th 978, 1030; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 27-28.)

D. The Trial Court's Refusal to Sever the Counts was an Abuse of Discretion

1. The Motion to Sever and the Court's Stated Reasons for Denying it.

The two murder counts (and the connected ex-felon in possession of

a firearm charges) were of the "same class" under Penal Code section 954 and thus the requirements for joinder were satisfied. Nevertheless, McKinnon argued below that severance was warranted under state law and his federal constitutional right to due process because: 1) the evidence relating to each charge was not cross-admissible as to the other; 2) the prosecution would introduce gang evidence to prove motive for the Martin homicide, which was inadmissible and extremely inflammatory as to the Coder homicide charge; 3) both cases were weak, thus creating a risk that the jury would convict based upon the spillover effect of aggregate evidence; 4) it was the joinder itself that allowed the prosecution to allege the multiple murder special circumstance and thus turn both matters into a capital case; and 5) the potential prejudice in joining the trials was not outweighed by the judicial benefits to be gained, which were minimal given that the cases involved no duplication of evidence or witnesses. (2 CT 301-342, citing, inter alia, *Williams v. Superior Court*, *supra*, 36 Cal.3d 441; *People v. Smallwood*, *supra*, 42 Cal.3d 415; see also 1 RT 95-100, citing *People v. Bradford*, *supra*, 15 Cal.4th 1229.) McKinnon based his motion on the transcripts of the preliminary hearings in both cases. (2 CT 302-306.)

In his written opposition, the prosecutor summarily asserted, without analysis, that the evidence was cross-admissible under Evidence Code section 1101, subdivision (b), for the purpose of proving "modus operandi and identity." (3 CT 755, 757.) Consequently, there was no potential prejudice from the joinder. (3 CT 755, 757, citing *People v. Memro* (1995) 11 Cal.4th 786, 850 ["cross admissibility suffices to negate prejudice . . . ."].)

At the hearing on the motion, defense counsel reiterated the

arguments made in his written motion, emphasizing the fallacy of the prosecution's summary assertion that the evidence was cross-admissible to prove modus operandi and intent. (1 RT 95-100.) The prosecutor presented no argument in support of his summary assertion that the evidence was cross-admissible or against defense counsel's argument that it was not. (See 1 RT 95-112.) To the contrary, in response to the defense argument regarding the lack of cross-admissibility, the prosecutor merely pointed to Penal Code section 954.1, which provides that cross-admissibility is not a prerequisite to consolidation. (1 RT 101, 104.)

Nor did the prosecutor dispute that both cases were relatively weak. Rather, he argued that the law was not concerned with the effect of joining two weak cases together, but rather with the effect of joining an "extremely strong" case with a weak case. (1 RT 103.) Hence, because the evidence supporting both murder charges was "roughly equal," the question of "whether it's two weak cases or it's two strong cases" was irrelevant. (1 RT 103-104.)

The judge and the prosecutor discussed at length what they perceived to be the novel logistical difficulties posed by severing the charges. (1 RT 101-102, 107-110.) The judge expressed his belief that severance would necessitate a first trial by a jury that would not be death qualified. (1 RT 107.) If McKinnon were convicted of murder, then it would necessitate a second trial by a second jury, who "would not be death qualified either, because neither jury could be informed of the multiple murder special circumstance." (1 RT 107.) If that trial resulted in a second murder conviction, "then we would impanel a *third jury*, who would then be death qualified, and would hear evidence on the multiple murder allegation and then proceed into the penalty phase." (1 RT 107, italics added.)

Defense counsel explained that in fact, severance would only require two trials with two juries. The first trial would proceed as an ordinary, non-capital murder trial. (1 RT 107.) If convicted in that trial, the prosecutor could allege a *prior murder* special circumstance in the second trial (Pen. Code, § 190.2, subd. (a)(2)) and death qualify the second jury, who would hear and determine all issues in the case, from guilt on the charge, to the truth of the special circumstance allegation, and to the appropriate penalty, if necessary. (1 RT 108-109; see also 2 CT 321-322; Pen. Code, § 190.1, subd. (b).) Following further comments by the prosecutor upon the assertedly "novel" procedure severance would necessitate, the court replied, "I'm not going to embark on that course of action." (1 RT 110.)

Without explaining the basis of its reasoning, the court ruled that evidence of the two murders was cross-admissible because Harold Black would testify that McKinnon had confessed to both crimes. (1 RT 111.) In addition, he reasoned that even though different guns were used in the crimes, "there is some cross-admissibility in that the defendant had access to small handguns within a very relatively brief period of time . . . ." (1 RT 111.) Furthermore, as to the relative strength of the cases, "we don't have a case where there's overwhelming evidence in one case where you're going to bootstrap another case before the jury." (1 RT 111.) Apparently having been swayed by the prosecutor's position that the law is unconcerned with joining two weak cases, the court did not address whether the two cases were weak and the potential prejudice joining two weak cases would pose. (1 RT 111-112.) The court agreed that the gang evidence would be admissible as to the Martin murder charge only, but "in the overall scheme of things I can't say that that would deny the defendant of due process rights under the other homicide. Judicial economy is an issue here too,

gentlemen. It's a balancing. And I don't think that these matters tried together, with the cross-admissibility of evidence that I've mentioned denies anybody a fair trial. So the motion to sever will be denied." (1 RT 112.)

At the next court session, the court clarified its ruling regarding cross-admissibility. (1 RT 120.) Having apparently reconsidered its reasoning that "access to small handguns" rendered the evidence cross-admissible, the court ruled that the evidence of the two crimes and their circumstances were insufficiently similar to be cross-admissible on the issue of identity under section 1101, subdivision (b). (2 RT 120-121.)

Instead, the court "wanted to make . . . clear" that the evidence would be cross-admissible as to two issues presented by Harold Black's testimony: first, whether Black was telling the truth that McKinnon had confessed to the Martin and Coder murders; and second, whether McKinnon was telling the truth when he made the confessions. (2 RT 121-122.) As to the first issue, the court reasoned that the evidence was cross-admissible to bolster Black's credibility, apparently based upon the premise that if Black were being truthful about McKinnon's confession to one crime, then it tended to support the inference that he was being truthful about the other. (2 RT 121-122.) As to the second issue, the court reasoned, if McKinnon made the statements, then they tended to show that he had knowledge of both crimes. (2 RT 122.)

Pursuant to the authorities discussed in part B, above, and as will be demonstrated below, the potential prejudice posed by joining the cases far outweighed any judicial benefit to joining them. The court's denial of the motion to sever was an abuse of discretion.

2. The Evidence Relating to the Two Murder Charges was Not Cross-Admissible.

In assessing the cross-admissibility of evidence for severance purposes, the question is "whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*People v. Balderas*, *supra*, 41 Cal.3d at pp. 171-172; accord, *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1315-1316.) "Cross-admissibility is the crucial factor affecting prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) If the evidence is cross-admissible, prejudice is generally dispelled. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1315-1316.) While lack of cross-admissibility alone is not sufficient to prohibit joinder and demand severance, that factor nevertheless weighs heavily in favor of potential prejudice and, therefore, severance. (See, e.g., *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 425-426; *Williams v. Superior Court, supra,* 36 Cal.3d at pp. 448-451 & fn. 9; *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.)

This Court has long and consistently recognized that "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428; *People v. Alcala* (1984) 36 Cal.3d 604, 631; *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 448-450 & fn. 5.) The admission of such evidence "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317;

Williams v. Superior Court, *supra*, 36 Cal.3d at pp. 448-450 & fn. 5.) Of course, "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044; *People v. Garceau* (1993) 6 Cal.4th 140, 186 [use of such evidence may dilute presumption of innocence].) Thus, "joinder under circumstances where the joined offenses are not otherwise cross-admissible has the effect of admitting the most prejudicial evidence imaginable against an accused." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 429 [citing and discussing supporting authorities].)

These concerns are reflected in Evidence Code section 1101, subdivision (a), which provides: "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." At the same time, under section 1101, subdivision (b), evidence of prior crimes or misconduct is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such act."

Even when the evidence has some bearing on a disputed, material issue, its admission is not guaranteed. Given the extremely inflammatory nature of other crimes evidence, its admission under section 1101, subdivision (b), is sharply circumscribed. It is to be received with "extreme caution," and only when its probative value is *substantial* and *necessary* to prove a *disputed* issue. (*People v. Williams* (1988) 44 Cal.3d 883, 907;

accord *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405; *People v. Alcala*, *supra*, 36 Cal.3d at p. 631; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 429; *People v. Thompson*, *supra*, 27 Cal.3d at pp. 315, 318.) While a plea of not guilty technically places all elements in issue, the element must genuinely be in dispute in order to be proved with other crimes evidence. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 426; *People v. Ewoldt*, *supra*, at p. 406; *People v. Bonin* (1988) 47 Cal.3d 808, 848-849; *People v. Alcala*, *supra*, at pp. 631-632; *People v. Thompson*, *supra*, 27 Cal.3d at pp. 315, 318, & fn. 20.) Moreover, to be admissible, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404) under which "the probative value of the evidence must not be substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Harrison* (2005) 34 Cal.4th 208, 229; accord, *People v. Alcala*, *supra*, 36 Cal.3d at pp. 631-632.)

Applying these principles, this Court has held that "[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.] . . . .' (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so

unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt, supra*, 7 Cal.4th 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, supra*, 7 Cal.4th at p. 425, italics added.)

Here, as the trial court recognized, the critical issue genuinely in dispute as to both charges was the identity of the perpetrators of the murders. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2 ["Evidence of identity is admissible where it is conceded or assumed that the charged crime was committed by someone, in order to prove that the defendant was the perpetrator"].) Hence, in order to be cross-admissible to prove identity, "'[t]he pattern and characteristics of the crimes'" had to "'be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt, supra*, at p. 403.) However, the only common features here were that: 1) the victims were male; 2) they were both shot in the head; and 3) both shootings occurred in roughly the same general area of Banning. All of these features are common to most homicides and thus hardly constitute a highly distinctive "signature." (See Fox & Zawitz, *Homicide Trends in the United States*, Bureau of Justice Statistics Web Site, *www.ojp.usdoj.gov* [both the perpetrators and the victims of approximately 65 percent of homicides are male, and handguns are the most commonly-used weapons in homicides].) The distinctive features of the two homicides, on the other hand, were numerous and included that: 1) different guns were used in each crime (2 CT 313; 1 RT 97); 2) there was no motive offered for the Coder murder, while the preliminary hearing evidence was that the Martin murder was motivated by gang rivalry (1 CT 123-124; 1 RT 97); 3) Martin was a gang member and Coder was not (2 CT 316; 1 RT 97); 4) McKinnon knew

Martin but apparently did not know Coder (1 CT 51-52, 122, 143); 5) Coder was shot once while Martin was shot twice (1 CT 16, 78-79; 1 RT 97-98); 6) according to the preliminary hearing evidence, there were arguably two perpetrators involved in the Coder murder (1 CT 45-47) while there was only one involved in the Martin murder (1 CT 86-87); 7) the Coder murder occurred in a dark and empty field behind a crack infested motel while the Martin murder occurred in a residential area where several apartment complexes were located (1 CT 16, 43, 48, 84; 101); and 8) the murders occurred more than a month apart (1 CT 1, 16; 1 RT 97).

This Court has consistently found offenses that are far more similar than the Coder and Martin homicides to be insufficiently similar to support an inference of identity. For instance, in *People v. Rivera* (1985) 41 Cal.3d 388, the trial court admitted a prior armed robbery based upon the prosecutor's contention that the prior crime was sufficiently similar to the charged crime to support an inference of identity because:

> 1) both crimes occurred on a Friday night; 2) both occurred at approximately 11:30 p.m.; 3) both involved convenience markets; 4) both markets were in Rialto; 5) both markets were located on street corners; 6) both crimes involved three perpetrators; 7) both involved getaway vehicles; 8) prior to both crimes, two or three people were observed standing outside the store; and 9) the defendant used a [similar] alibi defense in both cases . . . .

(*Id.* at pp. 392-393.) The Court held that the trial court erred: "[t]aken alone or together, however, these characteristics are not sufficiently unique or distinctive so as to demonstrate a 'signature' or other indication that defendant perpetrated both crimes. Convenience stores are often on street corners and are prime targets for crimes; undoubtedly many of these offenses occur late on Friday evenings and involve a getaway car and more

than one perpetrator; finally, alibi is a common defense." (*Id.* at p. 393.)

Similarly, in *People v. Bean*, *supra*, 46 Cal.3d 919, this Court held that two murders were insufficiently similar to support an inference of identity where they: 1) occurred three days apart; 2) occurred in close proximity; 3) were both accomplished by blows to head; 4) involved older women victims; 5) occurred in the commission of burglaries/robberies; and 6) involved taking victims' cars and abandoning them in the same area. The Court held that "these factors are not unique . . . and [therefore] do not establish a unique modus operandi." (*Id.* at p. 937; see also *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 450 [two murders insufficiently similar when both committed by shooting, but different in location, time, date, and number of people involved].)

The Courts of Appeal are in accord. For instance, in *In re Anthony T.* (1980) 112 Cal.App.3d 92, Division Four of the Court of Appeal for the Second Appellate District held that two crimes were insufficiently similar to prove identity despite the facts that: 1) both were robberies; 2) both were committed by two perpetrators; 3) both were committed with guns; 4) both occurred in take-out chicken stands where the perpetrators forced employees to remove money from store safes; and 5) both were committed within two months of each other. (*Id.* at pp. 100-101; see also *People v. Felix* (1993) 14 Cal.App.4th 997, 1005-1006 [prior robbery committed by the two codefendants was insufficiently similar to prove that they were the perpetrators of the charged robbery despite the facts that: 1) both crimes were committed by two perpetrators; 2) both crimes involved multiple victims in business establishments; and 3) the two codefendants were known to have committed the prior crime together].)

Clearly, and as the trial court ruled (2 RT 120-121), the evidence in

this case fell far short of demonstrating that "[t]he highly unusual and distinctive nature of both . . . offenses virtually eliminate[d] the possibility that anyone other than the defendant committed" them. (*People v. Balcom*, supra, 7 Cal.4th at p. 425.) Instead, the court held that the evidence here would be cross-admissible in order to: 1) bolster the credibility of Harold Black's testimony that McKinnon had confessed both crimes to him; and 2) demonstrate the veracity of the confessions themselves, as they supported the inference that McKinnon must have known about both crimes. (2 RT 120-122.)

Addressing the court's second rationale first, it was a *non sequitur*. The court's reasoning that McKinnon's alleged confessions supported the inference that they were truthful because he had knowledge of each crime simply went to the relevance of each confession to prove the specific crime to which he had allegedly confessed. It does not follow that McKinnon's knowledge and alleged confession to *one crime* (along with all of the other evidence relating to that crime) would in any way be relevant or admissible to prove his guilt *of the other*. Indeed, the only way that McKinnon's truthful confession to one crime would be relevant to prove his guilt of the other would necessarily rest upon the inference that if he had committed and confessed to one murder, he was more likely than not to have committed and confessed to another. Of course, the inference is strictly forbidden. (See, e.g., *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428 ["whenever an inference of the accused's criminal disposition forms a 'link in the chain of logic connecting the uncharged offense with a material fact' . . . the uncharged offense is simply inadmissible, no matter what words or phrases are used to 'bestow a respectable label on a disreputable basis for admissibility – the defendant's criminal disposition"]; accord, *People v.*

Thompson, *supra*, 27 Cal.3d at p. 316.)

As to the trial court's first rationale, it apparently reasoned that if Black were being truthful about one of McKinnon's confessions, he was more likely being truthful as to the other. From that premise, the court further reasoned that Black's testimony regarding *both* confessions, as well as all of the other evidence regarding the crimes to which McKinnon had allegedly confessed, was cross-admissible. Once again, the court's reasoning was flawed.

Reviewing courts have repeatedly condemned admission of a defendant's other crimes in order to bolster a prosecution witness' credibility regarding the charged crime. (See, e.g., *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396-1397; *People v. Pitts* (1990) 223 Cal.App.3d 606, 835 and authorities cited therein [other crimes evidence "is not admissible solely to corroborate or bolster a witness' credibility"]; *People v. Scott* (1987) 194 Cal.App.3d 550, 552, and authorities cited therein [same – evidence of uncharged offenses against complaining witness inadmissible to bolster her credibility]; *People v. Key* (1984) 153 Cal.App.3d 888, 894 ["although the examples cited in (section 1101) subdivision (b) are not exclusive, none allow prior crimes evidence to be admitted solely to corroborate or bolster the credibility of a witness . . . .]; *People v. Thompson* (1979) 98 Cal.App.3d 467, 481 [where defendant charged with furnishing marijuana to minors on one occasion, evidence that he had done so on prior occasions inadmissible to bolster credibility of prosecution witnesses]; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1294, 1321-1322 [in joint trial of co-defendants charged with murder, attempted robbery, and conspiracy to commit robbery, trial court erred under section 352 in admitting evidence of co-defendant's guilty plea to robberies and

another participant's conviction as an accessory after the fact to the murders simply in order to bolster prosecution witness' testimony regarding crimes and the parties' participation in them].) Indeed, in *People v. Brown*, *supra*, 17 Cal.App.4th 1389, the reviewing court soundly rejected the very theory on which the trial court's ruling in this case rested.

In *Brown, supra*, the defendant was charged with molesting his daughter based in part on police testimony that he had confessed the crime to them. (*Id.* at p. 1392.) The defendant denied having made the confession. (*Id.* at pp. 1392-1393.) The prosecution moved to admit the police officers' testimony that the defendant had also confessed to molesting his niece and sister, along with other evidence to prove those uncharged crimes, including the testimony of his niece. (*Id.* at p. 1394.) The trial court ruled that the defendant had put the police officer's credibility in issue by denying that he had confessed to the charged crime against his daughter. (*Ibid.*) It reasoned that the officers' testimony regarding the defendant's confession to the uncharged crimes was particularly credible because it was independently corroborated by his niece, and the officers could not have known about those acts unless the defendant had told them about them. (*Ibid.*) From that premise, the trial court reasoned that, because the officers' testimony regarding the defendant's confession to the uncharged acts was particularly credible, it tended to support the inference that the officers were also being truthful about the defendant's confession to the charged crime. (*Ibid.*) Hence, the trial court admitted not only the defendant's confession to the uncharged crimes, but also corroborating testimony from the defendant's niece. (*Ibid.*)

The reviewing court reversed, finding admission of the evidence relating to the uncharged crimes violated Evidence Code sections 1101 and

352. (*People v. Brown*, *supra*, 17 Cal.App.4th at pp. 1395-1396.) First, the appellate court rejected the trial court's premise that the officer's testimony regarding the defendant's confession to the uncharged crimes was particularly credible. The record indicated that the defendant did not volunteer his confession to those crimes, but rather was specifically questioned about them. If this were true, the appellate court held, then no inference could be drawn that the officers' knowledge about the uncharged crimes could only have been gained through the defendants' confession. To the contrary, the evidence tended only to support the prohibited inference that the defendant had a propensity to molest young girls. (*Id.* at pp. 1395-1396.)

In any event, even if the officers' knowledge regarding the uncharged crimes could only be reconciled with the defendant having confessed to them, the Court of Appeal found error in the trial court's admission of the evidence regarding those crimes for the purpose of bolstering the credibility of the officers' testimony that defendant had confessed to the charged crime. (*People v. Brown*, *supra*, 17 Cal.App.4th at pp. 1396-1397.) "As a general rule, the courts have interpreted Evidence Code section 1101 as not permitting introduction of uncharged prior acts solely to corroborate or bolster the credibility of a witness. (See *People v. Tassell* (1984) 36 Cal.3d 77; *People v. Pitts*, *supra*, 223 Cal.App.3d 606, 835; *People v. Key* (1984) 153 Cal.App.3d 888, 894.)" (*People v. Brown*, *supra*, 17 Cal.4th at pp. 1396-1397.) Applying that rule, the *Brown* court emphasized, "the purpose for admitting the crimes involved a collateral issue; they were not admitted to prove" the charged crimes, "but whether the detectives were truthful," a collateral issue on which "[t]he court permitted a mini-trial" on the uncharged crimes, allowing not only the

officers' testimony that the defendant had confessed to those crimes, but also the niece's testimony that the defendant had, in fact, molested her. (*Id.* at p. 1397; see also *People v. Wheeler* (1992) 4 Cal.4th 284, 296 [witness credibility collateral issue].) And, whether the defendant had committed the uncharged crimes and confessed as much to the officers "were only tangentially related to whether the detectives testified truthfully when they stated" the defendant had confessed to the *charged crime*. (*Ibid.*) At the same time, the evidence "presented a clear danger of undue prejudice. The prior uncharged acts involved the same conduct as the charged offense . . . . There was a danger the jury would use the evidence to draw the impermissible inference that [the defendant] was criminally disposed towards engaging in that conduct and therefore must have engaged in the charged conduct." (*Ibid.*) Concluding that "any probative value of this evidence was clearly outweighed by a danger of undue prejudice," the *Brown* court held that the trial court committed prejudicial error under Evidence Code sections 1101 and 352 in admitting it. (*Id.* at p. 1398.)

This case is analytically identical to *Brown*. As in *Brown*, there was nothing about Black's testimony regarding either of McKinnon's alleged confessions to support an inference that his account could only have been based on McKinnon having made either confession to him.

Black did not volunteer either of McKinnon's alleged confessions. As to the Martin murder confession, Investigator Buchanan approached Black two years after his brief incarceration with McKinnon had ended and specifically questioned him about the Martin murder and McKinnon's role in it. (1 CT 125-126.) The only details Black purported to recount from McKinnon's alleged confession that were consistent with the undisputed true facts was that Martin had been shot in the head (although Black did not

know how many times) in front of the Meadowbrooks Apartments. (1 CT 122, 147-148.) These were hardly specific details that only the perpetrator would know. Further, Black had ample opportunity to hear about these general facts from other sources well before he told his story to Investigator Buchanan. According to Black's preliminary hearing testimony (on which the motion to sever was based), friends and family members told him that Gregory Martin had been shot and killed *before* McKinnon allegedly confessed that crime to him, and Black did not tell police about that confession until *two years later*. (1 CT 125-126, 141-142, 146-147.)

Moreover, of the remarkably few general details Black did purport to recount about McKinnon's confession to the Martin shooting, one was absolutely inconsistent with the true facts. Black described with specificity McKinnon's alleged confession that he had spent the night with friends at the Meadowbrooks Apartments and shot Martin as he was leaving *early the next morning*. (1 CT 122.) In truth, Martin was shot at about 8:00 *in the evening*. (1 CT 84-85.)

As to the alleged Coder confession, it was Investigator Buchanan who brought up the Coder murder – and whether McKinnon had confessed to it – when he interviewed Black about the Martin murder confession. (1 CT 145.) Black failed to tell Investigator Buchanan that he knew anything about it at that time. (1 CT 143, 145.) It was not until some time after this conversation with Buchanan that Black claimed that McKinnon had also confessed to shooting Coder, "some white boy down at the Desert Edge Motel," a confession Black incredibly claimed that McKinnon made at the same time that he had confessed to the Martin murder. (1 CT 143.) Not surprisingly, Black provided no other details regarding this alleged confession. Obviously, just as in the *Brown* case, there was nothing about

Black's testimony regarding *either* confession to support the inference that he could only have known about those crimes and their circumstances if McKinnon had told him about them.

In any event, as in *Brown*, even assuming some minimal relevance of Black's testimony regarding one confession – along with *all* of the evidence relating to the confessed crime – to his credibility regarding the other, it went to a collateral issue, was only tangentially relevant, and was substantially outweighed by the enormous prejudice posed by admitting all of the evidence regarding the commission of another similar murder *in this capital case*. (See *People v. Keenan*, *supra*, 46 Cal.3d at p. 500 ["severance motions in capital cases should receive heightened scrutiny for potential prejudice"]; accord *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431.) The two crimes and the evidence relating thereto simply was not cross-admissible. (See, e.g., *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 448-451 & fn. 9 [lack of cross-admissibility weighs in favor of potential prejudice and, hence, severance]; accord, *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 425-426; *United States v. Lewis*, *supra*, 787 F.2d at p. 1322.)

3. The Gang Evidence, Offered to Prove Motive as to the Martin Murder Charge, was Irrelevant and Inadmissible as to the Coder Murder Charge, Highly Inflammatory, and Likely to Lead to Prohibited, Prejudicial Inferences of McKinnon's Violent Criminal Disposition to Commit Both of the Charged Murders.

Where the evidence relating to one charge is more inflammatory than that relating to the other, that is a factor weighing in favor of severance. (See, e.g., *People v. Sandoval*, *supra*, 4 Cal.4th at p. 173). Here, the prosecutor represented that he intended to present evidence regarding

McKinnon's membership in the Crips gang in order to prove his motive to kill Martin as an act of retaliation against the Bloods. (1 RT 102.) It was undisputed that the evidence was irrelevant and inadmissible as to the Coder murder charge. (See 1 RT 102.)

As defense counsel argued below (1 RT 98-99; 2 CT 315-316), gang membership evidence is well recognized as being extraordinarily prejudicial and inflammatory. (See, e.g. *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344.) Like other violent crimes evidence, it carries a grave risk "that the jury [will] view[] appellant as more likely to have committed the violent offenses charged against him because of his membership in the [] gang." (*People v. Cardenas*, *supra*, at pp. 904-905; accord, *People v. Avitia*, *supra*, at p. 194; *People v. Bojorquez*, *supra*, at p. 344.) It breeds an equal tendency to condemn, not because the defendant is guilty of the present charge, but because the jury fears he will commit a similar crime in the *future* or, conversely, because it believes that the gang member defendant likely committed previous crimes for which he has escaped unpunished. (See, e.g., *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230 [despite absence of "formal convictions," it is "reasonable to infer" prior criminality from gang membership]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 317 [prior criminality breeds tendency to condemn because defendant has previously escaped punishment]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 [gang involvement suggests future criminality]; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1501 [same]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 163 [evidence relating to defendant's future criminality irrelevant and

inadmissible in trial on guilt or innocence because "jury is not free to convict a defendant simply because he poses a future danger"].) Particularly when a gang – such as the Crips – and its bloody rivalry with another gang – such as that between the Bloods and the Crips – are notorious, any evidence connecting the defendant to that gang tends to inflame jurors against him. (Cf. *People v. Brown* (2003) 31 Cal.4th 518, 546 [characterizing the Bloods as a "notorious street gang"]; *People v. Berryman* (1994) 6 Cal.4th 1048, 1066 [same - Crips]; *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 453 [recognizing potential prejudice from joinder involving gang evidence given "highly publicized phenomenon of gang warfare in Southern California"]; *People v. McKee* (1968) 265 Cal.App.2d 53, 59 [given that "most of the Northern California public regard Hell's Angels . . . with distaste," evidence identifying defendant as Hell's Angels member had "intrinsic inflammatory qualities"].)

"There is 'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes [or gang involvement] to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" (*United States v. Lewis*, *supra*, 787 F.2d at pp. 1321-1322, quoting from *United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1116 [trial court committed prejudicial error in refusing to sever counts where inflammatory prior crimes evidence was admissible as to only one count]; *Panzavecchia v. United States*, *supra*, 658 F.2d at p. 341 [same].) As this Court observed in *Williams*, evidence of a defendant's gang membership weighs in favor of severance due to its potential for prejudice: "the allegation that petitioner is a gang member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders or, alternatively, that involvement

in one shooting necessarily implies involvement in the other." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 452-453.) Hence, the potential for significant undue prejudice in joining the allegedly gang-related Martin murder charge with the Coder murder case, in which it was conceded that there was no hint of gang involvement and therefore gang evidence was inadmissible, weighed heavily in favor of severance.

4. The Preliminary Hearing Evidence as to Both Cases was Relatively Weak.

At the outset, and as the authorities cited in part C, above, establish, the prosecutor's argument that the critical question in assessing potential prejudice is whether a weak case has been joined with an "extremely strong" one – and *not* whether two weak cases have been joined together – was legally incorrect. (1 RT 103; see, e.g., *People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1120 [prejudice from joinder may arise from cumulation of evidence where two weak cases have been joined]; *People v. Kraft*, *supra*, 23 Cal.4th 978, 1030 [same]; *People v. Marshall*, *supra*, 15 Cal.4th at p. 27 [same]; *People v. Sandoval*, *supra*, 4 Cal.4th at p. 173 [same]; *Williams v. Superior Court*, 36 Cal.3d at pp. 453-454 [same]; see also *United States v. Davis* (8th Cir. 1996) 103 F.3d 660, 676, cert. denied 520 U.S. 1258 [unfairness may result from joinder where there is danger jury will cumulate evidence in two weak cases]; *United States v. Pierce* (11th Cir. 1984) 733 F.2d 1474, 1477 [same]; *United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 736; *Garris v. United States* (D.C. Cir. 1969) 418 F.2d 467, 469 [same].) Indeed, as defense counsel emphasized below (1 RT 99-100; 2 CT 317-319), this Court has unequivocally stated that the assessment of potential prejudice from joinder:

> should not be limited to situations where the relative strengths of the case are unequal. Indeed, our principal concern lies in

> the danger that the jury [hearing two relatively weak cases] would aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials there would not be convictions on both charges. Joinder in such cases will make it difficult not to view the evidence cumulatively. The result might very well be that the two cases would become, in the jurors' minds, one case which would be considerably stronger than either viewed separately.

(*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 453-454.) At bottom, "joinder should never be a vehicle for bolstering *either one or two* weak cases against one defendant, *particularly where conviction in both will give rise to a possible death sentence*." (*Id.* at p. 454, italics added.)

Nevertheless, from the trial court's remarks in ruling on the motion to sever, it clearly appears that it was persuaded by the prosecutor's legally incorrect argument. In considering the relative strength of the cases, the court observed only that, "we don't have a case where there's overwhelming evidence in one case where you're going to bootstrap another case before the jury." (1 RT 111.) It did not even address, much less assess, whether the two cases were relatively weak. (See 1 RT 110-112.) Of course, it is well settled that when a trial court is called upon to exercise its discretion, it must fully understand the nature and scope of that discretion. Denial of a motion without such knowledge itself establishes an abuse of discretion. (See, e.g., *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; *People v. Davis* (1984) 161 Cal.App.3d 796, 802 [court abused its discretion where it was "misguided as to the appropriate legal standard to guide the exercise

of this discretion"].) Here, whether the court accepted the prosecutor's argument and denied the motion based upon a misunderstanding of the law, or whether it understood the legal relevance of two weak cases to its assessment of potential prejudice but disregarded it, it seems abundantly clear that the court did not analyze the issue with the heightened scrutiny and care demanded of severance motions in capital cases. (*People v. Keenan*, *supra*, 46 Cal.3d at p. 500; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431; *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454.) "Even if such an ill-considered ruling were justifiable in a less serious case, it was impermissible when questions of life and death were at stake." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 431.)

Of course, this Court has provided trial courts with guidance in assessing the relative strength of charges for severance purposes. In *Williams v. Superior Court*, *supra*, 36 Cal.3d 441, cited by defense counsel below (2 CT 306-324), the trial court denied the defendant's motion to sever two murder cases against him, both of which raised a question of identity. In one case, a burst of gunfire was heard and "[s]everal witnesses placed petitioner Williams in the group of assailants and saw him run from the scene along with the others." (*Id.* at p. 445.) Witnesses testified that the defendant did not know the victim; however, the defendant was a member of the Bloods and the victim was a friend of, or affiliated with, a rival gang. (*Ibid.*) In the other, an eyewitness identified the defendant as one of three occupants of a car from which a gun was fired, killing the victim. The victim was in territory claimed by a rival gang and wearing that gang's colors. The defendant later allegedly said that members of a rival gang were "hassling" him about the murder. (*Id.* at pp. 445-446) This Court characterized the cases as "involving the joinder of one weak case and one

strong case or alternatively of two relatively weak cases. . . Others obviously may differ in their assessment of the relative strengths of the two cases, but under either approach the danger of prejudice remains manifest." (*Id.* at p. 453, & fn. 10.)

Similarly, in *People v. Smallwood*, *supra*, 42 Cal.3d 415, also cited by defense counsel (2 CT 306-324), the trial court denied the defendant's pre-trial motion to sever two unrelated murder charges against him based on the preliminary hearing evidence. A witness to the first murder, Hall, testified at the preliminary hearing that she had seen the defendant and had heard him say that he "had a piece" or a gun and was "going to make some money." Shortly thereafter, she heard the sound of gunshots. She ran in their direction and saw the defendant with several other people around a body. The defendant bent over the body, his hands empty, before running away. The victim's empty wallet was later found 300 feet from his body. About 45 minutes later, Hall saw the defendant with a gun. Hall did not come forward with her account until seven or eight months later, after she had been shot by her cousin. While she explained that she did not come forward sooner because she did not want to get involved, there was also evidence that a motive to fabricate arose in the interim: Hall believed the defendant had encouraged her cousin, who was also the defendant's girlfriend, to shoot her. (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 422-423.) This Court characterized the evidence as weak and concluded that "such thin evidence must necessarily have been bolstered by allowing the jury to receive evidence of the unrelated [second] homicide." (*Id.* at p. 430.)

Indeed, "even the wisdom of hindsight" based upon the evidence presented at trial did not alter this Court's view of the relative weakness of

the case. (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 431.) As to Hall, her account at trial was essentially the same as it had been at the preliminary hearing. Additional evidence was presented she was a "narcotics user" and facing drug-related charges when she testified against the defendant. (*Id.* at p. 432.) Initially, she told police that she had actually witnessed the shooting itself, but later admitted that she had lied because she was angry. (*Ibid.*)

In addition, a second witness, Spencer, testified that he actually saw the defendant shoot the victim in the head. (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 419.) At the same time, he admitted that he was "a regular user of drugs and alcohol," and had consumed one or two Valium, some beer, and "possibly" some marijuana on the date of the murder. (*Id.* at p. 419.) He also lied on cross-examination when he denied having met with the District Attorney investigator. (*Id.* at p. 432.) Spencer further testified that he also witnessed the second murder, a charge on which the jury ultimately hung. (*Ibid.*) On this record, this Court concluded that the witnesses were less than reliable and the evidence relating to the first murder was weak and, hence, if tried alone, the possibility of acquittal on that charge "was scarcely remote." (*Id.* at p. 432.) "It is very probable that the weight of the two accusations was a major factor in Smallwood's conviction of one of them." (*Ibid.*)

Using *Williams* and *Smallwood* as a benchmark, the preliminary hearing evidence (on which the severance motion was based) as to both charges against McKinnon was weak. At the very least, the evidence as to the Martin murder charge was exceedingly weak as compared to the Coder case. In either case, the potential prejudice in joining the cases was great and thus weighed heavily in favor of severance.

a. The Preliminary Hearing Testimony Relating to the Coder Murder.

According to Detective Caldwell's preliminary hearing testimony, he interviewed Gina Lee on the night of the Coder murder and she denied knowing anything about the crime. (1 CT 40-41.) Approximately eight months later, he "contact[ed]'" Lee on the street, took her to the police station, and interrogated her again. (1 CT 42, 54.) Detective Caldwell knew that Lee was a habitual crack user; in fact, she told him that she had been consuming crack cocaine on the day of the interrogation. (1 CT 55.) This time – while high on crack and separated from her next fix – Lee told Detective Caldwell that she was walking behind the motel on the night of the shooting, while high on crack, when she heard shots and turned and saw McKinnon and Orlando Hunt running away. (1 CT 43-47, 55, 65.)

Lee was in custody for a robbery conviction when she testified at the preliminary hearing. (1 CT 20.) She testified that she spoke to Detective Caldwell twice, but did not recall telling him that she had seen McKinnon at the time of the shooting nor did she see McKinnon at that time. (1 CT 23-25.) Consistent with her daily crack habit, Lee explained that she had been using crack cocaine all day and night both on the date Coder was killed and on the date of her second interview with Detective Caldwell. (1 CT 30-33.) She further explained that her long term, daily crack habit affected her memory and distorted her sense of reality. (1 CT 33.)

Of course, as this Court recognized in *People v. Smallwood*, *supra*, police statements of drug addicts or heavy users pose particular trustworthiness concerns and therefore should be treated with heightened caution and scrutiny. (42 Cal.3d at pp. 419, 431-433 [fact prosecution witnesses were drug users, one of whom had consumed drugs and alcohol

when he claimed to have witnessed murder, important factors considered in concluding case was weak for severance purposes]; accord, *United States v. Miele* (3d Cir. 1993) 989 F.2d 659, 666 and authorities cited therein; *Gov't of the Virgin Islands v. Hendricks* (3d Cir. 1973) 476 F.2d 776, 779; *Fletcher v. United States* (D.C. Cir. 1946) 158 F.2d 321, 322 [drug addict is "inherently a perjurer"]; *People v. Lewis* (Ill. S.Ct. 1962) 185 N.E.2d 168; see also *Banks v. Drektke* (2004) 540 U.S. 668, 678, 700 [in emphasizing the "serious questions of credibility" informers pose, Court described informant's post-verdict declaration that, given his narcotics habit, he feared that if he did not help detective in building evidence against defendant, he would be arrested on drug-related charges].) Certainly, when a witness, like Lee, is intoxicated not only when she witnessed certain events, but also when she first purports to recount those events several months later, her ability to accurately perceive and recall is dubious, at best. (See, e.g., *People v. Medina* (1974) 41 Cal.App.3d 438, 463.)

Moreover, it requires no stretch of the imagination to understand that a junkie in police custody is uniquely willing to say anything she needs to say in order to be released and score her next fix. As one Court has explained:

> The addict's habit makes him uniquely subject to constant surveillance and susceptible to arrest – he is in a perpetual status of violating the law. [Footnote omitted]. For the addict, arrest [or detention] is a harassment of a special sort, for he is forced to undergo the beginnings of withdrawal symptoms. [Footnote omitted]. At this stage, . . . the promise of immediate release and return to the habit is irresistible. [Footnote omitted.] The deliberate harassment of addicts for information, through illegal searches, arrests and general

intimidation by police and other officials, has been reported. [Footnote omitted].

(*United States v. Kinnard* (D.C. Cir. 1972) 465 F.2d 566, 570.)

In addition, Detective Caldwell testified at the preliminary hearing that eight months after the murder, Kerry Scott told him that he had seen McKinnon shoot Coder once in the head. (1 CT 48-49, 60.)[16] While this hearsay evidence was admissible at the preliminary hearing, the trial court should nevertheless have considered its hearsay character in assessing the strength of the Coder murder case against Mr. McKinnon. As this Court has stated, it has long and universally been recognized that "largely because a declarant is absent and unavailable for cross-examination, hearsay evidence is less reliable than live testimony." (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608, and authorities cited therein; accord, *Crawford v. Washington* (2004) 541 U.S. 36, 61-62, 68-69, and authorities cited therein ["testimonial" evidence, including out of court statements from witnesses to police officers, is not constitutionally reliable unless the declarant is subject to cross-examination].)

Harold Black testified at the preliminary hearing that he was in prison with McKinnon in late February or early March 1994. (1 CT 122, 146-147.) He was in custody for a parole violation and had a number of prior convictions for various offenses involving violence and dishonesty. (1 CT 127-128.)

In March of 1996, two years after his brief period of incarceration with McKinnon, Black was still in custody at a different prison and facing a

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[16] The wealth of evidence calling Scott's reliability into serious question was not presented at the preliminary hearing. (See Part E-2, below.)

pending second strike charge for spousal abuse. (1 CT 126-127.) Investigator Buchanan approached Black in the prison, primarily to discuss the Martin murder case. (1 CT 125-126.) As discussed in more detail in Part b, below (discussing the preliminary hearing testimony relating to the Martin murder charge), Black secured promises of leniency on his pending charge and, in exchange, recounted an alleged confession McKinnon made, while in custody, to the Martin murder. (1 CT 125-126, 136-137.)

During that very conversation, Investigator Buchanan specifically asked Black about the Coder murder. (1 CT 145.) Black told him that he did not know anything about it. (1 CT 145.)

Apparently in a later interview, Black made an inexplicable about-face and claimed that McKinnon did volunteer that he had killed Coder, or "some white boy down at the Desert Edge Motel," during the same conversation in which he had allegedly confessed to the Martin murder. (1 CT 143, 145.) Black provided no other details regarding this alleged confession nor did he explain why he had failed to mention it when Investigator Buchanan specifically asked him about it. (1 CT 143, 145.)

Black further testified that there were "no deals" for his statements and testimony against McKinnon and that he was receiving nothing in exchange. (1 CT 137, 151.) When pressed, however, he eventually admitted that he was ultimately permitted to plead guilty to the spousal abuse charge as a second strike, for which he received only a two- year sentence. That sentence was ordered to run concurrent to the time that he had already served on the parole violation, so that he did not have to serve any actual, additional time on the second strike conviction. (1 CT 137-139, 151-152.) In return, he promised to testify against McKinnon. (1 CT 151-152.)

Detective Caldwell testified that on an unspecified date, a man named Gregory Taylor was involved in an assault arising from a fistfight with Chester Norwood and taken to the Banning Police station. (1 CT 51.) Upon his arrival at the station, Taylor asked to speak with a detective. (1 CT 51.) When Detective Caldwell met with Taylor, Taylor told him that he had been in custody with McKinnon in Chino when McKinnon confessed to shooting a "white boy" (presumably Coder) in the head in Banning. (1 CT 51-52.)[17] While Caldwell claimed not to recall whether Taylor had actually been arrested as the perpetrator of the assault (1 CT 62), that inference certainly seemed more likely than not given his presence at the police station and his immediate offer of information that he had not bothered to share with police at an earlier date.

Harold Black knew Taylor and claimed that he had told Taylor that McKinnon confessed the *Martin* murder to him. (1 CT 140, 143.) He did not recall telling Taylor about McKinnon's alleged confession to the Coder murder. (1 CT 143-144.) Finally, Taylor never told Black that McKinnon had made any confession to him (Taylor). (1 CT 144-145.)

Like drug addicts, the "'serious questions of credibility' informers pose" are well recognized. (*Banks v. Dretke*, *supra*, 540 U.S. at p. 700 and authorities cited therein; *On Lee v. United States* (1952) 343 U.S. 747, 752; Pen. Code 1127a, subd. (b) ["In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a party, the court shall instruct the jury in part that 'The testimony of an in-custody informant should be viewed with caution and close scrutiny . . . .'"]; Assem.

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[17] Taylor did not testify at trial nor was any evidence presented that McKinnon had ever made such a statement to him.

Com. on Public Safety, Rep. on Assem. Bill No. 278 (1989-1990 Reg. Sess.) as amended May 4, 1989 [section 1127a enacted because "[n]umerous county jail informants have testified to confessions or admissions allegedly made to them by defendants while in custody . . . Snitches are not persons with any prior personal knowledge about the crime. . . . They testify only that a defendant made an inculpatory statement to them while in proximity in the jail or place of custody. [¶] [Such persons] gather restricted and confidential information by duplicitous means and thereby lend the credibility of corroboration to wholly fabricated testimony"]; *United States v. Gomez* (9th Cir. 2004) 358 F.3d 1221, 1226-1227 ["we have stressed repeatedly that informants as a class . . . are oftentimes untrustworthy. . . . On occasion, informants mislead investigators and prosecutors in order to feather their own nests"]; *Guam v. Dela Rosa* (9th Cir. 1980) 644 F2d 1257, 1259; *United States v. Beard* (11th Cir. 1985) 761 F.2d 1477, 1481; *United States v. Garcia* (5th Cir. 1976) 528 U.S. 580, 588, *cert. denied* 429 U.S. 889.) Furthermore, "information received from sources," like Harold Black and, inferentially, like Gregory Taylor, "who are themselves the focus of pending criminal charges or investigations is inherently suspect." (*People v. Campa* (1984) 36 Cal.3d 870, 882; accord, *People v. Smallwood*, *supra*, 42 Cal.3d at p. 432 [fact prosecution witness faced pending criminal charges important factor considered in concluding case was weak for severance purposes]; *People v. Brown* (1970) 13 Cal.App.3d 876, 883; *Williamson v. United States*, *supra*, 512 U.S. at pp. 607-608 (conc. opn. of Ginsburg, J.).) An out of court statement made to police in the *hope* of gaining leniency, like - inferentially - Taylor's, is inherently unreliable even if the declarant is not offered or granted leniency. (See, e.g., *Lilly v. Virginia* (1999) 527 U.S.

116, 139; *Forn v. Hornung* (9th Cir. 2003) 343 F.3d 990, 997, and authorities cited therein.) If, like Harold Black, the person who provides the information receives leniency or some other benefit or advantage, that is further evidence casting doubt on the reliability of his statement. (See, e.g., *Singh v. Prunty* (9th Cir.) 142 F.3d 1157, 1163, cert. denied, 525 U.S. 956 (1998); *Guam v. Dela Rosa*, *supra*, 644 F.2d at p. 1259; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1381; see also *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 422-423 [facts that several months had passed between murder and key prosecution witness' implication of defendant, during which time a motive to fabricate arose, were important considerations in concluding case was weak for severance purposes].)

Even among the class of suspect in-custody informants, Harold Black was uniquely lacking in credibility. Although he freely shared the details of McKinnon's alleged jailhouse confession to the Martin murder, and although *Buchanan specifically asked him about the Coder murder and McKinnon's connection to it and Black indicated that he knew nothing about it*, Black later claimed that during the very conversation in which McKinnon confessed to the Martin murder, he also confessed to the Coder murder. Black offered no explanation for his earlier omission and indeed the most likely explanation was that McKinnon simply never made any such confession.

Certainly, the bare double hearsay evidence from Detective Caldwell, which recounted what Taylor had told him, which in turn, purported to recount McKinnon's alleged confession to having shot "a white boy" in Banning, bore little indicia of reliability. Taylor himself and his account, of course, were not subject to cross-examination or adversarial testing. (See, e.g., *Kulshrestha v. First Union Commercial Corp.*, *supra*, 33

Cal.4th at p. 608 and authorities cited therein ["hearsay evidence is less reliable than live testimony"]; *Crawford v. Washington*, *supra*, 541 U.S. at pp. 61-62, 68-69 ["testimonial" evidence, including out of court statements from witnesses to police officers, is not constitutionally reliable unless the declarant is subject to cross-examination].) Apart from Taylor's motive to provide false information to police at the time he made his statement, that statement was certainly undermined by Harold Black. In short, Taylor's statement to Detective Caldwell added little to the weight of the state's case against McKinnon for the Coder murder.

In sum, at the time the motion to sever was made, the evidence against McKinnon relating to the Coder charge consisted of: 1) the repudiated hearsay statement of an admitted crack addict, Gina Lee, who had identified – while high on crack – McKinnon as a man she had seen – also while high on crack – running away after she heard gunshots; 2) the hearsay statement of Kerry Scott identifying McKinnon as the shooter; 3) the hearsay statement of an in-custody informant, Gregory Taylor, who claimed to recount an undetailed, vague jailhouse confession McKinnon allegedly made to shooting a "white boy in Banning"; and 4) the testimony of another in-custody informant and convicted felon, Harold Black, who also claimed that McKinnon made a bare, jailhouse admission to killing a "white boy" at the Desert Edge Motel – a claim inconsistent with Black's prior police statement and which contained no information other than what the police had furnished him – and who had compelling motive to lie given the benefits he was promised *and received* for his information. Under *Williams* and *Smallwood*, this evidence was weak.

b. The Preliminary Hearing Testimony Relating to the Martin Murder.

As to the evidence in support of the Martin murder charge, it could not be characterized as anything other than paper thin. Sergeant Palmer testified at the preliminary hearing that Martin had been shot shortly before 8:00 p.m. on February 12, 1994. (1 CT 84-85.) That evening, Palmer interviewed Lloyd Marcus, who had witnessed the shooting. (1 CT 86-87.) Marcus told Sergeant Palmer that the shooter and victim were standing directly under a street light. (1 CT 108-109.) He could see them well enough to identify Martin by his nickname "Moto" (1 CT 108-109) and to describe the shooter as Asian or Mexican and someone he did not know (1 CT 107-109). Although Palmer had little independent recollection of his interview with Marcus, *although his report did not indicate that Marcus had ever named the shooter*, and despite all evidence to the contrary in the statement memorialized in his report, Palmer claimed to have an independent recollection that Marcus had identified the shooter as "Popeye," whom Palmer knew to be McKinnon. (1 CT 104-109.)[18]

Sergeant Palmer's claim that Marcus had identified McKinnon by name as the shooter was so improbable on its face that no rationale factfinder could accept it. (See, e.g., *People v. Thornton* (1974) 11 Cal.3d 738, 754 [while credibility determinations are ordinarily for trier of fact, inherently improbable testimony of witness cannot support conviction and should be disregarded]; *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065 [testimony must be disregarded when it is "inherently improbable or

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[18] Indeed, Palmer knew McKinnon well and his department had a long and troubled history with him. (See 1 RT 74; 11 RT 1324-1327; 13 CT 3771-3773, 3775, 3783, 3787.)

unbelievable, i.e., 'unbelievable per se,"' 'physically impossible,' or '"wholly unacceptable to reasonable minds"' (Citations)"]; accord, *United States v. Ramos-Rascon* (9th Cir. 1993) 8 F.3d 704, 709, fn. 3 [due process prohibits conviction based on, and appellate court may disregard, evidence that "is so improbable on its face that no reasonable trier of fact could accept it"; rejecting as inherently improbable police officer's testimony regarding certain observations he made]; *United States v. Saunders* (7th Cir. 1992) 973 F.2d 1354, 1358.) It is difficult to conceive of a piece of evidence more critical, or of a more watershed moment in a murder investigation, than an eyewitness' identification of the murderer *by name*, particularly a name known to the investigating officer. Yet, Sergeant Palmer failed to include that alleged, critical piece of evidence in his report.

To the contrary, that alleged piece of evidence was completely irreconcilable with *every other piece of evidence contained in the report of Marcus's statement*. Marcus's statement that he could see both men well given their location under a street light and his description of the shooter as Asian or Mexican and someone he did not know (1 CT 107-109) was completely irreconcilable with Palmer's claim that Marcus identified the shooter as someone he *did* know – McKinnon – and someone very obviously a dark-skinned African-American with very obviously African-American hair. (8 SCT 13-16.) Indeed, if Marcus knew McKinnon well enough to be able to identify him by name as Popeye, he would also know McKinnon well enough to know that he was quite obviously not Asian or Hispanic. (*Ibid.*) There was simply no way to reconcile the evidence contained in the report with Sergeant Palmer's claim regarding alleged, critical evidence omitted from it. In short, there was no way to reconcile Palmer's uncorroborated and undocumented claim that Marcus had

identified the shooter as McKinnon with anything other than being a lie.

According to Investigator Buchanan's preliminary hearing testimony, he spoke to Marcus "at some point in time" after the shooting. (1 CT 154.) Marcus told him that he did not witness the shooting and did not know McKinnon or anyone named "Popeye." (1 CT 154-155.)

In addition, and as noted above, in March 1996, Investigator Buchanan approached Harold Black about the Martin murder while Black was in prison and facing a pending felony charge as a second strike. (1 CT 122, 125-128.) Investigator Buchanan promised that he would have the district attorney "reevaluate" his pending second strike case in exchange for any information, which Black understood to mean a dismissal. (1 CT 135-136.) Investigator Buchanan also promised to assist him in changing his parole location to Salt Lake City. (1 CT 136-137.) Having secured these promises, Black told Investigator Buchanan – and so testified at the preliminary hearing – that McKinnon approached him one day while they were in custody together in late February or early March of 1994. (1 CT 121, 132-137.)

According to Black, McKinnon volunteered that he had spent the night with some friends at the Meadowbrook Apartments, unexpectedly encountered Martin as he was leaving the next *morning*, and shot him in the head for his "homey Scotty." (1 CT 122, 147, 153.) Black understood McKinnon to be referring to Scotty Ware. (1 CT 123.) He explained that McKinnon and Ware were both members of the Crips gang. According to Black, Ware had been shot by a Bloods gang member a year earlier and Martin belonged to the Bloods. (1 CT 123-124.) Black could not recall any other details McKinnon provided about the shooting, such as how many times he had shot Martin or what kind of gun he had used. (1 CT 147-148.)

Black also admitted that before McKinnon allegedly confessed to him, and certainly well before he told Investigator Buchanan about it more than two years after the murder, friends and family members had told him about the shooting death of Martin. (1 CT 141-142, 146-147.)

Also according to Black, McKinnon told him that he was in custody for a parole or probation violation because he had been arrested for putting a gun in Kimberly Gamble's purse. (1 CT 124-125.) However, Black did not suggest that McKinnon had ever indicated that the gun was the weapon used to kill Martin. As discussed in Part a, above, in exchange for his information and promise to testify against McKinnon, Black received an enormously beneficial plea agreement which allowed him to avoid having to serve a single, actual day in prison on a second strike conviction. (1 CT 137-139, 151-152.)

Once again, Black's credibility was highly suspect for the reasons already discussed. He not only had compelling motive to make a false claim that McKinnon had confessed to the Martin murder, he had ample opportunity to do so in the two-year interim between the murder and Black's first statement to Investigator Buchanan, during which time he had discussed the murder with third parties. (1 CT 43-44, 141-142, 146-147.) He certainly did not provide any details that only the perpetrator would know; indeed, he could not even say how many times Martin had been shot. And, as previously discussed, he claimed that McKinnon said that he had shot Martin *early in the morning* (1 CT 122, 147, 153), while in truth Martin was shot and killed shortly before 8:00 *in the evening* (1 CT 84-85).

Finally, it was stipulated that on February 19, 1994, a week after the Martin shooting, police found the Martin murder weapon in Kimiya Gamble's purse while McKinnon was with her. (1 CT 79.) According to

Investigator Buchanan, he interviewed Gamble on an unspecified date and she told him that the gun was McKinnon's and that he had told her to put it in her purse. (1 CT 155.) At the time of the preliminary hearing, police were still in possession of the gun, but had not checked it for fingerprints. (1 CT 157.)

Of course, proximity alone does not prove possession. (See, e.g., *People v. Martin* (1973) 9 Cal.3d 687, 696; *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 550, and authorities cited therein ["defendant's mere proximity to (item), her presence on the property where it was located, and her association with the person who controls it are insufficient to" prove possession].) While Investigator Buchanan testified to Gamble's hearsay statement shifting the blame for possessing the gun to McKinnon, the suspect reliability inherent in such self-serving, blame shifting hearsay statements to law enforcement officials is well known. (See, e.g., *Lilly v. Virginia* (1999) 527 U.S. 116, 131; *Lee v. Illinois* (1986) 476 U.S. 530, 545; *People v. Duarte* (2000) 24 Cal.4th 603, 610-612.) Harold Black's claim that McKinnon told him that he was in custody because he had put a gun in Gamble's purse added little to the probative value of the gun evidence. (1 CT 124-125.) Setting aside the myriad other problems with Black's credibility, it is significant that he never suggested that McKinnon in any way indicated that the gun for which he had been arrested was the Martin murder weapon. If McKinnon had, in fact, confessed to the Martin murder *and* to possessing the gun found in Gamble's purse, it would seem only natural that he would mention that the gun was the murder weapon. The fact that he did not cast a further pall on the veracity of Black's claims.

In any event, regardless of whether McKinnon or Gamble or *both*

possessed that gun *a week after* the Martin shooting, given the dearth of other evidence against McKinnon, it simply did not transform an exceedingly weak case into a strong one. (Cf. *People v. Chambers* (1861) 18 Cal. 382 [possession of stolen property alone insufficient to prove possessor stole it because there can be so many innocent explanations for possession, particularly when possession discovered sometime after the theft or taking]; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1174 [defendant's possession of murder victim's car, credit cards and other property insufficient to prove his identity as murderer]; *In re David K.* (1978) 79 Cal.App.3d 992, 999-1000 [evidence insufficient to prove that defendant was one of three people who robbed victim of automobile and possession where he was found in automobile containing possessions only three hours after robbery and in company of another identified as a perpetrator, but he did not personally possess any of the victim's property].)

In sum, at the time the motion to sever was made, the evidence against McKinnon relating to the Martin charge consisted of: 1) the facially incredible testimony of Marshall Palmer that Lloyd Marcus had identified McKinnon by name as Martin's killer; 2) Palmer's *memorialized* statement of Marcus describing the killer as an Asian or Hispanic man who was unknown to him, a description starkly inconsistent with McKinnon's obvious African-American ancestry; 2) the testimony of in-custody informant Harold Black, who recounted an alleged confession that did not betray intimate knowledge of the crime and indeed was inconsistent with the true facts of the crime, who had a compelling motive to fabricate the claim, and whose testimony as a whole was highly suspect; and 3) evidence that the Martin murder weapon was found in Kim Gamble's purse and her inherently suspect hearsay statement made to law enforcement several years

after its discovery shifting blame to McKinnon for its possession. Once again, under *Williams* and *Smallwood*, this evidence cannot be characterized as anything other than anemic.

The trial court's conclusion that "we don't have a case where there's overwhelming evidence in one case where you're going to bootstrap another case before the jury" (1 RT 111) reflects that it failed to appreciate or assess the potential prejudice of joining the two weak cases. As the foregoing amply demonstrates, regardless of whether they are characterized as two relatively weak cases or one exceedingly weak case as compared to a stronger case, "under either approach the danger of prejudice remains manifest" and weighed heavily in favor of granting the motion to sever. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 453, & fn. 10.)

5. The Joinder Itself Gave Rise to the Multiple Murder Special Circumstance Allegation and thus the Capital Murder Charge.

Neither one of the murder charges, standing alone, gave rise to a special circumstance allegation. Indeed, as the prosecutor candidly acknowledged, the very purpose of joining the two counts was to allege the sole special circumstance of multiple murder. (Pre-Trial RT 1.) This Court has consistently recognized that where, as here, "any one of the charges carries the death penalty or the joinder of them turns the matter into a capital case," that factor weighs in favor of a substantial danger of prejudice and, hence, severance. (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 173; accord, *People v. Bradford*, *supra*, 15 Cal.4th at p. 1318; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 27-28; *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454.) As this Court observed in *Williams*:

> Even greater scrutiny is required . . . [where] it is the joinder *itself* which gives rise to the special circumstance allegation

> of multiple murder under Penal Code section 190.2, subdivision (a)(3). If the cases [were] severed, then under section 190.2, subdivision (a)(2), the possibility of the death penalty arises *only if* there is a conviction for murder in the first case to be tried. It is therefore of utmost importance that [the court] consider the cases both separately and together in order to fairly assess whether joinder would tend to produce a conviction when one might not be obtainable on the evidence at separate trials. Clearly, joinder should never be a vehicle for bolstering either one or two weak cases against one defendant, particularly where conviction in both will give rise to a possible death sentence.

(*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454.)

6. The Actual Judicial Benefits to be Gained by Joining the Trials were Minimal While Severing the Two Cases Carried the Potential of Conserving Substantial Judicial Resources.

As this Court recognized in *Smallwood*, "[n]o longer may a [trial] court merely recite a public policy favoring joinder or presume judicial economy to justify denial of severance." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 425.) Rather, the actual potential benefits of joining the cases requires "an individualized assessment" in order to determine just how weighty those benefits are. (*Id.* at p. 426; *accord Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 451.) "Where there is little or no duplication of evidence, 'it would be error to permit (judicial economy) 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.' (*Williams*, *supra*, 36 Cal.3d at pp. 451-452.)" (*People v. Smallwood*, *supra*, at p. 427.)

Here, as defense counsel argued below, there were few actual judicial benefits to be gained through joinder. Once again, the evidence was not cross-admissible. (See, e.g., *People v. Smallwood*, *supra*. 42 Cal.3d

at p. 430 [potential judicial benefits from joinder diminish substantially when evidence is not cross-admissible]; accord *United States v. Foutz*, *supra*, 540 F.2d 733, 738.) There would be no duplication of evidence and, apart from Harold Black, no common witnesses. (2 CT 323-324; see, e.g., *People v. Smallwood*, *supra*, at p. 427 ["where there is little or no duplication of evidence, 'it would be error to permit (judicial economy) to override more important and fundamental issues of justice"].)

Nor were there duplicative motions that would require re-litigation. With respect to the motions that had been filed prior to the hearing on the motion to sever, there were only a handful of fairly standard motions that applied to both counts, most of which were submitted without argument or granted without objection or discussion. (1 RT 2; 1 CT 208-213 and 1 RT 9 [granted motion to federalize objections]; 1 CT 213-220 and 1 RT 10-11 [granted request for hearings on motion for preservation purposes]; 1 CT 204-207 and 1 RT 14 [denied motion for prosecution to disclose legal theories]; 1 CT 234-245 and 1 RT 14-17 [granted general motion for disclosure of impeachment evidence].) In other words, it would have consumed minimal time and resources to bring those motions again in a separate trial. The only pre-trial motions requiring hearings (to suppress and dismiss for destruction of evidence) were directed to the Martin murder charge alone. (2 CT 286-300, 428-434; 1 RT 42-94.) The remaining motions were directed to death qualification and the penalty phase, which would not have applied to the first, non-capital trial in the event of severance. (1 CT 225-233, 246-285; 2 CT 378-427, 441-439.)

Under the circumstances, the only conceivable judicial benefit to be gained through joinder was the selection of a single jury. But having a single jury hear all of the evidence relating to both charges is precisely what

creates such tremendous prejudice from joining two unrelated offenses. (See, e.g., *People v. Smallwood*, 42 Cal.3d at p. 432, fn. 15, quoting from *United States v. Smith* (2d Cir. 1940) 112 F.2d 83, 85 ["juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one"]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318 [even if other crimes evidence admissible for purpose identified in Evidence Code section 1101, it "'always involves the risk of serious prejudice'"]; *United States v. Lewis*, *supra*, 787 F.2d at p. 1322 [it is very "difficult for jurors to compartmentalize damaging information about one defendant derived from joint counts" in same trial]; *United States v. Ragghianti* (9th Cir. 1975) 527 F.2d 586, 587 [danger that single jury hearing evidence relating to different counts will consider evidence admissible as to only one count in determining guilt as to both].) Under the circumstances, the minimal judicial benefit to be gained by selecting a single jury simply did not outweigh the acute potential for prejudice in joining the two unrelated murder cases against McKinnon. (See, e.g., *People v. Smallwood*, *supra*, 42 Cal.3d at p. 427, & fn. 8 [discussing federal authorities affording minimal weight to judicial economy when "the only time saved by . . . joinder is the selection of one jury rather than two"].)

Indeed, as defense counsel further argued, but the trial court failed to acknowledge, severing the trials presented the very real potential of *conserving* judicial resources. (1 CT 256-258.) It is beyond dispute that McKinnon stood a better chance of acquittal had he been tried separately on the first, non-capital murder charge. (See, e.g., *United States v. Lewis*, *supra*, 787 F.2d at p. 1322; 2 CT 329-341 [citing results of several empirical studies reflecting that joinder increases the likelihood of guilt verdicts on one or all of the charges, particularly where counts charge

similar offenses]; *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 75-79 [acknowledging results of studies indicating that death qualification process increases likelihood of jurors returning guilt verdict]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318.) Of course, if the first trial resulted in acquittal, then the second trial would not have been a capital case, thus conserving the considerable judicial resources that would otherwise have been expended on a capital trial.[19] (See, e.g., Rupp, A., *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based On County Funding?* (2003) 71 Fordham Law Review 2735, 2755 and ns. 174-175 [citing 1993 study showing average cost of capital trial over three times the cost of non-capital trial in Los Angeles]; Ellis, J., *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* (2003) 29 Mental & Physical Disability L. Rep. 11, 14 ["It is universally recognized that capital trials are vastly more expensive to conduct than non-capital trials"]; see also *Tabish v. Nevada* (2003) 119 Nev. 293, 306, 72 P.3d 584, 592 [where severance of counts actually carried potential to "promote judicial economy in a far less potentially prejudicial manner, . . . considerations of judicial economy were far outweighed by the manifest prejudice resulting from the joinder"].)

Even if McKinnon were convicted of murder in the first trial and the second trial proceeded as a capital case, however, severing the cases would not have required substantially greater judicial resources than joining them. In this regard, the statements of both the prosecutor and the trial judge that severing the trials would pose unusual logistical problems, and indeed

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[19] Even if convicted, the scant benefit to be gained by joining the trials pales in comparison to the costs of post-conviction challenges to the refusal to sever and the potential costs of new trials.

would require the impanelment of *three* juries, betrayed an alarming ignorance of the law underlying the court's exercise of discretion and the weight it afforded to concerns of judicial economy. (1 RT 101-102, 107-110.)

As defense counsel emphasized more than once, if McKinnon were convicted in the first trial, the prosecutor would allege a *prior murder* allegation under Penal Code section 190.2, subdivision (a)(2) in the second trial – not a *multiple murder* allegation, as the prosecutor and trial court believed. (1 RT 108-110; 2 CT 321-322; see also *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 449-450, & fn. 7.) Furthermore, Penal Code section 190.1, subdivision (b) clearly sets forth the procedure to be followed where a prior murder special circumstance has been alleged. (See 2 CT 325-328.)

According to that statute, where a prior murder allegation has been made, the truth of the allegation is to be determined in a proceeding bifurcated from the determination of guilt on the current murder charge. (See *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301.) As this Court has recognized, "the statute recognizes that evidence of [a prior murder] conviction may potentially have an inflammatory effect on jurors who are asked to determine a defendant's guilt or innocence on a current murder charge." (*People v. Farnham* (2002) 28 Cal.4th 107, 145.) Thus, severing the trials would not have required proceedings any more unusual, costly, or logistically difficult than any other trial involving a prior murder special circumstance allegation, for which the procedure is clearly delineated by statute. The court's denial of the motion based upon its misconception that severance would require a novel, logistically difficult procedure necessitating three juries and, therefore, the expenditure of exorbitant

judicial resources, was error of the most patent, fundamental kind. Once again, for this reason alone, the court's denial of the severance motion was an abuse of discretion. (See, e.g., *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; *People v. Davis* (1984) 161 Cal.App.3d 796, 802.)

In sum, there were few judicial benefits to be gained by joining the trials while there were substantial potential benefits to be gained by severing them. Thus, the judicial economy in joining the trials was entitled to little, if any, weight. Balanced against that negligible factor, the substantial risk of prejudice posed by joining the cases where: 1) the evidence was not cross-admissible; 2) the unusually inflammatory gang evidence was admissible only as to the Martin murder charge but would undoubtedly be considered in assessing McKinnon's guilt of both charges; 3) both cases were weak or, alternatively, an exceedingly weak case was joined with a stronger one; and 4) the joinder alone converted both cases into a capital matter, clearly demanded that the cases be severed. The trial court clearly abused its discretion by refusing to do so.

E. Joinder of the Murder Counts Was Prejudicial and Violated McKinnon's State and Federal Constitutional Rights to Due Process and Reliable Jury Verdicts on the Murder Charges

Regardless of whether the trial court's denial of the motion to sever amounted to an abuse of its discretion at the time it was made, its effect was prejudicial and violated McKinnon's state and federal constitutional rights to due process and reliable guilt verdicts. (U.S. Const., Amends. 5, 8 & 14; Calif. Const., art. I, §§ 7, 15 & 17; see, e.g., *People v. Harrison*, *supra*, 32

Cal.4th at p. 120; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 162; *People v. Arias*, *supra*, 13 Cal.4th at p. 127; *People v. Johnson*, *supra*, 47 Cal.3d at p. 590; *People v. Grant*, *supra*, 113 Cal.App.4th 579; see also *Zafiro v. United States* (1993) 506 U.S. 534, 539 [severance mandated under due process clause of federal constitution if it "compromise[s] a specific trial right . . . or prevent[s] the jury from making a reliable judgment about guilt or innocence]; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [in capital case, Eighth Amendment requires heightened degree of reliability in guilt phase verdicts].) As discussed in Part C (pages 47-50), above, in assessing the actual prejudice flowing from joinder, the reviewing court should be guided by the same factors that guide the trial court's assessment of potential prejudice. (See, e.g., *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1084-1085, and authorities cited therein; *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 588-594, and authorities cited therein.) In addition, the reviewing court should consider whether the evidence adduced at trial as to the counts was similar, thus making it probable that the jury would "draw the impermissible conclusion that because he did it before, he must have done it again"; whether the jury received instructions limiting its consideration of evidence to one count and thus diminished the potential for prejudice; and whether the prosecutor encouraged the jurors to consider the charges in concert, or otherwise urged them to consider evidence admitted as to one count as proof of the defendant's guilt of the other. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1085; accord *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 588-594; *United States v. Lewis*, *supra*, 787 F.2d at pp. 1322-1323.)

In *Bean v. Calderon*, *supra*, 163 F.3d 1073, the defendant was charged with the murders of Beth Schatz and Eileen Fox. The murders

occurred three days apart, in close proximity, were accomplished by blows to head, involved older women victims, occurred in the commission of burglaries/robberies, and involved taking the victims' cars and abandoning them in the same area. (*Id.* at pp. 1075-1076.) The trial court denied defendant's motion to sever the two counts because the evidence was cross-admissible to demonstrate a common modus operandi and, thus, to prove identity. (*Id.* at p. 1083.) The defendant challenged his ensuing convictions on the ground that the court's refusal to sever violated his federal due process right to a fair trial. (*Id.* at pp. 1083-1084.)

On his state appeal, this Court held that although the crimes were superficially similar, they were not sufficiently similar to demonstrate a common modus operandi and prove identity. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1083, citing *People v. Bean* (1988) 46 Cal.3d 919, 935.) Nevertheless, this Court held that the trial court did not abuse its discretion in refusing to sever the cases nor did the effect of the joinder deprive defendant of a fair trial. (*Ibid.*, citing *People v. Bean*, *supra*, at p. 940.)

The Ninth Circuit Court of Appeals agreed with this Court's conclusion that the two murder charges were not cross-admissible because there was insufficient evidence of a common modus operandi. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1083.) However, the Court of Appeals disagreed that the joinder did not deprive defendant of his right to a fair trial. (*Id.* at pp. 1085-1086.)

The Court of Appeals emphasized that, although the evidence was not cross-admissible to demonstrate a common modus operandi and prove identity, the prosecutor "encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of Bean's criminal activities." (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.) For

instance, the prosecutor commented upon "the similarity of the two crimes" and argued that "having done it once, it made it that much easier three days later and about 10 blocks away" to do it again. (*Ibid.* at p. 1083.) "Thus, the jury could not 'reasonably [have been] expected to "compartmentalize the evidence" so that evidence of one crime [did] not taint the jury's consideration of another crime,' *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir.1987) . . ." (*Id.* at p. 1084.) Furthermore, while the trial court provided a standard instruction to consider each count separately (see CALJIC No. 17.02), it did not instruct the jury that it could not consider the evidence on one charge in determining the defendant's guilt on the other. (*Ibid.*) Finally, the evidence that defendant had murdered Schatz was relatively stronger than the evidence that he had murdered Fox. (*Id.* at p. 1085.) Based on all these factors, the court concluded that the joinder of the charges violated the defendant's due process right to a fair trial, which required reversal of the Fox murder conviction. (*Id.* at pp. 1085-1086.)[20]

The Court of Appeal in *People v. Grant*, *supra*, 113 Cal.App.4th 579, relied in part on *Bean*, *supra*, as well as on the precedents of this Court, to reach a similar conclusion. There, the defendant was charged in count one with burglary based upon evidence suggesting that he had broken into a school and attempted to steal computer equipment. (*Id.* at pp. 564-565.) He was charged in count two with receiving stolen property based upon evidence that, immediately following his arrest at the school, police searched defendant's home and discovered computer equipment that had been stolen from a different school approximately two years earlier. (*Id.* at

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[20] The court held that, given strength of the evidence underlying the Schatz murder conviction, the joinder did not prejudice the defendant as to that conviction.

pp. 565-566.) The trial court denied defendant's motion to sever, which he challenged on appeal.

The Court of Appeal held that the trial court's denial of the motion to sever was not an abuse of discretion at the time of its ruling. (*People v. Grant*, *supra*, 113 Cal.App.4th at p. 567.) "Nevertheless," the court held, "the joinder substantially prejudiced defendant's right to a fair trial," and thus required reversal. (*Ibid.*)

First, the appellate court held that the evidence relating to the two counts was not sufficiently similar to render it cross-admissible under Evidence Code section 1101. (*People v. Grant*, *supra*, 113 Cal.App.4th at p. 568.) Although not sufficiently similar to allow cross-admissibility, the circumstances of the two crimes were sufficiently similar to increase the risk that jurors would draw prohibited inferences of criminal disposition from their determination of defendant's guilt as to one of the counts. (*Id.* at pp. 568-569.) Indeed, the prosecutor urged the jurors to consider evidence of the defendant's guilt of one charge as proof of his guilt of the other. (*Id.* at pp. 569-570, 572.) Furthermore, the jury was given no instructions limiting its consideration of the evidence to any one count. (*Id.* at pp. 570-571.) Finally, the evidence on one of the counts was weak as compared to that on the other. (*Id.* at pp. 571-572.) Under the circumstances, the provision of standard instructions to decide each count separately, that the statements of counsel were not evidence, and that the People bore the burden of proving defendant's guilt of each charge beyond a reasonable doubt, were insufficient to cure the prejudice that arose from joining the counts. (*Id.* at p. 571.) To the contrary, under all of these circumstances, the joinder was so prejudicial as to violate defendant's right to a fair trial as to both charges. (*Id.* at p. 572; see also *Tabish v. Nevada*, *supra*, 72 P.3d at

pp. 590-595 [refusal to sever counts prejudicial and violated due process where, inter alia, crimes were not sufficiently similar to be cross-admissible or evidence a common scheme or plan, evidence relating to one crime more "graphic" than the other, and prosecutor argued similarity of crimes, despite trial court's limiting instruction].)

Pursuant to these authorities, and as will be demonstrated below, joinder of the Coder and Martin murder cases violated McKinnon's right to due process because the evidence at trial was not cross-admissible, highly inflammatory evidence marginally relevant to only one charge was admitted in the joint trial on both charges, the trial evidence supporting both charges was extremely weak, the prosecutor exploited the potential prejudice from joinder by improperly urging the jurors to consider the charges in concert and as demonstrating a common modus operandi, and the court provided no instructions to ameliorate the prejudice.

1. Evidence of the Two Murders was Not Cross-Admissible, the Prosecutor Never Argued the Theory on Which the Court Ruled That it was Cross-Admissible, and Inflammatory Gang Evidence that was Purportedly Admissible as to Only the Martin Murder Charge was Heard by the Jury in Assessing McKinnon's Guilt of Both Charges.

The potential for prejudice in joining the Martin and Coder murder charges was realized at trial. As discussed in part C-2, above, the evidence of the two murders was not cross-admissible. Nothing that occurred at trial changed that fact.

To the contrary, the manner in which the trial was conducted only underscores the error in the trial court's ruling that the evidence was cross-admissible on the issue of Harold Black's credibility. At trial, the

prosecutor did argue that Black's claim that McKinnon had confessed to *possessing the Martin murder weapon* found in Kim Gamble's purse was corroborated by Kim Gamble's testimony and therefore credible, which, in turn, suggested that his claim that McKinnon confessed to the Martin murder was credible. (9 RT 1220.) The prosecutor never, however, suggested that the evidence relating to one of the *murder* charges bolstered Black's credibility regarding that charge, which, in turn, bolstered his credibility about McKinnon's alleged confession *to the other murder charge.* (See 9 RT 1131-1149, 1202-1229.) The prosecutor's failure to make use of the evidence for that purpose clearly demonstrates that the evidence relating to one charge bore little or no probative value in bolstering Black's credibility regarding the other, as discussed in part C-2, and, hence, further demonstrates that the evidence was not cross-admissible.

Therefore, in deciding McKinnon's guilt of the Martin murder, the jurors heard a tremendous amount of prejudicial and otherwise inadmissible evidence connecting him to the Coder murder, while in deciding his guilt of the Coder murder charge, they heard a substantial amount of prejudicial and otherwise inadmissible evidence connecting him to the Martin murder. Furthermore, as predicted, inflammatory evidence regarding McKinnon's membership in the notorious Crips gang was admitted to prove his motive to kill Martin, but heard by the same jury that was asked to determine his guilt of the unrelated Coder murder. (1 RT 102, 111-112; 6 RT 783, 881, 963; 7 RT 1035.) Thus, the injection of the Martin murder evidence into the Coder murder prosecution was exceptionally prejudicial.

2. The Trial Evidence Supporting the Coder Murder Charge was Weak.

Moreover, the evidence ultimately presented at trial as to each

charge, standing alone, was even weaker than the preliminary hearing evidence suggested. As to the Coder case, Gregory Taylor's hearsay statement that McKinnon had allegedly confessed to the Coder murder was not presented at trial. There was no evidence connecting McKinnon to the Coder murder weapon. There was no evidence that McKinnon even knew Coder, much less that he had *any* motive to kill him. (See, e.g., *People v. Albertson* (1944) 23 Cal.2d 550, 566 ["startling fact that no motive whatsoever is shown" is a "'fact to be reckoned on the side of innocence'"].) And not a scintilla of physical evidence connected McKinnon to Coder's murder.

The only evidence against McKinnon came from the mouths of Kerry Scott, Gina Lee, Orlando Hunt, and Harold Black. All four had enormous credibility problems. All four provided accounts that were wildly inconsistent with each other, with other witnesses, and with the physical evidence.

a. The Credibility Problems Relating to the Abilities and Willingness of Scott, Lee, Hunt and Black to Tell the Truth and Their Motives and Opportunities to Falsely Implicate McKinnon.

Scott, Lee, and Hunt were the only purported eyewitnesses to the Coder shooting. The evidence at trial presented deeply troubling questions regarding the fundamental questions of their *abilities* to accurately perceive or recall and their *willingness* to tell the truth. Kerry Scott, like Gina Lee, was an admitted crack cocaine addict. Indeed, both Scott and Lee admitted that they were high on crack when they claimed to have witnessed what they said they did. (4 RT 644-645, 647, 664, 672-674, 687-688; 6 RT 811-812, 815, 802-803, 824; 13 CT 3585.) Similarly, Orlando Hunt – who did

not testify at the preliminary hearing – testified at trial that he was a heavy user of crack and other drugs. (4 RT 547-548, 570-572, 574-575.) As Gina Lee and Johnetta Hawkins both testified at trial, crack addiction and intoxication distorts the user's sense of time and reality. (4 RT 671-674; 6 RT 774-775; see, e.g., *People v. DiMaso* (1981) 426 N.E.2d 972, 974 ["evidence of habitual drug use is a significant factor in evaluating witness credibility not only because it evinces a generally dishonest character, but also because it is particularly probative of a witness' ability to perceive and recall"]; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 419, 431-433 [emphasizing witnesses' drug use in characterizing them as unreliable and the case based upon their testimony as weak for severance purposes]; see also *Fletcher v. United States*, *supra*, 158 F.2d at p. 322 [drug addict is "inherently a perjurer"].) Furthermore, even assuming that Scott actually witnessed the shooting (a generous assumption, indeed, as explained below), his ability to identify the shooter from a distance of *50 yards*, or half a football field, and across a field that all agreed was very dark, was highly questionable. (6 RT 795, 818.) In addition, all four witnesses had felony records, ranging from prostitution and making false statements to law enforcement officers to armed robbery and assault with a firearm causing great bodily injury. (4 RT 644-645, 561-562; 6 RT 774, 952-954.)

Moreover, the trial evidence revealed that all of the witnesses had ample opportunity to make up false allegations against McKinnon for the Coder murder. Scott and Lee did not make up their claims about McKinnon until eight months after the shooting, after it had been covered in the local paper and the subject of much rumor and innuendo. (6 RT 804, 817, 837, 845; 13 CT 3588.) Hunt did not tell his story until nearly two years after the shooting, when he knew that McKinnon was the focus of the

investigation. (4 RT 559. 567. 577, 612, 629-630.) As already discussed, Black did not claim that McKinnon confessed to shooting "that white boy down at the Desert Edge Motel" until nearly two and a half years later and after Investigator Buchanan furnished him with the only "details" Black recounted by specifically asking Black if he knew anything about McKinnon's possible involvement in that "white boy's" murder at the Desert Edge. (6 RT 964, 980, 982; 7 RT 1021-1022.)

The trial evidence further revealed that all four had strong motive to make false allegations against McKinnon. Kerry Scott was a paid informant who regularly sold information to the Banning police in exchange for money to help fund his "hundreds of dollars a day" crack addiction. (6 RT 776-777, 811-812, 815.) In his capacity as a paid informant, he claimed to have witnessed *three* separate murders, a claim that would strain credulity even in cities with high murder rates, and one completely lacking in credibility in a small town like Banning that experienced only three or four homicides a year. (6 RT 813-815, 874.)[21] Scott did not inform his police contacts about what he had allegedly witnessed until eight months later, when they approached him in his capacity as a paid informant – and while he was undoubtedly in need of funds to maintain his "hundreds of dollars a day" crack cocaine habit – and asked him if he had any new information. (6 RT 814-818.) His explanation for not sharing that information for several months because he had not "want[ed] to get involved" was equally lacking in credibility, given that he freely and habitually exchanged information with the police, including information

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[21] One of the other murders Scott claimed to have witnessed was committed on the same night as the Martin murder. (1 RT 68; 6 RT 814, 845.)

about murders, for drug money. (6 RT 801.) While he denied that he had received any money or other benefit for his information and testimony against McKinnon, that claim was dubious at best, particularly in light of the astonishingly light three-year sentence he received for his string of separate crimes, including aggravated assault and aggravated robbery. (6 RT 775, 808; cf. *Killian v. Poole* (9th Cir. 2003) 282 F.3d 1204, 1208 [fact witness receives benefit after providing evidence is circumstantial evidence of promise].) In any event, given his long and profitable history with the Banning Police Department, there was certainly compelling basis on which to conclude that he *expected* to be rewarded for his story, just as he had consistently been rewarded in the past. (See, e.g., *Gov't of the Virgin Islands v. Hendricks* (3d Cir. 1973) 476 F.2d 776, 779 [heightened caution and scrutiny should be applied to "testimony of a former or current addict who recognizes, or may recognize, the *possibility* of being rewarded by the Government," regardless of whether Government actually rewards, or intends to reward, witness]; *United States v. Holmes* (9th Cir. 2000) 229 F.3d 782, 786-787 [suspect informers include those who receive, or *expect to receive*, benefit for information].)

Orlando Hunt initially denied any knowledge of the crime. He was given a polygraph examination and told that he failed when he disavowed knowledge of the crime and McKinnon's role in it. (4 RT 612-613; 13 CT 3601.) He was repeatedly threatened with being charged for the murder himself unless he "chose" to become an eyewitness to McKinnon having shot Coder. The prosecutor explicitly threatened Hunt that he would decide "what's appropriate to do to you, for you, with you, whatever. . . . You're either a defendant or you're an eye witness [*sic*] . . . . [T]hey aren't good choices. There's no good choice. . . . [I]f you're ready now or whatever, to

tell me the truth 'cause I know what the truth is but I've gotta be able to hear from you and either use you or do you, one of the two. You understand?" (13 CT 3599.) When Hunt finally relented and claimed to have been in front of the motel when McKinnon was behind it and he heard shots, but stopped short of claiming to have actually witnessed the shooting, the prosecutor and Buchanan told him that they would charge him with the murder unless he said that he had actually witnessed it. (13 CT 3601-3603, 3610.) Of course, Hunt eventually said just what he was told to say and, as promised, was not charged with the murder but rather became the prosecution's star witness. It is well recognized that police statements wrung from unwilling "witnesses" through a combination of such threats and promises of leniency are highly suspect. (Cf. *People v. Lee* (2002) 95 Cal.App.4th 772, 784-788 [where witness told he failed polygraph when he disavowed knowledge of crime and then threatened that he would be charged with murder unless he identified defendant as killer, witness' ensuing statement and testimony identifying defendant as killer was insufficiently reliable to satisfy due process]; *People v. Badgett* (1995) 10 Cal.4th 330 [coerced witness statements inherently unreliable and violate due process]; *Clanton v. Cooper* (10th Cir. 1997) 129 F.3d 1147, 1157-1158 [same].)

Similarly, Gina Lee had a motive to tell Detective Caldwell what he wanted to hear. As previously discussed, she was a hardcore crack addict who committed crimes on a daily, even hourly basis, who was high on crack when she made her statement, and who was no doubt terrified of ongoing harassment, the ugly prospect of going through withdrawal in a holding cell, and possible criminal prosecution. (See, e.g., *United States v. Bernard* (1980) 625 F.2d 854, 858, & fn. 6 [one reason addicts' police statements

should be treated with special care is reality that they have abnormal fear of custody where they have no access to drugs to which they are addicted]; *United States v. Kinnard*, *supra*, 465 F.2d at pp. 570-571 [same]; *Banks v. Drektke*, *supra*, 540 U.S. at pp. 678, 700 [in emphasizing the "serious questions of credibility" informers pose, Court described informant's post-verdict declaration that, given his narcotics habit, he feared that if he did not help detective in building evidence against defendant, he would be arrested on drug-related charges].) When called to testify at the preliminary hearing, while she was sober and no longer subject to the same pressure, she changed her story and testified that she did not remember anything about the shooting. (4 RT 674, 694.) After her preliminary hearing testimony, the prosecutor sent "word" to her through Orlando Hunt that he would not "mess with her time" or "mess with her if she cooperates with me. . . . and have her come clean and say, 'Yeah, I was lying on the prelim 'cause I was scared and I was trying to support ___ and whatever,' whatever her trip was." (13 CT 3626-3629.)[22]

Much of the same evidence regarding the benefits promised to, and received by, Harold Black which had been presented at the preliminary hearing was presented at trial. Again, Black entered into an enormously beneficial plea bargain whereby he completely avoided a 15-year prison sentence in exchange for his testimony against McKinnon. (6 RT 977, 979, 987-988, 991-992; 7 RT 1004-1007; 7 SCT 22-26 [People's Trial Exhibit

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[22] In addition, Investigator Buchanan spoke to Lee after her preliminary hearing testimony and before she testified at trial. (4 RT 646.) Buchanan's documented penchant for pressuring witnesses in this case to testify in a particular manner, evidence that the court erroneously excluded, is discussed in Argument III, below.

29].) 7 RT 1004, 1006-1007.)

Additional evidence was presented at trial casting further doubt on the reliability of Black's statements and testimony. The agreement provided that Black was to remain "crime free" and that any deviation would result in revocation of the agreement. (7 RT 1004, 1005-1007.) However, Black did not remain "crime free." (7 RT 1006-1007.) Instead, only one month after his release, Black was again arrested and taken into custody, this time for robbery. (6 RT 953, 970-971; 7 RT 1007-1008.) If convicted, Black understood that the robbery would be his third strike and he faced "life in prison." (7 RT 1008-1010.)

The trial prosecutor assigned to the McKinnon case was also assigned to Black's robbery case. (7 RT 1011.) Despite Black's clear violation of the agreement, it was not revoked. To the contrary, despite his prior record and the seriousness of the charge, Black was again released on his own recognizance. (6 RT 973; 7 RT 1010.) The robbery charge was still pending at the time of trial, having been continued "a year or so." (6 RT 971-973; 7 RT 1008.) While he denied that it was pending because its outcome was tied to his testimony against McKinnon, he steadfastly refused to explain why the charge was still pending. (6 RT 971-973; 7 RT 1008.) Thus, Black had much to gain by sticking to his already incredible account at trial and everything to lose – what effectively amounted to the rest of his life – by recanting it.

b. The "Eyewitness" Accounts of Scott, Lee, and Hunt were Significantly Inconsistent with Each Other, the Physical Evidence, Other Witnesses, and Their Own Prior Statements.

Finally, the accounts presented at trial of all of the witnesses were

wildly inconsistent with each other, with the physical evidence, with other witnesses, and even with their own prior statements. Again, Harold Black's claim that McKinnon admitted to having shot "that white boy down at the Desert Edge Motel" (6 RT 964) was incredible for all of the reasons already discussed and directly inconsistent with his first statement to Investigator Buchanan denying any knowledge of McKinnon's connection to Coder's death.

As to Scott, Hunt, and Lee, all three claimed to have been behind the motel when the shooting occurred. (4 RT 650-652, 683; 6 RT 795-797, 818-820, 824-825, 833-834.) Remarkably, however – with the exception of Lee's police statement that she saw Hunt with McKinnon – *none of those witnesses saw each other.* (4 RT 594-595, 683; 6 RT 799, 821, 823.) Scott did not see Lee or Hunt or *anyone* other than McKinnon and Coder and specifically testified that he saw no one at the locations where Hunt and Lee claimed to have seen and heard the shooting. (4 RT 553-554, 651-652; 6 RT 799, 821, 823; see also People's Trial Exhibit 1 [diagram on scene on which Lee, Hunt, and Scott marked their locations by the first letter of their last names].) Similarly, Lee did not see Scott. (4 RT 683; 13 CT 3589.) Nor did Hunt see Lee or Scott. (4 RT 594-595.)

Scott described with specificity McKinnon canting the gun to the side "gangsta style." (6 RT 833-834.) Hunt described with equal specificity McKinnon pointing the gun in the standard position and was certain that it was not canted "gangsta style." (13 CT 3611, 3613, 3620-3621.) Scott described the gun as chrome (6 RT 835), while Hunt described it as black (4 RT 592.) Scott testified that the gun was two to three feet from Coder's head when McKinnon fired it. (6 RT 847.) Hunt similarly described the gun as about two feet from Coder's head when it was fired.

(13 CT 3621.) However, according to the medical examiner, the gun was actually pressed tightly against Coder's skin when it was fired. (5 RT 718.)

Perhaps most remarkably, Scott testified that McKinnon fired the gun at Coder's head *four times*. (6 RT 796, 837.) Coder was shot only once. (4 RT 520-521; 5 RT 716, 718.) Furthermore, given the absence of any bullets or shell casings at the crime scene and the other evidence that the shooter ran directly from the scene, it seems clear that the gun was fired only once. (4 RT 524, 534-537.) Scott was certain that McKinnon *walked*, and did not run, away after shooting Coder. (6 RT 825.) Hunt and Gina Lee were equally certain that he ran away. (4 RT 556; 13 CT 3580, 3587, 3615.)

Like Scott, in their police statements, both Lee and Hunt described "shots," in the plural, as having been fired. (13 CT 3586-3587, 3590, 3593-3594, 3601.) By the time of trial, however, their accounts curiously changed to describing – consistent with the physical evidence – only one shot as having been fired. (4 RT 551-552, 556, 650; see *Kyles v. Whitley* (1995) 514 U.S. 419, 443, & fn. 14 [evidence of changes in witness' story raised implication that he had been coached by state].)

Lee also claimed that she was with Chester Norwood in the field when the shot or shots were fired. (13 CT 3580, 3585-3586, 3593-3594; 4 RT 648, 667, 680-681.) However, Desert Edge resident Jessie Brown was certain that Norwood was with him in his room when the gunshot was fired. (8 RT 1068-1070.) Lee also claimed that her cousin, Johnetta Hawkins, was back in her (Lee's) room when the shot was fired. (4 RT 657, 667.) Hawkins agreed that she was in Lee's room at the time, but also testified that she was certain Lee was either inside of the room with her or just outside the door *at the front* of the motel when the shot was fired behind the

motel. (5 RT 729-730, 749-751, 754.)

Of course, Lee was extremely intoxicated on crack on the night of the shooting and had been for several years prior to the shooting. (4 RT 644-645, 650, 667, 671-675, 680-681, 687-691; 13 CT 3585.) Certainly, her rambling, inconsistent, and largely incoherent accounts of the events surrounding the shooting bore out her admission that her addiction distorted her perception of both time and reality. (See, e.g., *United States v. Miel*, *supra*, 989 F.2d at p. 667 [witness who admitted to "extensive and increasing abuse of cocaine" and whose testimony "was laden with imprecision and inconsistency" lacked sufficient indicia of reliability to support drug quantity-based sentence]; *United States v. Simmons* (8th Cir. 1992) 964 F.2d 763, 776-777 [drug addict witness who admitted crack intoxication caused memory impairment and whose testimony was imprecise and inconsistent was insufficiently reliable to support drug-quantity based sentence]; *United States v. Robison* (6th Cir. 1990) 904 F.2d 365, 371-372, cert. denied (1990) 498 U.S. 946 [same – testimony of witness who was "admittedly a heavy drug user and subject to periods of memory loss," whose memory during relevant time was "hazy" due to drug use, and whose testimony was otherwise imprecise].)

Although Lee acknowledged that she had told police that she saw McKinnon and Hunt running away immediately after hearing the gunshots, she explained at trial that in truth it was too dark to identify the running men and she had simply assumed they were McKinnon and Hunt because she had seen them moments before the shooting. (4 RT 683-684, 695-696.) Of course, Lee was high when she spoke to police, but in custody and sober when she testified at trial. (4 RT 644, 678, 680.) Certainly, her testimony that it was too dark to identify the running men was consistent with the

other evidence that it was extremely dark behind the motel. Just as certainly, her ability to accurately identify the men was called into serious question by her state of intoxication at the time and her habitual, daily crack cocaine use. Thus, while Lee explained that she had assumed the running men were Hunt and McKinnon because she had seen them together moments before the shooting, it was more than reasonably possible that her intoxication distorted her sense of time and she in fact saw them together hours or even days before the shooting.

Indeed, Lee inconsistently claimed that McKinnon and Hunt ran directly to McKinnon's car and drove away immediately after the shots were fired (13 CT 3580, 3587); that she went directly to her motel room immediately after the shots were fired, where she found McKinnon *and* Hunt (13 CT 3581, 3584, 3587, 3590, 3592); that after the shots were fired, she went to purchase and use more crack before returning to her motel room, where she found McKinnon alone (13 CT 3594-3595); and that she did not see McKinnon again until nearly an hour after the shooting, in *someone else's* motel room, and after she had consumed yet more crack (4 RT 685-690).

Lee further inconsistently described the police as arriving immediately after she heard the shots and saw Coder's body (13 CT 3589); as arriving 10 to 15 minutes after hearing the shots (13 CT 3590); and as arriving more than an hour after hearing the shots (4 RT 664, 687, 690).

According to Lee's trial testimony, when she and Johnetta Hawkins went to the other motel room and saw McKinnon about an hour after the shots were fired, he looked "kind of strange" and seemed upset. (4 RT 658.) When Lee asked him what was wrong, he put his finger to his lips and told her and Hawkins, "shhh. . . . somebody's dead outside." (4 RT

659.)

Hawkins confirmed that she was with Lee after the shooting; however, she was certain that she never saw McKinnon. (5 RT 732-733, 747-748.) Similarly, both Hawkins and Jesse Brown were sure that the blue Cadillac McKinnon often drove, and which Lee saw McKinnon driving that night, was not at the motel after the shooting. (5 RT 747-748; 8 RT 1061-1072.) Police, who cordoned off the area and interrogated the people at the motel, never indicated that McKinnon was among them or that the blue Cadillac was at the motel when they arrived.[23] Finally, although both Hawkins and Lee testified that they were together after the shooting, although Hawkins never saw McKinnon or his car, and although Lee herself never suggested that McKinnon had ever threatened her, Hawkins testified that Lee told her sometime that night that McKinnon had threatened to kill her. (5 RT 735-736.)[24] In short, given that Lee's various accounts of the events surrounding the shooting were inconsistent with each other and with virtually all of the other evidence, it seems clear that her perception of time and reality was - as she admitted at trial - grossly distorted and unreliable.

Finally and just as significantly, prior to trial, both Kerry Scott and Orlando Hunt admitted to a defense investigator that they had not, in fact, witnessed the Coder shooting. (4 RT 609; 6 RT 802.)

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[23] Indeed, according to Detective Caldwell's preliminary hearing testimony, he did not see a blue Cadillac at the motel when he arrived. (1 CT 59.)

[24] Lee herself was never asked if McKinnon had ever threatened her and thus her alleged statement to that effect was incompetent hearsay. (See Argument VI, below.)

In sum, the evidence connecting McKinnon to the Coder murder came solely from the mouths of admitted drug addict felons who were threatened with being charged for the murder; who were under the influence of crack cocaine at the time of the shooting and/or at the time of their police statements; or whose testimony was essentially bought and paid for by law enforcement and/or the prosecution. Their accounts were inconsistent with each other, with their own prior statements, and with the physical evidence. Just as it was at the preliminary hearing, the evidence presented at trial cannot be characterized as anything other than weak and unreliable.

Indeed, although presentation of evidence, argument, and instructions took less than six court days, during which there were numerous proceedings from which the jurors were absent (4 RT 502 - 9 RT 1265; 13 CT 3571-3575, 3633-3634, 3802-3805), the jurors deliberated for three full days over four court sessions before reaching their verdicts on the Coder charges on January 4, 1999. (10 RT 1283-1284; CT 3805-3810.) Given that the case was a fairly straightforward one that turned solely on identity and thus was a simple question of guilt or innocence, the length of the jury's deliberations is a strong, objective indication that the jury considered the case to be a close one. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 365 [finding prejudice from error where "the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner"]; *In re Martin* (1987) 44 Cal.3d 1, 51 [deliberations over the course of five days "practically compels the conclusion" that the case was "very close"]; *People v. Cardenas*, *supra*, 31 Cal.3d at p. 907 [12-hour deliberations "graphic demonstration of the closeness of the case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine hours]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [almost six hours]; *Mayfield v. Woodford*, *supra*,

270 F.3d at p. 932 [lengthy deliberations one indication of close case]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 ["the jury spent three days deliberating in the penalty phase, suggesting that the California jury saw this as a close case"]; *United States v. Kojayan* (9th Cir. 1993) F.3d 1315, 1323 [fact jury deliberated over two days after one and a half day trial indicated close case]; compare, e.g., *People v. Cooper* (1991) 53 Cal.3d 771, 837 [whether length of deliberations demonstrates close case should be assessed in light of relative complexity of legal issues and complexity and amount of evidence presented; rejecting inference that 27 hours of deliberations indicated close case where "trial lasted over three months[,] [d]ozens of witnesses testified, some about complex scientific testing[,] [and w]ell over 700 exhibits were admitted into evidence"].)

3. The Trial Evidence Supporting the Martin Murder Charge was Even Weaker than That Supporting the Coder Murder Charge.

And just as it was at the preliminary hearing, the trial evidence connecting McKinnon to the Martin murder was even weaker than the Coder murder evidence. Much like Harold Black's testimony, Sergeant Palmer's testimony was even less believable at trial than it had been at the preliminary hearing. According to Lloyd Marcus's statement memorialized in Palmer's report, Marcus was able to see Martin and the shooter well because they were standing directly under a street light. (6 RT 919.) Not only was he able to identify Martin by name (6 RT 894, 919-920), he was able to describe the shooter with specificity as an adult Mexican or Asian male, about six feet one inches to six feet two inches tall, about 190 to 220 pounds, wearing a red baseball cap, a Pendleton shirt, and black pants. (6 RT 895, 922-924, 947-948.) According to the report, Marcus said that Asian or Hispanic shooter was "unknown" to him. (6 RT 920.)

Evidently, it was only sometime after the Martin murder weapon was found in Kim Gamble's purse, while Gamble was with McKinnon, that Sergeant Palmer first claimed to "remember" that Marcus actually identified the shooter by name as "Popeye," although Palmer failed to include that important identification in his report or otherwise document or memorialize it in any way. (6 RT 894-895, 920-921.) At trial, it emerged that Marcus's description of the shooter as Asian or Hispanic was not only inconsistent with McKinnon's obvious African-American race (8 SCT 13-16), but also – by Sergeant Palmer's own reluctant admission – inconsistent with McKinnon's height and weight. (6 RT 923, 947-949.) Nevertheless, Palmer claimed that Marcus's description of the shooter "fit" and was "pretty close" to McKinnon. (6 RT 924-925, 938-939.)

Palmer knew McKinnon and that his nickname was "Popeye." (6 RT 926.) Indeed, given their exchange when he and Detective Caldwell interrogated McKinnon, it was clear that McKinnon had a lengthy history with various members of the Banning Police Department. (13 CT 3771-3773, 3775, 3783, 3787.) Palmer was also aware that McKinnon was with Kim Gamble when the alleged Martin murder weapon was discovered in her purse, and that McKinnon was subsequently arrested and taken into custody for the Coder murder. (6 RT 883, 889; 13 CT 3765-3766, 3788.) Hence, not only was Palmer's claim that Marcus had identified McKinnon by name as Popeye incredible on its face, the evidence at trial revealed a motive for Palmer to fabricate that claim against McKinnon.

Palmer apparently made no attempt to obtain an arrest warrant for McKinnon. Instead, for the first time at trial, he claimed that immediately after taking Marcus's statement, he "put the word out" to his officers to be on the lookout for McKinnon and bring him in for "questioning." (6 RT

897-898, 927-928.) Again, however, he never documented or memorialized this bulletin in any way or, apparently, issued a written bulletin to any other agencies. (6 RT 928-929.) The prosecution offered no other evidence, such as the testimony of other officers, to corroborate Palmer's claim. (See e.g. *People v. Ford* (1988) 45 Cal.3d 431, 442-443 [where party has power to call logical witness or present material evidence and fails to do so, it is reasonable to infer that the evidence would be adverse to that party]; accord *United States v. Taylor* (9th Cir. 1995) 52 F.3d 207, 211; *People v. Hall* (1964) 62 Cal.2d 104, 111 [weakness of case demonstrated by "the absence of evidence that would normally be forthcoming"].) Moreover, Palmer knew "several addresses" connected to McKinnon and other places he was known to frequent, claimed that he had an officer look for him at those places, and indeed continued to search for him for "several weeks." (6 RT 926, 928.) However, according to the prosecution's own witness, Kim Gamble, as well as McKinnon himself, they were living with his family in San Bernardino at the time of the murder until their arrest a week later. (6 RT 938; 7 RT 1039-1040; 13 CT 3776-3777, 3795-3796.)

Indeed, despite Palmer's claim that he immediately began looking for McKinnon in order to "question" him about Martin's murder, when he and Detective Caldwell finally did question McKinnon 10 months later, on December 29, 1994, *neither he nor Detective Caldwell ever "questioned" him about the Martin murder, either directly or indirectly.* The interrogation focused solely on the Coder murder – asking McKinnon where he was in January 1994 (when Coder was killed), whether he knew Coder or had heard about his murder, and even telling him that eyewitnesses had identified him as Coder's killer. (13 CT 3766-3796.) Not once did they tell McKinnon that there was an eyewitness who had

identified him as Martin's killer; not once did they ask McKinnon where he was when Martin was killed; not once did they ask McKinnon whether he knew Martin or had heard about his murder. In sum, not only was Sergeant Palmer's claim that Marcus had identified McKinnon as Martin's killer completely inconsistent with the actual report of Marcus's statement in every way; it was also completely inconsistent with Sergeant Palmer's own actions (or inaction) following that alleged identification. In short, Sergeant Palmer's claim that Marcus had identified McKinnon as Martin's killer was nothing but a big lie. (See, e.g., *People v. Thornton*, *supra*, 11 Cal.3d at p. 754 [inherently improbable testimony of witness cannot support conviction and should be disregarded]; accord, *Oldham v. Kizer*, *supra*, 235 Cal.App.3d 1046, 1065; *United States v. Ramos-Rascon*, *supra*, 8 F.3d at p. 709, fn. 3 [due process prohibits conviction based on, and appellate court may disregard, evidence that "is so improbable on its face that no reasonable trier of fact could accept it"]; *United States v. Saunders*, *supra*, 973 F.2d at p. 1358.)

The evidence clearly showed that Marcus had seen the shooter, provided a detailed description of him that was inconsistent with McKinnon in every way, and never intimated that the shooter was McKinnon. Balanced against this neutral eyewitness' identification of *someone else* as the shooter was the testimony of Harold Black and the discovery of the Martin murder weapon in Kim Gamble's purse a week after the murder and while she was with McKinnon.

Black's testimony that McKinnon had confessed to the Martin murder was essentially identical to his preliminary hearing testimony. (6 RT 951 - 7 RT 1027.) And, as at the preliminary hearing, Black's account of McKinnon's confession that he had shot Martin in the morning was

inconsistent with the true fact that Martin had been shot and killed in the evening. (6 RT 874, 876-877, 883, 893, 963.) Further, Black's claim that the shooting was a gang-motivated retaliatory act for the killing of Scotty Ware was inconsistent with a wealth of other evidence, as discussed in Argument II, below. The only details he shared that were consistent with the true facts were that Martin had been shot in the head outside of the Meadowbrooks Apartments, general details he could easily have been learned through other sources during the two-year period between Martin's murder and Black's first statement to Investigator Buchanan, during which time he admitted discussing the murder with others. (6 RT 766-768, 780, 878, 959-962; 7 RT 1014-1015.) Palmer also testified that several civilians had gathered around Martin's body when he arrived on the scene. (6 RT 884-885.) Hence, it was undoubtedly a matter of common knowledge, and a sensational subject much discussed in provincial Banning, that Martin had been shot in the head in front of the Meadowbrooks Apartments. For these reasons and those already discussed in the previous sections, Black's police statement and testimony were grossly unreliable.

The fact that the Martin murder weapon was found in Kim Gamble's purse a week after the murder did not transform a paper thin case into one of substance. As discussed above, there was no evidence that McKinnon's fingerprints were on the gun and proximity alone does not prove possession. (See, e.g., *People v. Leib* (1976) 16 Cal.3d 869; *United States v. Vasquez-Chan*, *supra*, 978 F.2d 546, 550, and authorities cited therein ["defendant's mere proximity to [item], her presence on the property where it was located, and her association with the person who controls it are insufficient to" prove possession].) To be sure, Gamble testified at trial that the gun was McKinnon's. (7 RT 1032-1033.) However, her testimony was suspect for a

number of reasons.

First, upon her arrest, she admitted that the gun was hers. (4 RT 642; 7 RT 1035-1036, 1046.) Even after her relationship with McKinnon ended and she presumably no longer had any motive to protect him, she pled guilty to possessing the gun. (7 RT 1029, 1034, 1036, 1048.) When asked why she would plead guilty if the gun were McKinnon's and he put it in her purse, she explained she was told she needed a lawyer, but could not afford one. (7 RT 1036.) However, when presented with the copy of her plea agreement, which clearly advised her of her right to free counsel if she could not afford one, Gamble admitted that she was so advised and offered no explanation for pleading guilty if the gun was not hers. (7 RT 1048-1049.) Furthermore, when Investigator Buchanan interrogated her about the gun and McKinnon over two years later, Gamble had a small child, a career in the military, and hence much to lose by not cooperating with the prosecution. (7 RT 1028, 1049-1050, 1054.)[25]

Even if McKinnon had given Gamble the gun, it still fell short of proving that he committed the murder. According to the prosecution's own evidence, McKinnon was a small time drug dealer in a community in which virtually anything and everything was bartered for drugs. (5 RT 741-742; 6 RT 811-812, 815, 940; 13 CT 3583, 3588, 3592, 3613-3614.) Given Gamble's admission that she was attempting to obtain a gun at the time, a

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[25] Indeed, Investigator Buchanan wrote a memo to the prosecutor in this case in which he indicated that he believed that the gun was McKinnon's and that he put it in Gamble's purse and therefore he would "find this gal (Kimiya Gamble) and make a witness out of her or arrest her for 32 PC." (Def. Ex. B at 7 SCT 38, parenthetical in original). Unfortunately, as discussed in Argument III, below, the court refused to admit the memo. (8 RT 1099-1103)

more than reasonable explanation is that McKinnon either purchased or bartered drugs for that gun in the week after the murder, in order to give it to his girlfriend, who wanted a gun, and in whose purse it was found.

At bottom, there were a number of plausible explanations for the presence of the gun in Kim Gamble's purse a week after the murder that were entirely consistent with McKinnon's innocence. Of course, where such circumstantial evidence supports more than one rational inference and any one favors innocence, the beyond a reasonable doubt standard *requires* the inference favoring innocence. (See, e.g., *People v. Bean*, *supra*, 46 Cal.3d at pp. 932-933; see also *People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7 ["Substantial evidence means more than simply one of several plausible explanations for an ambiguous event"].)[26]

In sum, the evidence as to both charges was extraordinarily weak. Certainly, the evidence that McKinnon was guilty of the Martin murder was even weaker than that pointing to his guilt of the Coder murder. Indeed, the jurors requested readback of the entirety of both Palmer and Black's testimony and declared they were deadlocked on the Martin charges on the fourth day of their deliberations, before reaching their verdicts on the fifth day – all strong, objective indicia that they recognized the weakness of the state's Martin murder case. (13 CT 3810; 14 CT 4018-4019, 4093-4095, 4098; see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [requests for readback and expression of deadlock indicate close case]; *United States v. Harbor* (9th Cir. 1995) 53 F.3d 236, 243 [same - expression of deadlock].) For the reasons set forth above and below, the

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[26] Unfortunately, as discussed in Argument IV, below, the court erred in failing to instruct the jury on the legal principles relevant to circumstantial evidence with CALJIC No. 2.01.

fact that they eventually convicted McKinnon of the charge despite that recognition is an objective indication that the balance was tipped not by the evidence, but rather by the joinder of the charges.

4. The Prosecutor Exploited the Superficial Similarities Between the Crimes and Improperly Encouraged the Jurors to Consider the Charges in Concert as Demonstrating a Common Modus Operandi and an Inference of Identity, and the Jurors were Given No Instructions Disabusing Them of the Notion that They Could Do Just That.

As previously discussed, this Court has recognized that the joinder of unrelated charges supported by weak evidence – especially when inflammatory evidence such as gang membership is involved – creates a tremendous danger that the jury will cumulate the evidence against the defendant or, alternatively, conclude that his commission of one of the charged crimes necessarily implies his commission of the other. (See, e.g., *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 452-453.) That danger is particularly acute where the charged crimes bear some similarities (although not sufficient similarities to render the evidence cross-admissible). (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1085; accord *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 588-594; *United States v. Lewis*, *supra*, 787 F.2d at pp. 1322-1323; see also *People v. Calderon* (1994) 9 Cal.4th 69, 80 [evidence defendant has committed other crime "bearing some similarity to, and of comparable seriousness to the charged offense . . . creat[es] a serious risk that the jury [will] conclude that defendant has a criminal disposition"].) And the fact of undue prejudice is virtually undeniable when the prosecutor does not differentiate between the charges, but rather capitalizes on their superficial similarities by encouraging the jury to consider the set of charges in concert and as reflecting a common modus

operandi. (*People v. Grant*, *supra*, 113 Cal.App.4th at p. 567; accord *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1083-1086; *Tabish v. Nevada*, *supra*, 72 P.3d at pp. 591-592; cf. *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1085 [reversible error in joining trials of codefendants with antagonistic defenses based in part on prosecutor's closing argument capitalizing on potential prejudice from such joinder]; *United States v. Sherlock* (9th Cir. 1989) 962 F.3d 1349, 1362 [same].) Here, despite the court's pre-trial ruling that the crimes were not sufficiently similar to demonstrate a common modus operandi and support an inference of identity, the prosecutor highlighted the superficial similarities between the two crimes to urge the jurors to do just that.

For instance, the prosecutor elicited from Sergeant Palmer that of the 16 to 17 homicides that had been committed in Banning in the last 4 years or so, only 3 or 4 involved gunshot wounds to the head. (6 RT 875.) Although the court sustained defense counsel's relevance objection to the question, the prosecutor was undeterred. (6 RT 875.)

In his argument to the jurors, the prosecutor emphasized, "nobody said anything different than the method and the manner that the two murders were done [*sic*], they were done by the same person, they were used by the same manner [*sic*], shot, was even the same part of the body, there was no robberies [*sic*], there was no physical fights [*sic*], there was no – no rape cases . . . *They were basically very similar types of murders*. And the only witnesses that identified people identified Popeye as having done the murder." (9 RT 1228, italics added.)

At another point, the prosecutor similarly argued, "Did anybody say that it wasn't shots to the head, that it wasn't out in the night, out in the open, *both murders being the same*? No." (9 RT 1207, italics added.) At

still another, the prosecutor argued, "Think of all the murders that you know of. How many of them are done with a shot to the head out in the street in the dark, one male shooting another male that's alone? It's not unique, but it's kind of unusual." (9 RT 1229.)

Hence, given the prosecutor's exploitation of the superficial similarities between the two crimes, the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime," *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir.1987). . . ." (*Bean v. Calderon*, *supra*, 163 F.3d at pp. 1083-1084; accord, *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 569-570, 572 [joinder of counts prejudicial where, *inter alia*, prosecution argued similarities between crimes]; *Tabish v. Nevada*, *supra*, at pp. 591-592 [joinder of counts prejudicial where, inter alia, the prosecution "emphasiz[ed] in its closing arguments its view of the similarities" between the incidents]; compare *United States v. Smith* (9th Cir. 1986) 795 F.2d 841, 851 [refusal to sever charges was not manifestly prejudicial where prosecution and court took great pains to avoid emphasizing that the charges were somehow connected].) Hence, the superficial similarities between the crimes invited the jurors improperly to cumulate the evidence and consider the charges in concert and as demonstrating a common modus operandi and identity and the prosecutor *encouraged* them to do so.

Moreover, nothing in the court's instructions disabused the jurors of the notion that they could do just that. The jurors received no instructions that their consideration of any piece of evidence was limited to any particular count. (See, e.g., *Bean v. Calderon*, *supra*, 163 F.3d at p. 1085 [omission of limiting instruction one factor considered in concluding that

joinder of offenses was prejudicial and violated defendant's due process right to fair trial as to one count]; *People v. Grant*, *supra*, 113 Cal.App.4th at p. 572 [same]; *Panzavecchia v. United States*, *supra*, 658 F.2d at p. 338, 341 [same]; *United States v. Lewis*, *supra*, 787 F.2d at pp. 1322-1323 [same where the "court did not instruct the jury to consider the evidence as to each count separately until the third day of the trial; the caution was repeated once later the same day. We share the D.C. Circuit's skepticism of the efficacy of such instructions no matter when they are given"]; cf. *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905 [given prejudice that inheres in other crimes and gang membership evidence, it is a "near certainty" that jurors will draw prohibited inferences of criminal disposition from it unless clearly informed that they are prohibited from doing so]; *United States v. Jobson* (6th Cir. 1996) 102 F.3d 214, 222 [standard instructions which did not identify the legitimate purposes for which the gang evidence could be considered were "were inadequate to safeguard against the impermissible use of gang evidence . . . [W]e must assume, then, that the jury improperly considered the gang evidence . . . ."]; *People v. Dellinger* (1984) 163 Cal.App.3d 284, 299-300 [likelihood that jurors will improperly consider other crimes evidence may be so great that even limiting instruction will not protect accused against impermissible inferences of criminal disposition]; *People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [same].)

The only instruction even addressing the different counts was CALJIC No. 17.02, which simply told the jurors:

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

(14 CT 3873; 9 RT 1255-1256.) This instruction, standing alone, simply

did nothing to ameliorate the prejudice that arose from joining the charges and the prosecutor's exploitation thereof in his argument to the jurors. (*People v. Grant*, *supra*, 113 Cal.App.4th at p. 592, & fn. 8; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1083; *Panzavecchia v. United States* (5th Cir. 1981) 658 F.2d 337, 338, 341, & fn. 1; compare *United States v. Silva* (4th Cir. 1984) 745 F.2d 840, 844 [prejudicial effect of joining charges where certain evidence not cross-admissible was cured by court's "repeated" instructions limiting the jury's consideration of evidence to one count].)[27]

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[27] Defense counsel did not request a limiting instruction. However, McKinnon does not challenge the omission of a limiting instruction as an independent error, for which a request below would ordinarily be required. Instead, he submits that the absence of a limiting instruction is one factor among many in the record as a whole that precludes a determination that the joinder was harmless. Under both the state law and federal constitutional standard, the presence or absence of a limiting instruction must be considered as part of the entire record in assessing the presence or absence of prejudice. (See, e.g., *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [assessment of prejudice under state law requires examination of entire record, including jury instructions]; accord, *Rose v. Clark* (1986) 478 U.S. 570, 583 [whether constitutional error harmless under federal standard requires assessment of entire record].)

In any event, it is well settled that counsel is not required to make futile requests or objections. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [objection unnecessary to preserve error for appeal where it would be futile]; accord, *People v. Chavez* (1980) 26 Cal.3d 344, 350, fn. 5; *People v. Zemavasky* (1942) 20 Cal.2d 56, 62.) Because the trial court erroneously – determined that the evidence relating to both murders was cross-admissible on the issue of Harold Black's credibility, it seems clear that the court would have rejected defense counsel's request for an instruction limiting the evidence to either charge alone.

5. Conclusion

In sum, the "(1) evidence on the crimes . . . jointly tried [was] not . . . cross-admissible in separate trials; (2) [the gang evidence as to the Martin murder charge was] unusually likely to inflame the jury against the defendant; (3) a 'weak' case [was] . . . joined . . . with another 'weak' case, so that the 'spillover' effect of aggregate evidence on [the] charges . . . [likely] alter[ed] the outcome of some or all of the charges; and (4) . . . the joinder . . . turn[ed] the matter into a capital case." (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 173; accord, *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1120; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1030; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 27-28.) In addition, the crimes were superficially similar, the prosecutor capitalized on those superficial similarities to encourage the jurors to consider the charges in concert and evidence admitted as to one count as proof of the defendant's guilt of the other, and the jurors received no instruction disabusing them of the notion that they could do just that. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1085; accord *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 588-594; *United States v. Lewis*, *supra*, 787 F.2d at pp. 1322-1323.)

For all of these reasons, joinder of the counts was prejudicial and violated McKinnon's state and federal constitutional rights to a fair trial, and to reliable guilt and penalty determinations. Reversal of the entire judgment is required. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1085; accord *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 588-594; *United States v. Lewis*, *supra*, 787 F.2d at pp. 1322-1323.)

At the very least, it is clear that the evidence supporting the Martin murder charge was even weaker than that supporting the Coder charge, as

evidenced by the jury's requests for readback during it's guilt phase deliberations of virtually all of the testimony relating to that charge and its initial indication of deadlock. Absent the bolstering effect of the evidence relating to the Coder murder charge, it is more than reasonably probable that the jurors would have seen the state's Martin murder case for what it was: the gun found in Kim Gamble's purse while she was with McKinnon was the Martin murder weapon. Despite the fact that a neutral eyewitness clearly had described Martin's killer as *someone other* than McKinnon, local law enforcement knew McKinnon and had a long history with him, knew that he had been charged with another murder, and therefore decided to pin the Martin killing on him. Having made that determination, the state set out to manufacture evidence to fit its theory – Sergeant Palmer lied about Marcus's identification of McKinnon; the state bought and paid for Black's equally unreliable testimony; and the state pressured Kim Gamble into recanting her prior, consistent admissions that the gun was hers and falsely claiming that it was McKinnon's. Hence, the joinder deprived McKinnon of a fair trial *at least* as to the Martin murder charge, which requires reversal of that conviction. Because the only special circumstance alleged and found true was multiple murder under section 190.2, subdivision (a)(3), reversal of that conviction also requires that the special circumstance finding be stricken and the death judgment be reversed.

II

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S ADMISSION OF THE GANG EVIDENCE VIOLATED STATE LAW AND MR. MCKINNON'S RIGHTS TO A FAIR TRIAL, CONFRONTATION, AND RELIABLE JURY VERDICTS THAT HE WAS GUILTY OF A CAPITAL OFFENSE, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

As previously discussed, the prosecution was permitted to introduce evidence that McKinnon was a member of the notorious street gang, the Crips, along with evidence suggesting that Martin's murder was gang-motivated. As will be demonstrated below, the trial court erred in denying McKinnon's *in limine* motion to exclude the evidence under Evidence Code section 352 because its probative value was substantially outweighed by its danger of creating undue prejudice against McKinnon – particularly given that it was wholly irrelevant and inadmissible as to the joined Coder murder charge. Furthermore, the court erred in overruling defense counsel's objections on hearsay and lack of foundation grounds when the prosecutor presented to the jury incompetent hearsay evidence to prove the facts critical to his theory that the gang evidence was relevant to motive.

The erroneous admission of the gang evidence violated not only state law, but also McKinnon's state and federal constitutional rights to confront the evidence against him. (U.S. Const., Amend. 6; Calif. Const., art. I, § 15.) Finally, the errors, which injected extraordinarily inflammatory evidence of no or minimal probative value into a very close case, violated McKinnon's state and federal constitutional rights to a fair trial and a reliable jury determination that he was guilty of a capital offense. (U.S.

Const., Amends. 8 & 14; Calif. Const., art. I, § 15; see, e.g., *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1383, cert. denied *Olivarez v. McKinney* (1993) 510 U.S. 1020 [erroneous admission of propensity evidence violated defendant's due process right to fair trial]; *People v. Partida* (2005) 37 Cal.4th 428, 436-438 [erroneous admission of gang evidence may violate defendant's due process right to fair trial].) At the very least, respondent cannot prove the erroneous admission of the evidence harmless beyond a reasonable doubt. The judgment must be reversed

B. The Trial Court Erred in Denying McKinnon's *In Limine* Motion to Exclude the Gang Evidence Under Evidence Code Section 352

1. The Motion to Exclude the Gang Evidence and The Court's Ruling.

As mentioned in Argument I, McKinnon made an *in limine* motion to exclude his gang membership and related gang evidence. (2 CT 435-440; 1 RT 18, 112.) He emphasized the substantial undue prejudice inherent in such evidence. (2 CT 435-438, citing, inter alia, *People v. Cardenas* (1982) 31 Cal.3d 897.) He argued that the danger of prejudice was particularly great and unfair since the evidence was clearly irrelevant and inadmissible as to the Coder murder charge, yet would "spill over into the[] [jury's] deliberations on the Coder homicide." (2 CT 438.) Moreover, the state's evidence linking the Martin murder to any gang activity or motive was extremely weak, tenuous, and of minimal relevance, thus diminishing its probative value. (2 CT 438-440.) Hence, he argued, the danger of undue prejudice from the evidence substantially outweighed its probative value, it should be excluded under Evidence Code section 352, and its admission would violate his constitutional rights to a fair trial. (2

CT 435-438.)[28]

The prosecution agreed that its theory was that Martin's murder was gang-motivated based on Harold Black's testimony that McKinnon said that he had shot Martin "for Scotty," and argued that McKinnon's gang membership was relevant and admissible to prove motive under Evidence Code section 1101, subdivision (b). (1 RT 102.) In support of his claim of relevancy, the prosecutor offered to prove that: 1) a man named Scotty Ware was a member of McKinnon's gang, the Crips; 2) Ware had been killed "some years earlier" by a member of the Bloods; and 3) Martin was a Bloods member. (1 RT 102.) Based on these preliminary facts, the prosecutor argued that McKinnon's Crips membership was relevant and admissible as tending to prove that he killed Martin as a retaliatory act against the Bloods for the murder of a fellow Crip. (1 RT 102.)

The trial court agreed with defense counsel that the evidence was irrelevant and inadmissible as to the Coder murder charge. (1 RT 111-112.) Nevertheless, based upon the prosecution's offer of proof, which it concluded was supported by the preliminary hearing evidence, the court denied the motion to exclude the evidence as to the Martin murder charge without further explanation. (1 RT 111-112.)

Although the court did not specify the preliminary hearing evidence on which it relied in making its ruling, the only evidence offered at the preliminary hearing regarding the purported gang motive came from Harold Black. As previously discussed, Black testified that McKinnon had confessed to killing Martin for "Scotty." (1 CT 122.) Although McKinnon

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[28] The motion was heard with the motion for severance, as the two issues were "closely tied." (1 RT 18, 95-112.)

did not explain what he meant, Black inferred that McKinnon was referring to Scotty Ware. (2 RT 122-123.) Without indicating that he even knew Ware or explaining exactly how he purported to come by such knowledge, Black testified that Ware was a Crip, that he had been killed by a Bloods member, and that Martin was a Blood. (1 CT 123-124.) Black further testified that Bloods and Crips in Banning otherwise "intermingle[d]" and got along. (1 CT 124.)

2. The Court Abused its Discretion by Refusing to Exclude the Gang Evidence.

As discussed in Argument I, above, Evidence Code section 1101, subdivision (a) provides:

> 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.

Subdivision (b) provides, however, that evidence of other misconduct is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such act."

It is certainly true that gang evidence *may* be relevant and admissible to prove motive under Evidence Code section 1101, subdivision (b). (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193 [gang evidence may be relevant and admissible to prove motive so long as its probative value is not outweighed by its prejudicial effect].) However, as this Court has consistently recognized, given the inherently prejudicial nature of gang membership evidence, the trial court must "carefully scrutinize such evidence before admitting it." (*People v. Williams*, *supra*, 16 Cal.4th at p.

193, and authorities cited therein; accord, *People v. Kennedy* (2005) 36 Cal.4th 595, 624; *People v. Carter* (2003) 30 Cal.4th 1116, 1194; *People v. Gurule* (2002) 28 Cal.4th 557, 653; *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905; see also *People v. Thompson* (1980) 27 Cal.3d 303, 314 [admissibility of other crimes or misconduct under section 1101 must be "scrutinized with great care"].)

In carefully scrutinizing the admissibility of such evidence over objection, the court must first determine that it is actually relevant to an issue in dispute. (See, e.g., *People v. Thompson*, *supra*, 27 Cal.3d at p. 316, & fn. 210 [in determining whether other acts of misconduct are admissible under section 1101, court must first determine if they are relevant to prove disputed issue]; *People v. Stanley* (1967) 67 Cal.2d 812, 818 ["the court should not permit the admission of other crimes (or gang evidence) until it has ascertained that the evidence" is relevant "to prove the issue upon which it is offered"]; see also Evid. Code, § 350 [only relevant evidence admissible]; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [constitutional guarantee to fair trial requires "that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence"].) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts, such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) The mere fact of gang membership, without more, does *not* tend to prove any of the issues identified in section 1101, including motive. (See, e.g., *People v. Avitia* (2005) 127 Cal.App.4th 185, 193-19; *People v. Perez* (1981) 114 Cal.App.3d 470, 477; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 79.)

Here, as noted above, the prosecutor explained that the relevance of

McKinnon's gang membership to prove his motive to kill Martin depended on the existence of at least three preliminary facts, which it offered to prove to the jurors: 1) Scotty Ware was a member of McKinnon's gang, the Crips; 2) Ware had been killed by a Bloods member "some years earlier"; and 3) Martin was a Blood. (1 RT 102, see also 4 RT 505 [opening statement in which prosecutor argued that evidence would show as fact that Ware was member of Crips, Martin member of Bloods, and Ware had been killed by Bloods member "acquainted" with Martin].) Assuming that Harold Black's preliminary hearing testimony was sufficient for the jury to find the existence of these facts – despite the absence of any indication that Black's testimony was based on his personal knowledge (see *People v. Staten* (2000) 24 C4th 434, 455-456 [witness' statement, made without "evinc[ing] any personal knowledge," that gang members committed specific crime was inadmissible hearsay]; see also, *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003-1004 [in absence of evidence of personal knowledge, lay witness testimony that person is a gang member, and that members of one gang shot member of another, was inadmissible hearsay]) – the court nevertheless erred in denying McKinnon's *in limine* motion to exclude the gang evidence.

Even if gang evidence bears some relevance to a disputed issue such as motive, section 1101 does not guarantee its admission. Given the prejudice inherent in such evidence, the trial court must carefully balance its probative value against its prejudicial effect under Evidence Code section 352 before admitting it. (See, e.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Williams*, *supra*, 16 Cal.4th at p. 193; *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905.) In this regard, this Court has emphasized, "[w]hen offered by the prosecution, we have condemned the

introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660; accord, *People v. Hernandez*, *supra*, at p. 1049 [gang evidence should not be admitted if its "probative value is minimal"]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194 [court erred in refusing to exclude gang evidence as more prejudicial than probative under section 342]; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344 [same]; *People v. Perez* (1981) 114 Cal.App.3d 470, 479 [same]; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 77-79 [same].) In assessing the probative value of evidence against its danger of prejudice or misleading the jury, the court should consider the strength of the evidence and its source and reliability. (*People v. Maestas* (1993) 20 Cal.App.4th 1482, 1494-1501 [weakness of gang evidence considered in assessing probative value and concluding trial court abused discretion in refusing to exclude it under section 352]; see also *People v. Maury* (2003) 30 Cal.4th 342, 432-433 [trial court properly excluded evidence under Evidence Code section 352 given its "doubtful reliability"]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [source and reliability of other crimes evidence considered in assessing probative value]; *People v. Milner* (1988) 47 Cal.3d 227, 238 [trial court properly excluded hypnotically-induced interview under section 352 due to questions of reliability]; *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1007 [assessment of hearsay declarant's credibility or trustworthiness is component of its probative value under section 352]; 1 Witkin, Cal. Evid.4th (2000) Circum. Evid. § 17, p. 341 [same]; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1100 [trial court erred in failing to exclude, under section 352, child sexual abuse accommodation syndrome evidence to prove molestation occurred in large part due to its unreliability]; *People v.*

Cella (1983) 139 Cal.App.3d 391, 405 [unreliability of evidence "offer(s) a prime subject for exclusion under Evidence Code section 352"].)

Here, if the evidence bore some probative value to the issue of motive, it was negligible at best. Given that Black did not claim to have witnessed Ware's murder, his testimony regarding the circumstances of Ware's death and the identity of his killer was obviously based upon the extrajudicial statements of others. Black did not identify that person or persons, did not describe the circumstances under which they made those statements or how they purported to come by their own knowledge, and did not otherwise provide any other testimony from which the court could determine that his account had *any* indicia of reliability. Nor did the prosecutor offer to produce such evidence at trial. Hence, whatever else might be said about Black's preliminary hearing testimony, it was exceedingly weak evidence of highly questionable reliability that McKinnon was motivated to kill Martin as an act of retaliation against the Bloods for the murder of an alleged Crip. (See, e.g., *People v. Maestas*, *supra*, 20 Cal.App.4th at pp. 1494-1501 [weakness of gang evidence considered in assessing probative value and concluding trial court abused discretion in refusing to exclude it under section 352]; see also, *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608 ["largely because a declarant is absent and unavailable for cross-examination, hearsay evidence is less reliable than live testimony"].)

In any event, even assuming the truth of the preliminary facts critical to the prosecution's gang motive theory, the evidence still bore minimal probative value. That is, even if Ware were a Crip, even if he had been killed by a Blood, and even if Martin were a Blood, the prosecution's proffer to the trial court was that Ware's murder had occurred "*some years*"

before Martin's murder. (1 RT 102.) Of course, the probative value of gang or other crimes evidence diminishes with the passage of time. (See, e.g., *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405; *People v. Thomas* (1978) 20 Cal.3d 457, 465-466; *People v. Harris* (1998) 60 Cal.App.4th 727, 739.) Certainly, the many years that passed between Ware's death and Martin's murder substantially diminished the probative value of the prosecution's entire gang motive theory.

Again, according to Harold Black's preliminary hearing testimony, Bloods and Crips "intermingled" in Banning. (1 CT 124.) And the prosecution's offer of proof bore no suggestion that McKinnon had any personal problem with Martin or that Martin himself had any involvement in Ware's death. Thus, it made little – if any – sense for McKinnon to wait "some years" while "intermingling" with members of the Bloods before committing an indiscriminate killing of *any* Bloods member as an act of retaliation against that gang for the murder of a fellow gang member. In other words, even assuming the truth of the necessary preliminary facts, they simply did not *"logically"* tend to prove McKinnon's motive for killing Martin (*People v. Garceau*, *supra*, 6 Cal.4th at p. 177) or, at most, were only "tangentially relevant" to prove motive (*People v. Cox*, *supra*, 53 Cal.3d at p. 660). As such, the evidence that McKinnon belonged to the Crips should have been excluded. (*Ibid.*; accord, *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049 [gang evidence should not be admitted if its "probative value is minimal"].)

Finally, as discussed in Argument I, the danger of unfair prejudice to McKinnon from admitting the gang evidence in this case was far greater than in the typical case. As the trial court and the prosecutor recognized, the evidence was absolutely irrelevant and inadmissible as to the Coder

murder charge. Given the powerfully damning nature of the gang evidence, it was folly for the court to assume that the jurors could compartmentalize that evidence and consider it only as to the Martin murder charge. To the contrary, as further discussed in Argument I, the primary evil in the admission of gang membership evidence lies in its portrayal of the defendant as a violent and dangerous man who has likely committed crimes in the past, will likely commit them in the future, and is more likely than not to have committed *any and all* of the violent crimes with which he is charged. Gang evidence is precisely the kind of evidence about the defendant that jurors do not limit to a particular count (see *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322 [emphasizing "difficult(y) for jurors to compartmentalize damaging information about one defendant derived from joint counts"]) and the emotional bias thereby evoked against the defendant himself, affecting all charges against him, is precisely the kind of prejudice that section 352 is designed to avoid (see, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 134 ["the 'prejudice' referred to in Evidence Code section 352" is evidence "that uniquely tends to evoke an emotional bias against a party as an individual"]).

In sum, the gang motive evidence was weak, of unproven and dubious reliability, and limited probative value, while its danger of unfairly prejudicing the jury against McKinnon was enormous. The court abused its discretion in admitting it.

C. The Trial Court's Admission of Hearsay Evidence Regarding the Alleged Gang-Related Motive for the Shooting Violated State Law and McKinnon's Sixth Amendment Right to Confrontation

At trial, the prosecutor first introduced the evidence in support of his gang motive theory through Kerry Scott. Scott testified that the rumor "on

the street" was that Ware had been shot and killed at a party sometime before 1994. (6 RT 784.) The prosecutor asked Scott what gang Ware claimed. (6 RT 784.) Defense counsel objected on hearsay and lack of foundation grounds. (6 RT 784.) The court replied by asking Scott if he had "ever talk[ed] to" Ware, to which Scott simply answered yes. (6 RT 784.) Again, the prosecutor asked him what gang Ware claimed; again, counsel made the "same objection." (6 RT 784.) The court overruled the objection and Scott was permitted to testify that Ware claimed the Crips gang. (6 RT 784.)

The prosecutor next asked Scott if he had "talk[ed] to people on the street after he was killed about who had killed" Ware and what "the word on the street" was about his killer. (6 RT 784-785.) Again, counsel objected that the question called for hearsay. (6 RT 785.)

At sidebar, counsel reiterated his hearsay objection. (6 RT 786.) Despite the facts that the prosecutor had offered *in limine* to prove *as a true fact* that a Bloods member had killed Ware (1 RT 102) and that his opening statement to the jurors represented *as a true fact* that Ware had been killed by a Blood (4 RT 505), the court responded that the prosecutor did not appear to be offering the evidence that a Blood had killed Ware for its truth. (6 RT 786.) Instead, according to the court, the prosecutor appeared to be offering the evidence for the nonhearsay purpose of illustrating the common understanding regarding the identity of Ware's killer, regardless of its truth. (6 RT 786.) The prosecutor seized upon the court's assistance and agreed that this was, in fact, the purpose for which he was offering the evidence. (6 RT 786-787.) The court ruled that the evidence was admissible for that purpose with the proviso that it would instruct the jurors that the evidence was limited to that purpose. (6 RT 786-787.)

Defense counsel objected that even if the evidence were offered for a nonhearsay purpose of demonstrating the rumor on the street regarding Ware's death, regardless of its truth, it would be irrelevant unless the prosecution made a foundational showing that McKinnon was also aware of the rumor and believed it. (6 RT 787-788.) The court again overruled counsel's objection, stating that "I don't think [the prosecutor] has to specifically prove that McKinnon was actually told that." (6 RT 788.) If the identity of Ware's killer was "general knowledge" on the streets, as Scott was prepared to testify, "there was a circumstantial inference." (6 RT 788.)

Finally, given the lack of foundation and Scott's dubious reliability, defense counsel argued that any probative value of the evidence was outweighed by its prejudicial effect and therefore should be excluded under Evidence Code section 352. (6 RT 788.) Again, the court overruled the objection. (6 RT 789.)[29]

Hence, Scott testified that the rumor "out on the street" was that a member of the Pomona Islands Bloods had killed Ware. (6 RT 789-790.)[30] The prosecutor asked him if "most of the people" in Banning had heard this rumor. (6 RT 790.) Again, defense counsel objected. (6 RT 791.) Implicitly overruling the objection, the court again attempted to come to the prosecutor's aid by asking Scott if other people had told him that they had

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[29] Defense counsel also objected that he had been given no notice that Scott had any knowledge about gangs in Banning, any knowledge relevant to the Martin murder case, or that he would testify as a witness in the Martin murder case. (6 RT 785-786.)

[30] Not a scintilla of evidence connected Martin to the Pomona Islands set of the Bloods gang.

heard the same rumor, to which Scott replied that they had. (6 RT 791.)

Both the state and federal Constitutions guarantee the right to a fair trial. (U.S. Const., Amend. 5 & 14; Calif. Const., art. I, § 15.) Essential to this guarantee is the right to confront one's accusers. (*Pointer v. Texas* (1965) 380 U.S. 400, 404.) Thus, the Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (See also Calif. Const., art. I, § 15.) The right to confrontation, in turn, guarantees the right to cross-examine adverse witnesses. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; *Pointer v. Texas*, *supra*, at pp. 404-405; *Davis v. Alaska* (1974) 415 U.S. 308, 317-318; *Barber v. Page* (1968) 390 U.S. 719, 720, 725-726; *Douglas v. Alabama* (1965) 380 U.S. 415, 419-420.) Improperly depriving an accused of the right to test the evidence against him through cross-examination is a denial of both the Sixth and the Fourteenth Amendments. (*Pointer v. Texas*, *supra*, 380 U.S. at p. 404; see, e.g., *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1173, overruled on other grounds in *Payton v. Woodford* (2002) 299 F.3d 815, 829, fn. 11 [erroneous admission of hearsay evidence regarding defendant's motive to commit charged crime violated Sixth Amendment right to confrontation].)

Hearsay rules are generally designed to protect similar values as the Confrontation Clause. (*California v. Green* (1970) 399 U.S. 149, 155.) By statute, California defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted" and prohibits its admission unless it qualifies under a statutory exception to the general rule of exclusion. (Evid. Code, § 1200.)

At the same time, out-of-court statements may be admissible for a

purpose that implicates neither the hearsay rule nor the Confrontation Clause – i.e., to prove something other than the truth of the matter asserted therein. However, "a hearsay objection may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute." (*People v. Armendariz* (1984) 37 Cal.3d 573, 585; accord *People v. Bunyard* (1988) 45 Cal.3d 1189, 1204.)

With respect to defense counsel's first hearsay and foundational objections to Scott's testimony that Ware claimed the Crips, the court erred in overruling them. (6 RT 784.) Testimony regarding a person's gang membership that is based upon extrajudicial statements is hearsay. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 659 [testimony regarding person's gang membership based on out-of-court statements hearsay]; *In re Wing Y., supra*, 67 Cal.App.3d at pp. 74-75, 77-78 [unless based on personal knowledge, lay witness testimony that person is gang member is inadmissible hearsay].)

Upon defense counsel's objections, the *prosecution* bore the burden of proving that the evidence either was not hearsay or fell within an exception to the hearsay rule and of laying the proper foundation for that exception. (See, e.g., *People v. Woodell* (1998) 17 Cal.4th 448, 464; *People v. Livaditis* (1992) 2 Cal.4th 759, 778.) It is more than a little troubling that the court stepped into the role of advocate and presumed to meet the prosecution's burden by asking Scott if he had ever spoken to Ware. (6 RT 784.) In any event, Scott's testimony that he had spoken to Ware was not sufficient to prove that the evidence was not hearsay.

The court apparently believed that it had somehow established the foundation for admission of evidence that Ware belonged to the Crips as a

hearsay exception or non-hearsay. However, Scott's testimony that he had simply talked to Ware was meaningless since Scott never testified that Ware actually told him that he belonged to, or affiliated with, the Crips. Hence, because there was no evidence at all to show that Scott's testimony regarding Ware's alleged gang affiliation was not hearsay, or fell within a hearsay exception, the court erred in admitting the evidence over defense counsel's objections.

The court's admission of the purported rumor that a Bloods member had killed Ware over defense counsel's hearsay and foundational objections was equally erroneous. (6 RT 784-798.) To the extent that the testimony tended to show that Ware had been killed by a Bloods member, it was clearly hearsay, as the trial court recognized. (6 RT 786-787; *see People v. Staten, supra,* 24 C4th at pp. 455-456 [extrajudicial statements, made without "evinc(ing) any personal knowledge," that gang members committed crime was inadmissible hearsay]; *In re Nathaniel C., supra*, 228 Cal.App.3d at pp. 1003-1004 [absent personal knowledge, witness' testimony that members of one gang shot member of another was hearsay].) The prosecutor himself did not offer the evidence for a nonhearsay purpose until the court spoon fed him one in response to defense counsel's hearsay objection. (6 RT 786-787.) But the prosecutor's actions spoke louder than his parroted words. Out of one side of his mouth, he seized upon the court's theory agreeing that the rumor was relevant for a purpose other than its truth, while out of the other side of his mouth, he represented the rumor as truth. In arguing the admissibility of the gang evidence *in limine*, the prosecutor offered to prove *as a true fact* that a Bloods member had killed Ware. (1 RT 102.) Furthermore, in his opening statement to the jurors, the prosecutor represented to the jury as *a true fact* that a Blood had killed

Ware. (4 RT 505; see, e.g., *People v. Coleman* (1985) 38 Cal.3d 69, 921-94 [trial court committed prejudicial error under section 352 by admitting inflammatory hearsay evidence for limited purpose where prosecutor argued and relied on it for its truth].)[31]

In any event, the court was incorrect that the rumor evidence was admissible even for the nonhearsay purpose of showing that McKinnon *believed* that the Bloods had killed Ware because – as defense counsel objected below – the prosecution failed to lay the necessary foundation for its admission under that theory. The trial court's ruling apparently recognized "'"one important category of nonhearsay evidence – evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and the hearer, believing such information is true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement."'" (*People v. Turner* (1994) 8 Cal.4th 137, 189, quoting from *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.) The court reasoned that the rumor was not offered for its truth, but rather for the reaction of the rumor on its "hearer" – i.e., to prove that McKinnon was aware of the rumor, believed it, and therefore had a motive to kill Martin. However, as the language of the exception makes clear – and as defense counsel argued below – a basic foundational requirement for admission of this category of evidence is that the relevant person actually *hear* the statement and *believe* it. (6 RT 787-

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[31] Indeed, the prosecutor went so far as to tell the jurors in his opening statement that Ware had been killed by a Bloods member "acquainted" with Martin, although he never presented, or offered to present, any evidence to prove that fact. (4 RT 505.)

788.) Otherwise, the statement is irrelevant and inadmissible. (See, e.g. *People v. Riel* (2000) 22 Cal.4th 1153, 1189 [out-of-court statement admissible for nonhearsay purpose of showing party's *reaction* to it, but there must be foundational showing that accusation was heard by the party]; *People v. Purvis* (1961) 56 Cal.2d 93, 97 [same]; *Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 178 [same].)

Here, as defense counsel argued, there was absolutely no evidence that McKinnon had even heard of the alleged rumor, much less that he believed it. (6 RT 787-788.) The court disagreed, reasoning that the jury could "infer" that McKinnon was aware of the rumor based on Scott's testimony that several other people had told him that they had heard the same rumor and therefore it was a matter of "common knowledge." (6 RT 788.) Consequently, for the court's rationale to be valid, it had to be true that the rumor was "common knowledge." Because any conclusion that the rumor was "common knowledge" was based upon incompetent hearsay, the court erred in admitting Scott's testimony concerning that aspect of the rumor.

The trap the trial court fell into, due to the state's desperate attempt to produce evidence linking McKinnon to the murder, was that it failed to recognize that at some point the "common knowledge" aspect of the rumor had to be offered for its truth in order for it to have any relevance to the issues in the case. The proper way to prove this "common knowledge," by utilizing competent evidence, would have been to produce enough witnesses from the community to testify to the rumor so that the jurors, if they accepted the truth of their testimony, could then have accepted that the rumor was of such "common knowledge" that McKinnon must have known about it. The state, however, either would not or could not meet this

burden. Rather than produce competent evidence, the state chose to offer the evidence of the "common knowledge" of the community through one person–Scott. It was impossible to accomplish this task without relying upon hearsay.

Scott's testimony that some people told him of the rumor may have been admissible as nonhearsay because the evidence being offered for its truth was that Scott had been told of the rumor by a few people, not that the rumor itself was true. So far, so good. It is when we get to the next level of the testimony that the state's shortcut to the evidence goes awry. Hearing of the rumor from a few people does not establish the foundational fact that it was "common knowledge" in the community – a foundational fact necessary for the establishment of a logical inference that McKinnon had heard the rumor. In order to establish this critical foundational fact, it must be accepted as true that the few people who told Scott of the rumor had in fact heard of the rumor from other people in the community; this is the only way the state could even take a run at establishing the "common knowledge" element. Therefore, the jury had to accept for its truth the representation that other members of the community had spoken of the rumor to those few people who had then spoken of the rumor to Scott. Under that scenario, what is being offered for its truth is that a sufficient number of community members spoke to the people who spoke to Scott, so that it could be accepted as "common knowledge" that the rumor was circulating in this particular community. It is perhaps understandable that the trial court did not fully understand the nature of the hearsay problem, since it is hard to believe that the state would attempt to prove such an essential part of its case in so convoluted a manner. This does not, however, excuse the fact that the component essential to the inference the

state needed to connect appellant to the murder was proven by incompetent hearsay. This evidence simply should not have been admitted.

After Scott testified, the only other gang evidence regarding the preliminary facts critical to the relevance of McKinnon's gang membership to the issue of motive came from Harold Black. Like Scott, Black testified that Ware was a Crip, Martin was a blood, and Ware "got killed at a party, supposedly by a member of the Blood gang." (6 RT 963.) Like Scott, Black never indicated that he had any personal knowledge of those facts, never indicated that he even knew Ware, and certainly never suggested that he had witnessed Ware's murder or that Ware's murderer had confessed to him. Nor, like Scott, did Black suggest that he had any personal knowledge that McKinnon was aware of, or believed, that a Blood had killed Ware. Just as the gang evidence was incompetent and inadmissible when Scott testified to it, so too was it incompetent and inadmissible when Black testified to it.

To be sure, defense counsel did not object to the evidence again when it came from Black. However, the purpose of the objection requirement (and the waiver rule) is to bring errors to the trial court's attention so that they may be corrected or avoided. (See, e.g, *People v. Partida* (2005) 37 Cal.4th 428, 434; *People v. Walker* (1991) 54 Cal.3d 1013, 1023.) That was accomplished in this case. Counsel did object to that the proffered gang evidence was more prejudicial than probative, but the court overruled the objection. And, counsel did object that the gang evidence required foundations of personal knowledge from the testifying witnesses regarding Ware's gang membership and direct evidence that McKinnon heard and believed that Ware had been killed by a Blood, but the court overruled the objections. Hence, the errors in admitting the gang

evidence were brought to the court's attention and the court refused to avoid them. Under the circumstances, there was nothing to gain from making the same objections to the same evidence when Black testified to it other than reinforcing the incompetent evidence in the minds of the jurors. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62 [further objections unnecessary where they would be "useless and would have served only to emphasize the matter to the jurors"]; *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, & fn. 8 [where counsel's hearsay objection overruled as to one statement, same objection to similar statements was unnecessary and hence did not waive error for appeal].)

Finally, McKinnon was deprived of an opportunity to confront and cross-examine the declarants who made the above-described statements. It cannot be disputed that those statements providing an alleged motive for Martin's murder were "crucial," given the court's implicit finding that the gang-related motive was so important that it outweighed the unusually acute danger of prejudice it posed in this consolidated trial. (See, e.g., *House v. Bell* (2006) 547 U.S. ___, 126 S.Ct. 2064, 2079 ["when identity is in question, motive is key"].) Hence, the court's admission of the evidence also violated McKinnon's state and federal constitutional rights to a fair trial and confrontation. (See, e.g., *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1172-1174 [erroneous admission of hearsay evidence regarding defendant's alleged motive to commit charged crime violated Sixth Amendment right to confrontation; even if classified as nonhearsay, the evidence was so unduly prejudicial and the case so close that the jurors could not be expected to so limit it]; see also *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 678; *Davis v. Alaska*, *supra*, 415 U.S. at pp. 317-318;

Pointer v. Texas, *supra*, 380 U.S. at pp. 404-405.)[32]

D. The Erroneous Admission of the Gang Evidence was Prejudicial, Violated McKinnon's Due Process Right to a Fair Trial, and Requires That the Judgment Be Reversed

Where gang membership is, in fact, irrelevant to any *legitimate* issue in the case, the irrelevance itself creates tremendous prejudice because the "only inference the jury" can draw from it is that the defendant has a bad character and criminal disposition. (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1382-1383, cert. denied *Olivarez v. McKinney* (1993) 510 U.S. 1020; see also *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905 [where gang evidence irrelevant to legitimate issue, irrelevance creates a "real danger" that the jury will infer criminal disposition from it]; *People v. Perez*, *supra*, 114 Cal.App.3d at p. 477 [where gang membership irrelevant, admission allows unreasonable inferences of guilt by association and criminal disposition].) Indeed, the prejudicial effect of such an impermissible inference may be so great as to deprive the defendant of his right to a fair trial. (*McKinney v. Rees*, *supra*, at pp. 1384-1385; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 ["if there are no permissible inferences the jury can may draw" from the other misconduct evidence, its admission can violate due process]; *Lesko v. Owens* (3d Cir.1989) 881 F.2d 44, 52 [due process violation arises from admission of other crimes evidence with probative value that is "conspicuously outweighed by its inflammatory

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[32] Defense counsel did not add federal constitutional grounds to his objections to this evidence. He did not do so because the trial court granted counsel's pre-trial motion to consider all of his trial objections and motions to be made under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (1 CT 209-213; 1 RT 9.) The People did not object. (Cf. *People v. Partida* (2005) 37 Cal.4th 428.

content"]; see also *People v. Partida, supra*, 37 Cal.4th at pp. 436-438 [erroneous admission of gang evidence may render trial fundamentally unfair in violation of due process]; *People v. Valentine* (1986) 42 Cal.3d 170, 177 [admission of irrelevant other crimes evidence may violate due process]; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [constitutional guarantee to fair trial requires "that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence"]; *Brinegar v. United States* (1949) 338 U.S. 160, 174 [rule against propensity evidence is historically grounded in fairness and one consistent with proof beyond reasonable doubt].) This is just such a case.

Defense counsel's *in limine* argument that admission of the gang evidence would violate McKinnon's state and federal constitutional rights to a fair trial proved to be prescient. As the prosecutor's gang motive theory played out at trial, it became increasingly apparent that it was completely unsupported and, hence, McKinnon's gang membership was irrelevant to any legitimate issue in the case.

Charles Neazer, Gregory Martin's roommate and a fellow Bloods member, testified that he knew Scotty Ware and that Ware was affiliated with the *Bloods*. (8 RT 1076, 1078, 1082, 1094.) Indeed, the prosecution presented no other evidence typically used to establish gang membership – such as police field identification cards, information from Cal-Gangs, or evidence that Ware bore gang tattoos – to corroborate Black and Scott's *interested* testimony that Ware claimed the Crips or to contradict Neazer's *disinterested* testimony that he affiliated with the Bloods. (See, e.g., *People v. Hall* (1964) 62 Cal.2d 104, 111 [weakness of case demonstrated by "the absence of evidence that would normally be forthcoming"]; accord, *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839; see also *People v. Ford* (1988)

45 Cal.3d 431, 442-443 [where party has power to call logical witness or present material evidence and fails to do so, it is reasonable to infer that the evidence would be adverse to that party]; accord *United States v. Taylor* (9th Cir. 1995) 52 F.3d 207, 211.) Indeed, while Marshall Palmer testified that his department "identified" active gang members and that it was "common knowledge" that Martin was a Blood and McKinnon was a Crip, he tellingly did not testify to Scotty Ware's alleged gang affiliation. (6 RT 881-882.)

Furthermore, the only evidence regarding the date of Ware's death came from Neazer, who testified that he had died *four years* before Martin was killed. (8 RT 1083.) As noted above, when considered with the other evidence, this considerable lapse of time between Ware's death and Martin's murder made the prosecutor's gang motive theory completely illogical.

Virtually all of the witnesses testified that Banning is such a small town that the traditional enmity between Bloods and Crips simply does not exist. (6 RT 781; 8 RT 1077-1078, 1080, 1090; 13 CT 3776.) People who claimed the different gangs often knew each other, associated, and "got along" for many years; indeed they were even members of the same families. (6 RT 781, 883, 946; 8 RT 1077.) As McKinnon himself put it when interrogated by Detective Caldwell and Sergeant Palmer, although he "hung" with the Crips, "as far as I'm concerned, ain't no gangs in Banning." (CT 3776.) The prosecution did not present evidence of a single act of Bloods-Crips violence committed in Banning, other than that alleged to have been committed in connection to this case.

Furthermore, there was no evidence that McKinnon even knew Ware, no evidence that Martin was in any way involved in Ware's death or

that he even knew Ware's killer, and no evidence that McKinnon believed that Martin was in any way responsible for Ware's death. Indeed, according to Neazer, he, Martin and McKinnon were all together, drinking and amicably socializing, a few days before Martin was killed. (8 RT 1081-1082.)

Given all of this evidence, McKinnon's membership in the Crips simply did not logically, naturally, and by reasonable inference tend to prove that he was motivated to kill a Blood with whom he socialized and got along, in a town where Crips and Bloods members typically socialized and got along, over the death of a third party that occurred several years earlier – a third party whom McKinnon may or may not have known, who may or may not have belonged to the Crips, whose death may or may not have been a murder which may or may not have been committed by a Blood. Thus, the evidentiary foundation vital to the relevance of McKinnon's gang membership to the issue of motive to kill Martin was utterly lacking.

Indeed, perhaps the most telling proof of the irrelevance of McKinnon's gang membership to motive is the fact that the prosecutor had completely abandoned his gang motive theory by his guilt phase closing argument. (See 9 RT 1131-1149, 1202-1229.)[33] Thus, given the

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[33] As discussed in Argument XIII, below, during penalty phase, the prosecutor moved to argue McKinnon's gang membership as an aggravating circumstance without limitation to the issue of motive. (12 RT 1455-1457.) Over the prosecutor's repeated protests, the court ruled that the gang evidence could not be utilized for any purpose at penalty other than as motive evidence. (12 RT 1456-1458, 1494-1496.) Having been so limited, the prosecutor did argue the "gang aspect" of the crimes during the penalty phase as a reason to sentence McKinnon to death. (13 RT 1626.)

irrelevance of McKinnon's gang membership to any legitimate issue in this case, it is more likely than not that the jury considered it for the prohibited purpose of proving his violent criminal disposition. (See, e.g., *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1382-1383, cert. denied *Olivarez v. McKinney* (1993) 510 U.S. 1020; *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905; *People v. Perez*, *supra*, 114 Cal.App.3d at p. 477.) The prejudicial effect of such an inference is manifest.

The weakness of the state's case against McKinnon for both the Martin and Coder murders has been extensively discussed in Argument I, which is incorporated by this reference herein. Certainly, in such a weak case, any error was likely to tip the balance in favor of conviction. Forcing McKinnon to stand trial, labeled as a member of the Crips was just such an error. McKinnon was thus deprived of his state and federal constitutional rights to a fair trial, as well as to his Eighth Amendment right to reliable guilt phase verdicts. The entire judgment must be reversed

At the very least, the Martin murder conviction must be reversed. As discussed in greater detail in Argument I above, the state's case against McKinnon for the Martin murder was exceptionally weak. A neutral eyewitness, Lloyd Marcus, had clearly described someone *other than McKinnon*, as the shooter and Palmer's 11th hour claim that Marcus had identified the shooter by nameas McKinnon was a patent lie. The questions regarding in-custody informant Harold Black's credibility and the inconsistencies in his account with the true evidence were deep and disturbing. As further discussed in Argument I, the jurors' requests for readback of the entirety of Palmer's and Black's testimonies and its expression of deadlock after four days of deliberations, before reaching its verdict on the Martin murder charge on their fifth day of deliberations,

clearly indicate that it considered the case against McKinnon for Martin's murder to be an extremely close one. (13 CT 3810; 15 CT 4108-4109; 14 CT 4093-4095, 4098; see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [requests for readback and expression of deadlock indicate close case]; *United States v. Harbor* (9th Cir. 1995) 53 F.3d 236, 243 [same - expression of deadlock].) On this record, it is clear that the erroneous admission of the highly inflammatory gang membership evidence violated McKinnon's right to a fair trial.

Finally, even if admission of the gang evidence did not violate McKinnon's state and federal due process rights to a fair trial, the judgment must be reversed. Because admission of the evidence violated McKinnon's federal constitutional right to confrontation, respondent bears the burden of proving the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional violations require reversal unless beneficiary of error can prove it harmless beyond a reasonable doubt; accord *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404.) In making this determination, the reviewing court's inquiry is not "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered" based upon the strength of the evidence. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Rather, the reviewing court must determine "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Ibid.*) For all of the reasons set forth above, respondent cannot sustain its burden of proving beyond a reasonable doubt that the verdicts were "surely unattributable to" the erroneous injection of McKinnon's membership in a notoriously violent gang into this very close case.

Accordingly, the entire judgment must be reversed. Even if the error

requires reversal of the Martin murder conviction and related firearm possession convictions alone, the sole special circumstance of multiple murder and the death judgment must be set aside.

III

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND MCKINNON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY REFUSING TO ADMIT THE DISTRICT ATTORNEY INVESTIGATOR'S DOCUMENTED INTENTION TO "MAKE" EVIDENCE TO FIT THE STATE'S THEORY THAT MCKINNON WAS MARTIN'S KILLER

A. Introduction

As discussed in the Statement of Facts, above, at least a year after the gun was discovered in Kimiya Gamble's purse, ballistics testing revealed that it was the Martin murder weapon. After this discovery, District Attorney Investigator Gaylen Buchanan found and interrogated Gamble and Harold Black. Thus, this discovery was the seed from which the Martin murder evidence grew.

As previously discussed, upon her arrest, Gamble admitted that the gun was hers and later pled guilty to a criminal charge of possessing it. (4 RT 642; 7 RT 1035-1036, 1042.) Following an interrogation by Buchanan over two years later, Gamble made a startling about-face by claiming that the gun was McKinnon's and that he had told her to put it in her purse when police stopped their car. (7 RT 1032-1033, 1045-1046, 1049-1052.) Similarly, although Black initially told Buchanan that he thought McKinnon was in custody for the Martin murder (7 RT 1020), he later claimed that McKinnon told him that he was in custody for a parole or probation violation because he had been arrested for putting a gun in Kim Gamble's purse. (6 RT 968-969.)

McKinnon's defense was that he was innocent of both murders and that the evidence against him was false, including the testimony of both

Gamble and Black. Black, of course, denied that he was lying. (6 RT 969-970.) Similarly, on cross-examination, Gamble denied that Buchanan had "pressure[d] [her] at all to get [her] to say that Crandell McKinnon told [her] to hide that gun" or that she had "*felt* any pressure from Buchanan to say that." (7 RT 1051, italics added.) She denied that Buchanan told her that "if [she] didn't cooperate with him that [she] could be all of a sudden a defendant in this murder case[.]" (*Ibid.*) Gamble did acknowledge that Buchanan told her that if she had "had something to do with this or if [she] had something to hide," she "would probably be made an accessory." (7 RT 1052.) However, she insisted, "he no way pressure[d] me and I freely gave the statement." (7 RT 1052.)

In order to rebut this evidence and support the defense theory of evidence fabrication, McKinnon moved to admit a memorandum Investigator Buchanan wrote to the prosecutor, Deputy District Attorney John Davis, and to examine Buchanan about it. (8 RT 1099.) The memorandum stated as follows:

> John -
>
> As you can tell by this [police] report McKinnon did not possess the handgun at the time of his arrest. However, I think he probably stuck it in the female's purse at the time of the car stop.
>
> I will find this gal (Kimiya Gamble) and make a wit [*sic*] out of her. Or arrest her for 32 P.C. She apparently pled out to the 12025/12031 PC charge and took 36 months probation.
>
> As of now, Steve Gomez and I plan to go to Folsom and interview Harold Black & Las Vegas to locate and interview

//
//

Johnetta Hawkins on May 1 & 2.

Buck

[P.S.] I'm keeping an envelope for def. discovery.

(Def. Ex. B at 7SCT 38, emphasis in original.)[34]

The prosecutor conceded that the document was a memorandum written to him by Investigator Buchanan. However, the prosecutor objected that the memo "contains several things in here that are not relevant, Mr. Buchanan's feelings about what might have happened to the gun." (8 RT 1100.) The prosecutor agreed that it would be appropriate to question Buchanan about whether he had "threatened [Gamble] that she would be prosecuted for 32[.]" (8 RT 1100.) At the same time, the prosecutor explained, "Mr. Buchanan would now say that he didn't threaten Miss Gamble, she was a witness. And apparently once he found out the details, there was no hint of a 32 and that he never threatened her with that." (8 RT 1100.) Therefore, the prosecutor objected to admission of the memo as irrelevant and not constituting impeachment of Buchanan. (8 RT 1100.)

Defense counsel replied that he was not offering the memo merely as impeachment, but also as evidence of Buchanan's intent in conducting his interrogations. (8 RT 1101.) As he explained, Buchanan "documented his intent," which was "at least circumstantial evidence" of what he said and did in interrogating Gamble. (8 RT 1101.)

The court ruled that the memo itself was inadmissible. (8 RT 1101.) It reasoned that both the first and third paragraphs of the memo were "totally irrelevant." (8 RT 1101.) The court agreed that "the topic" of the

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[34] "P.C. 32" refers to Penal Code section 32, which proscribes criminal liability for accessories.

second paragraph "may have some relevancy," but only if Buchanan's testimony made it relevant. (8 RT 1101, 1103.) The court ruled that defense counsel was required to call Buchanan and limit his examination as follows: "if he [Buchanan[denies making any threats or denies explaining to her her liability for Penal Code 32, and she admitted that he did yesterday on the stand, if he denies that, then you can examine him on his intent, whether to make her a witness or arrest her for PC 32, as outlined in paragraph No. 2." (8 RT 1101.)

Seeking clarification of the court's ruling, defense counsel inquired if he could ask Buchanan if he had specifically pressured Gamble into recanting her admission that the gun was hers and shifting the blame to McKinnon, as the memo suggested; if Buchanan denied doing so, counsel inquired if he would then be permitted to introduce the memo itself and examine Buchanan about it. (8 RT 1102.) The court ruled that he could not. (8 RT 1102.) The court said that defense counsel could ask Buchanan if his intention was to "interview [Gamble] as a witness or arrest her for PC 32." (8 RT 1102.) If Buchanan denied that that was his intention, counsel would then be permitted to introduce *only* paragraph two of the memo for "impeachment" of Buchanan. (8 RT 1102-1103.)

Defense counsel replied that the probative value of the evidence lay in "the document[] in toto." (8 RT 1103-1104.) If he could not present the memo itself to the jurors, then he declined to conduct the limited examination of Buchanan allowed by the court in order to introduce only a part of it. (8 RT 1104.) [35]

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[35] Despite conceding that he had voluntarily given defense counsel free access to the document, the prosecutor also fleetingly objected to its (continued...)

As explained below, the court erred in excluding the memo. The document as a whole was clearly relevant to critical issues in this case, and McKinnon had an absolute right to present it independent of Buchanan's testimony. The court's exclusion of this highly relevant evidence violated state law, as well as McKinnon's rights to a fair trial, present a meaningful defense, confrontation, and reliable jury determinations that he was guilty of a capital offense in violation of the Sixth, Eighth, and Fourteenth Amendments.

B. Evidence Regarding an Important Prosecution Witness' Bias or Motive in Testifying Is Highly Relevant and Admissible under Both State Law and the Federal Constitution

Evidence Code section 210 defines relevant evidence as "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Article I, section 28, subdivision (d) of the California Constitution provides that "relevant evidence shall not be excluded in any criminal proceedings."[36] (See also Evid. Code, § 351 [all relevant evidence is admissible].)

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[35] (...continued)
admission on work product grounds. (8 RT 1100.) No doubt because the work product objection was tardy and waived by the prosecutor's acknowledged disclosure of the document to defense counsel, the trial court neither acknowledged nor ruled upon that objection. (See, e.g., *McKesson H.B.O.C., Inc. v. Superior Court* (2003) 115 Cal.App.4th 1229, 1238-1240 [disclosure of documents to third parties that do not have interest in confidentiality waives any work product privilege].)

[36] Section 28, subdivision (d) contains an exception to this broad rule of inclusion, providing that "nothing in this section shall affect any existing statutory rule of evidence relating to privilege, or hearsay, or Evidence Code Sections 352, 782, or 1103."

Similarly, "a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor" (*People v. Marshall* (1996) 13 Cal.4th 799, 836) under the Fifth, Sixth, and Fourteenth Amendments (see *Holmes v. South Carolina* (2006) 547 U.S. ___, 126 S.Ct. 1727, 1731-1735; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S. 14, 23; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 877-879, cert. denied *Alcala v. California* (1993) 510 U.S. 877; *Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1089-1092; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062; *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273.) Furthermore, the heightened need for reliability in guilt and penalty verdicts entitles capital defendants to present such evidence in their defense. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

Here, the evidence was offered to show that Gamble changed her story to fit the prosecution's theory under threat of arrest and prosecution, and thus had motive and opportunity to bend to law enforcement's will and fabricate her testimony against McKinnon. In this regard, it is black letter law that evidence of a witness' bias or motive to testify in a particular manner is "relevant" evidence. (See, e.g., *Davis v. Alaska*, *supra*, 415 U.S. at pp. 311, 319-320; Evid. Code, § 780, subd. (f); *People v. Williams* (1997) 16 Cal.4th 153, 212; *People v. Mickle* (1991) 54 Cal.3d 140, 167-168; *People v. Chacon* (1968) 69 Cal.2d 765, 779].) Indeed, where the credibility of a key prosecution witness, like Gamble, is a critical issue, the defendant is entitled to present all evidence relevant to that issue under his federal constitutional rights to due process, present a meaningful defense,

and confrontation. (See, e.g., *Olden v. Kentucky* (1988) 488 U.S. 227, 231-233 (per curium) [exclusion of evidence relevant to witness' motive to fabricate violated defendant's Sixth Amendment right to confrontation]; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 678-679 [same]; *Davis v. Alaska*, *supra*, 415 U.S. at pp. 316-317 [same]; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 298-302 [same – violation of Fourteenth Amendment right to fair trial]; *Alcala v. Woodford*, *supra*, 334 F.3d at pp. 877-879 [Fourteenth Amendment]; *Franklin v. Henry*, *supra*, 122 F.3d at p. 1273 [Fourteenth Amendment].)

Similarly, evidence with which to "attack . . . the thoroughness and even good faith of the [police] investigation . . . "is not only relevant; where police have played a critical role in obtaining or producing the evidence against the defendant, evidence tending to discredit the investigation is so probative and potentially exculpatory that its suppression violates the defendant's right to a fair trial. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 443-454; *United States v. Sager* (9th Cir.2000) 227 F.3d 1138, 1145-1146 [trial court committed plain error in excluding as irrelevant evidence relating to police investigation and instructing jurors to refrain from "grading" the investigation; "to tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information"]; *People v. Memro* (1985) 38 Cal.3d 658, 681-682.) Hence, direct or circumstantial evidence tending to show that a witness has been threatened, intimidated, coached, or otherwise pressured into making or recanting allegations, or that he or she has been promised some benefit for making or recanting those allegations, is equally relevant and admissible on the question of that witness' credibility under state law and the federal

constitution. (See, e.g., *People v. Phillips* (1985) 41 Cal.3d 29, 45-47 [evidence tending to show that witness has been influenced to testify in particular manner is admissible "to ensure that the jury has a complete picture of the factors affecting the witness' credibility"]; *Alcala v. Woodford*, *supra*, 334 F.3d at pp. 877-879 [court's exclusion of evidence regarding suggestive police interview tactics and hypnosis, which cast doubt on credibility of prosecution witness' testimony, violated defendant's federal constitutional right to due process]; *Justice v. Hoke* (2d Cir. 1996) 90 F.3d 43, 49 [exclusion of evidence regarding key prosecution witness' bias or motive to fabricate allegation violated defendant's Sixth Amendment right to present a defense, particularly because it did not merely paint witness as dishonest but supported defense of fabrication]; accord, *Banks v. Dretke* (2004) 540 U.S. 668, 677-678, 699-703; *Davis v. Alaska*, *supra*, 415 U.S. at pp. 311, 319-320; *People v. Burgener* (2003) 29 Cal.4th 833, 868; *People v. Rutherford* (1975) 14 Cal.3d 399, 408; *United States v. Shoneberg* (9th Cir. 2005) 396 F.3d 1036, 1042; *People of Territory of Guam v. McGravey* (9th Cir. 1994) 14 F.3d 1344, 1349.)

C. The Trial Court's Exclusion of the Memo Violated State Law, as Well as McKinnon's Rights under the Sixth, Eighth, and Fourteenth Amendments

As noted above, in the first paragraph of his memorandum, Investigator Buchanan acknowledged that McKinnon did not possess the gun when he and Gamble were stopped, but expressed his theory that McKinnon "probably stuck it in the female's purse at the time of the car stop." (7 SCT 38.) In the second paragraph, Buchanan expressed his intention to find Gamble "and make a witness out of her [o]r arrest her" for being an accessory to the murder. (7 SCT 38.) In the third paragraph, Buchanan expressed his intention to interrogate Harold Black and Johnetta

Hawkins. (7 SCT 38.)

Defense counsel moved to admit the memo itself. (8 RT 1109, 1103-1104.) The court ruled that the memo itself was inadmissible because the first paragraph and third paragraphs were "totally irrelevant." (8 RT 1101; see also 8 RT 1103.)

The court further ruled that the "topic" of the second paragraph "may have some relevancy," and therefore was potentially admissible, but only depending on what defense counsel could elicit from calling Buchanan as a witness and examining him. (8 RT 1101, 1103.) That is, defense counsel was required to lay a foundation by first asking Buchanan about his "intent" in interrogating Gamble and eliciting his denial that he intended to "interview [Gamble] as a witness or arrest her for PC 32," or that he explained or threatened accessory liability to her. (8 RT 1101-1103.) Although the court couched its ruling in terms of relevance and the prosecution never made a hearsay objection, it clearly appears that the court's ruling was based on its misunderstanding that the memo was hearsay, and thus to be admissible it had to meet the foundational requirements applicable to one of the exceptions to the Hearsay Rule – such as the prior inconsistent statement exception codified in Evidence Code section 1235. (See Evid. Code, § 1200 [evidence of out of court statement inadmissible for truth of matter stated therein unless it qualifies under hearsay exception].)

The court was incorrect on both counts. Pursuant to the foregoing authorities, the memo as a whole was highly relevant. Moreover, it was relevant for *non-hearsay* purposes and, therefore, was independently admissible without the necessity of calling Buchanan as a witness.

The relevance of the first and second paragraphs were inextricably

intertwined. Both paragraphs revealed Buchanan's state of mind and intent in finding and interrogating Gamble: the state fixed on a theory that McKinnon was Martin's killer and therefore – despite all evidence to the contrary – he must have possessed the murder weapon and put it in Gamble's purse. Both paragraphs were susceptible of the more than reasonable inference that Buchanan intended to find Gamble and "make" her "a wit[ness]" *to that theory* by threatening to charge her as an accessory to murder if she refused. Further, these statements of intent or state of mind were relevant circumstantial evidence for the non-hearsay of proving that Buchanan acted in conformity with that intent when he did locate and interrogate Gamble. (Evid. Code, § 1250 ["evidence of a statement of the declarant's then existing state of mind . . . (including a statement of intent . . .) is not made inadmissible by the hearsay rule when: (1) The evidence is offered to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action; or (2) The evidence is offered to prove or explain acts or conduct of the declarant . . . ."] and Comment [when a statement is used to explain the declarant's state of mind or is relevant to prove his or her subsequent conduct, "the evidence is not hearsay because it is not offered to prove the truth of the matter stated"]; see, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 578, and authorities cited therein [statement of declarant's intent or mental state is relevant and admissible as circumstantial evidence tending to show declarant's future conduct in accordance with his or her expressed intent]; *People v. Jones* (1996) 13 Cal.4th 535, 547; *People v. Brust* (1957) 47 Cal.2d 776, 784-785; *People v. Peggesse* (1980) 102 Cal.App.3d 415, 419.)

The circumstantial evidence that Buchanan did threaten to arrest and charge Gamble as an accessory unless she agreed to change her story and

testify that the gun was McKinnon's was, in turn, highly relevant and admissible for the non-hearsay purpose of showing the *effect* on Gamble and her motive for recanting her prior admissions that the gun was hers and shifting blame to McKinnon for possessing the gun and putting it in her purse. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 189 ["'evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and the hearer, believing such information is true, acted in conformity with that belief'" is not hearsay]; accord, *People v. Burgener*, *supra*, 29 Cal.4th at p. 868 [threats made to witness were nonhearsay and relevant to issue of witness' fear and, thus, her credibility]; *People v. Duran* (1976) 16 Cal.3d 282, 294-295; *People v. Marsh* (1962) 58 Cal.2d 732, 737-738; *People v. Vogel* (1956) 46 Cal.2d 798, 805; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 871-872.)

Thus, contrary to the trial court's reasoning that "the topic" of the second paragraph *alone* was "possibly relevant," the second paragraph took much of its probative force from the first. Indeed, taking the second paragraph out of the context of the first, as the court proposed, distorted the meaning of the memo. The second paragraph – that Buchanan intended to interview Gamble and make her a witness or charge her as an accessory – did not by itself suggest anything necessarily inappropriate. To the contrary, given that the murder weapon was located in Gamble's purse, it was reasonable to conclude that she may have had information vital to the Martin murder investigation. And, given that reasonable conclusion, it was not necessarily unreasonable for Buchanan to threaten Gamble if she refused to provide truthful information, *regardless of the person to whom her truthful information might connect the murder weapon.* And, the second paragraph alone was not inconsistent with a conclusion that, when

asked where she obtained the murder weapon, she spontaneously replied that it was McKinnon's.

What the first and second paragraphs together showed, however, was that Buchanan did not intend to uncover just any evidence relevant to the murder or the owner of the gun, but evidence specifically connecting *McKinnon* to the murder by placing the murder weapon in his hands. And if Gamble refused to become a witness to that *specific* evidence, and refused to testify in a *particular fashion*, he would threaten her with extremely serious criminal charges that could destroy her life, her child's life, and her career. Thus, the first and second paragraphs together tended to show that Gamble's shift of blame for possession of the weapon to McKinnon was not spontaneous, but rather coached. (See, e.g., *Banks v. Dretke*, *supra*, 540 U.S. at pp. 677-678, 699-703 [evidence police coached prosecution witness highly relevant impeachment evidence].) It further tended to show that she made that coached statement – and testified to the same – under threat of extremely serious criminal charges. (See, e.g., *People v. Burgener*, *supra*, 29 Cal.4th at p. 868 [threats against witness relevant to credibility, particularly when offered to explain why his or her story has changed]; *People v. Phillips*, *supra*, 41 Cal.3d at pp. 45-47 [evidence tending to show that witness has been influenced to testify in particular manner is admissible "to ensure that the jury has a complete picture of the factors affecting the witness' credibility"]; *People v. Rutherford*, *supra*, 14 Cal.3d at p. 408 [evidence that police promised lenient treatment to witness' wife in exchange for his testimony against defendant was highly relevant to show witness' motive to lie]; *United States v. Shoneberg*, *supra*, 396 F.3d 1036, 1042 [defendant has right to present evidence of promised "benefit or detriment to flow to a witness as a result

of his testimony . . . to show why the witness might testify falsely in order to gain the benefit or avoid the detriment"]; *Alcala v. Woodford*, *supra*, 334 F.3d at pp. 877-879 [exclusion of evidence regarding suggestive police interview tactics and hypnosis, which cast doubt on credibility of prosecution witness' testimony, violated defendant's federal constitutional right to due process].)

As this Court has recognized, it is one thing to arrange for a witness to provide unspecified, but truthful, information in order to avoid criminal charges. It is quite another to require a witness to provide *specific* information or to testify in a *particular* fashion in order to avoid criminal charges. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1010 [agreement that requires person to testify in particular fashion in order to avoid criminal charges is inherently unreliable and introduction of testimony made pursuant to such agreement is inconsistent with due process; however, agreement that simply requires truthful testimony in order to avoid criminal charges is not]; *People v. Garrison* (1989) 47 Cal.3d 746, 768 [same].)

The court was equally incorrect in concluding that the third paragraph, in which Buchanan expressed his intention to interview Harold Black and Johnetta Hawkins, was "totally irrelevant." (7 SCT 38; 8 RT 1101; 7 RT 1003.) Again, the memo as a whole tended to show that Buchanan approached Black, as he did Gamble, with a clear theory already in mind. While the memo did not specifically state that he intended "to make" Black "a wit[ness]" to his theory (as he intended to do with Gamble), the jurors could certainly infer that he did so. It was only after Buchanan approached Black, Black claimed that McKinnon not only confessed to the Martin murder, but also to having placed the murder weapon in Gamble's

purse. The memo as a whole further tended to cast doubt on the reliability of those statements.

Similarly, Johnetta Hawkins had denied any knowledge of the shooting on the night it occurred. It was only after she was arrested, taken into custody, and interrogated by Buchanan that she changed her story and provided damaging evidence against McKinnon. (5 RT 726, 731-733, 735-737.) The memo as a whole tended to show that Buchanan used intimidation as an interrogation tactic and thus cast doubt on the reliability of all evidence that his interrogations produced, including that from Hawkins, and supported the defense of evidence fabrication. (See, e.g., *United States v. Sager*, *supra*, 227 F.3d at pp. 1145-1146 [officer's questionable interrogation tactics potentially affected not merely officer's credibility, but "perhaps more importantly . . . weight to be given to evidence produced by his investigation"]; see also *Kyles v. Whitley*, *supra*, 514 U.S. at pp. 443-454 ["damage to prosecution's case" from evidence of questionable interrogation tactics is not "confined to" undermining that witnesses's testimony, but extends to "the thoroughness and even good faith of the investigation, as well"].)

Certainly, the credibility of Gamble and Black's testimony putting the Martin murder weapon in McKinnon's hands a week after the murder was a critical component of an otherwise weak case against him. And proof that law enforcement had fabricated evidence against him was an equally critical component of McKinnon's defense. He had the right under the Sixth, Eighth, and Fourteenth Amendments "to expose the jury to the facts from which [the] jurors . . . could appropriately draw inferences relating to the reliability of the witness[es]" (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318; accord, *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680; *DePetris*

v. Kuykendall, *supra*, 239 F.3d at p. 1062) and their stories (*Crane v. Kentucky*, *supra*, 476 U.S. at pp. 684, 688, 690-691; *Alcala v. Woodford*, *supra*, 334 F.3d at pp. 877-879), and to support McKinnon's defense of evidence fabrication (see, e.g., *Justice v. Hoke*, *supra*, 90 F.3d 43, 49 [exclusion of evidence regarding prosecution witness' bias or motive to fabricate allegation violated defendant's Sixth Amendment right to present a defense, particularly because it did not merely paint witness as dishonest but supported defense of fabrication].) The trial court's exclusion of the entire memo as irrelevant was erroneous and violated McKinnon's rights under the Sixth, Eighth, and Fourteenth Amendments.[37]

D. Defense Counsel Did Not Waive McKinnon's Right to Challenge Exclusion of the Memo by Declining to Call Buchanan and Subjecting Him to the Limited Examination the Court's Ruling Allowed

Respondent may argue that defense counsel waived McKinnon's right to challenge the exclusion of the memorandum by declining to call Investigator Buchanan as a witness. Such an argument must be rejected.

The court's ruling made it abundantly clear that although the second paragraph of the memorandum *might* be admissible depending on Buchanan's testimony the memorandum itself was inadmissible under any circumstances. However, as set forth above and as defense counsel argued below, the probative value lay in the memorandum itself – particularly paragraphs one and two together. As further discussed above, even if

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[37] Furthermore, as discussed in part D, below, the relevance of the entire memo, including the third paragraph in which Buchanan expressed his intent also to question Harold Black, became even greater to rebut the prosecutor's guilt phase closing argument that the only rational explanation for the consistencies between Gamble and Black's accounts regarding the gun was that they were truthful. (9 RT 1220.)

defense counsel had been able to lay the foundation the court required with Buchanan's testimony and therefore been permitted to introduce the second paragraph alone, taking that paragraph out of context left a misleading impression.

As further set forth above, the memorandum itself was admissible for legitimate, relevant non-hearsay purposes. As this Court has recognized, extrajudicial statements are admissible for non-hearsay purposes without requiring the proponent to call the declarant, ask if he or she made the statement, and elicit a denial. (See, e.g., *People v. Duran*, *supra*, 16 Cal.3d at pp. 294-295; *People v. Marsh*, *supra*, 58 Cal.2d at pp. 737-738.) This case is no different. McKinnon was entitled to present the memorandum itself without being required to call Buchanan at all, much less being required to elicit specific testimony from him. If the prosecution wished to give Buchanan an opportunity to explain or deny the contents of the memorandum, it was certainly free to call him as its own witness.

E. The Error Requires Reversal of the Martin Murder Conviction, the Multiple Murder Special Circumstance, and the Death Judgment

As discussed in Argument II, above, where, as here, the exclusion of evidence violates a defendant's federal constitutional rights, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; accord, *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Yates v. Evatt*, *supra*, 500 U.S. at p. 404.) Once again, in making this assessment, the reviewing court must determine "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, at p. 279.)

Where, as here, the state's case against the defendant is a close one that turns largely upon witness credibility and the error goes to the critical

credibility question, it is particularly difficult for the state to satisfy this burden. (See, e.g., *Patterson v. McCarthy* (9th Cir. 1978) 581 F.2d 220, 221-222; *People v. Taylor* (1972) 8 Cal.3d 174, 186; *People v. Schindler* (1980) 114 Cal.App.3d 178, 190.) Indeed, when the state's case rests upon the credibility of its witnesses, it is well recognized that any error going to that issue is ordinarily prejudicial even under the more stringent state law test for prejudice, which places the burden on the appellant to prove that a more favorable result was reasonably probable absent the error. (See, e.g., *People v. Wagner* (1975) 13 Cal.3d 612, 620-621; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757; *People v. Taylor* (1986) 180 Cal.App.3d 622, 626; see also, e.g., *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1151-1152 [error prejudicial "even under the more restrictive plain error standard," which requires showing that error deprived defendant of right to fundamentally fair trial]; *Franklin v. Henry*, *supra*, 122 F.3d at p. 1273 [error prejudicial under *Brecht* standard for having substantial and injurious effect on the verdict].) Furthermore, under the state law test, "'in a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249; see also *Kotteakos v. United States* (1946) 328 U.S. 750, 763 [under federal "harmless error statute," errors "that may be altogether harmless in the face of clear error" may nevertheless require reversal when they "might turn scales otherwise level"]; *United States v. Agurs* (1976) 427 U.S. 92, 112-113 ["where the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt"].)

Under any standard, had Buchanan's memo been admitted into

evidence, it is reasonably probable that at least some of the jurors would have concluded that Gamble's dramatic shift of blame to McKinnon for possession of the gun was the false product of undue police pressure. At the very least, some of McKinnon's jurors would have had reasonable doubt as to the veracity of Gamble's testimony. Certainly, any such conclusion would have been devastating to the state's case.

The weakness of the Martin murder case and the jurors' recognition of its closeness have been extensively discussed in Arguments I and II, above, which are incorporated here by reference. Given the seemingly insurmountable credibility problems with the key prosecution witnesses in that case – Harold Black and Marshall Palmer – the gun evidence figured prominently in the state's case. The prosecutor emphasized it as powerful evidence of McKinnon's guilt in both his opening statement to the jurors (4 RT 506) and in his closing argument (9 RT 1218-1220, 1224, 1228).[38]

Indeed, the prosecutor went even further. In response to defense counsel's argument that the evidence that the gun was McKinnon's was not credible and that Harold Black's testimony as a whole was unworthy of belief, the prosecutor emphasized Harold Black's testimony that McKinnon told him he had been arrested for putting a gun in Gamble's purse and exploited the evidentiary error here to argue:

> . . . . *there's no way in the world that Harold Black would know*, if, like defense counsel is saying, Harold Black made all this up, I guess *I don't know where he's saying – where the defense is saying Harold Black got the information*, but Harold Black said what about the gun? He said that the gun

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[38] The strength of the gun evidence was further improperly bolstered by the failure to instruct the jurors on the appropriate consideration of circumstantial evidence. (See Argument IV, below.)

> was picked up by the police when the defendant put it into the girl's purse, in the car, something like that, close to that.
>
> That fact ended up being true, didn't it? We heard from Kimiya Gamble, *who has no connection to Harold Black*, and Kimiya Gamble said, "Yeah, when the police came up, the defendant told me to put it in the – put it – the gun got into my purse. I put it in my purse." The defendant directed her. *There's no way in the world that Harold Black would know that piece of information.*

(9 RT 1220, italics added.) Of course, the memo as a whole, including paragraph three in which Buchanan expressed his intent to interrogate Black, would have provided powerful evidence to rebut the prosecutor's argument and reveal it for the fallacy that it was. It was simply untrue that there was "no way in the world" that Black would "know that piece of information" about the gun story. To the contrary, the memo showed that Buchanan fixed upon that very theory before he had any evidence to support it and then shopped around for witnesses – specifically Gamble *and* Black – to testify to it. Nor was it true that there was "no connection" between Gamble and Black's similar accounts. To the contrary, as the memo would have revealed, the connection was *Buchanan* and his pet theory.

Thus, in effect, the prosecutor successfully obtained exclusion of the evidence as irrelevant yet argued the relevance of such evidence in his summation. It is well settled that a prosecutor's exploitation of an erroneous ruling excluding defense evidence is a strong indication of prejudice. (See, e.g., *People v. Minifie* (1996) 13 Cal.4th 1055, 1071; *People v. Daggett, supra*, 225 Cal.App.3d at p. 757; *People v. Varona* (1983) 143 Cal.App.3d 566, 570; *United States v. Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-1441; *United States v. Toney* (6th Cir. 1979) 599 F.2d 787, 790-791; see also *Kyles v. Whitley, supra*, 514 U.S. at p. 444 ["The likely

damage" from an evidentiary omission for which the prosecution is responsible "is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."].)

In *People v. Minifie*, *supra*, 13 Cal.4th 1055, for instance, this Court held that the trial court erred in excluding evidence that third parties had threatened the defendant, which the defendant arguably associated with the victim, offered in support of his claim of self-defense. (*Id.* at pp. 1065-1068.) In argument, the prosecutor emphasized that there was "no evidence" that the defendant had been threatened and that his claim of self-defense was "contrived" because it was "not supported by the evidence." (*Id.* at p. 1071.) This Court unanimously concluded, "[t]he jury argument of the district attorney tips the scales in favor of prejudice . . . . The reason there was 'no evidence' and the 'contrived' defense was 'not supported by the evidence' is easily explained. The missing evidence was erroneously excluded. This argument demonstrates that the excluded evidence was not minor, but critical to the jury's proper understanding of the case. It is, therefore, reasonably probable [under the state law test for harmless error] the error affected the verdict adversely to defendant." (*Id.* at pp. 1071-1072.)

Similarly, in *People v. Daggett*, *supra*, 225 Cal.App.3d 751, a child molestation prosecution, the trial court erred in excluding defense evidence that the complaining child witness had previously been molested by third parties, which was relevant to explain how the child could have acquired knowledge of molesting behavior. The appellate court concluded that the error was prejudicial due in large part to the prosecutor's closing argument that the child must have acquired the knowledge because the defendant had molested him. (*Id.* at pp. 757-758.) As the court explained, "[t]he

prosecutor asked the jurors to draw an inference that they might not have drawn if they had heard the evidence the judge had excluded. He, therefore, unfairly took advantage of the judge's ruling" and compounded the prejudicial effect thereof, which required reversal. (*Id.* at p. 758; accord, *United States v. Toney*, *supra*, 599 F.2d at pp. 790-791 [any argument that erroneous exclusion of evidence was harmless "is absolutely foreclosed" by prosecutor's argument exploiting evidentiary omission]; *United States v. Ebens*, *supra*, 800 F.2d at pp. 1440-1441 [prosecutor argument pointing to failure to present evidence that had been excluded on its own motion took "unfair advantage" of ruling].)

Here, as in *Minifie* and *Daggett*, the prosecutor highlighted the absence of the excluded evidence and encouraged the jurors to draw inferences adverse to McKinnon that they might not otherwise have drawn had they seen Buchanan's memo and been made aware, contrary to the prosecutor's argument, that Buchanan was a ready and willing source of information about the gun story and himself was a powerful "connection" between Gamble and Black, which provided more than a plausible explanation for the similarities in their stories. As in *Minifie* and *Daggett*, the prosecutor's argument seriously compounded the prejudicial effect of the trial court's evidentiary error here. (See also *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163 [even if evidence otherwise irrelevant, if the prosecutor's theory or argument makes it relevant, its exclusion violates due process]; accord, *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, fn. 1; *Green v. Georgia* (1979) 442 U.S. 95, 97 (per curium); *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-623; *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1217-1218.)

Furthermore, given Sergeant Palmer's facially incredible claim that

Lloyd Marcus had identified McKinnon by name as Martin's Asian or Hispanic killer, along with the "lost" murder book documenting the Martin murder investigation, there is little question that if the jurors had seen Buchanan's memo, the unmistakable stench of police corruption would have permeated the Martin murder case. Given the jury's recognition of the weakness of the case, the myriad other problems with Harold Black's testimony, the critical nature of the gun evidence, and the outrageous police conduct that produced the Martin murder evidence against McKinnon, respondent simply cannot carry its burden of proving beyond a reasonable doubt that the memo evidence would not have raised a reasonable doubt as to McKinnon's guilt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; see also, e.g., *In re Wilson* (1992) 3 Cal.4th 945, 957-958 [introduction of inadmissible evidence prejudicial under *Strickland* standard where state's case otherwise rested on "inherently suspect" testimony of "jailhouse informants" with felony convictions].) Thus, the Martin murder conviction and corresponding ex-felon in possession of firearm conviction must be reversed. Reversal of those convictions, in turn, requires that the sole special circumstance of multiple murder be set aside and the death judgment reversed.

Finally, the erroneous exclusion of Buchanan's memo affected the jury's consideration of the Coder murder case, as well. The memo tended not only to show Gamble's bias and motive for changing her story and shifting blame for the gun's ownership to McKinnon, but also supported McKinnon's defense of fabrication as to both charges. (See, e.g., *Justice v. Hoke*, *supra*, 90 F.3d at p. 49 [exclusion of evidence prejudicial not merely because it would have painted witness as dishonest, but also because it supported defense of fabrication].) Certainly, the memo was compelling

evidence calling into serious question Buchanan's interrogation tactics. Buchanan interrogated not only Gamble and Harold Black, but also Johnetta Hawkins (5 RT 726, 732, 735-737), Orlando Hunt (4 RT 559, 567, 577, 612, 629-630; 13 CT 3598-3632), and Gina Lee (4 RT 646-647; 13 CT 3636, 3629), all of whom were prosecution witnesses in the Coder murder case who changed their stories after being interrogated by Buchanan.[39]

As noted above, Hawkins had denied any knowledge of the shooting on the night it occurred and only changed her story and provided damaging evidence against McKinnon after she was arrested, taken into custody, and interrogated by Buchanan. (5 RT 726, 731-733, 735-737.) Similarly, Hunt had denied any knowledge of the shooting and only changed his story after being interrogated by Buchanan. (4 RT 559, 567, 577, 612, 629-630; 13 CT 3598-3632.) At the preliminary hearing, Lee recanted her statement to Detective Caldwell, and testified that she could not remember the events surrounding the shooting; her recollection was "refreshed" and she changed her story again only after being interrogated by Buchanan. (4 RT 692-694.)

Had the jurors been privy to Buchanan's memo, they surely would have viewed with a more jaundiced eye all witness statements and testimony that his interrogations produced. (See, e.g., *Kyles v. Whitley*, *supra*, 514 U.S. at pp. 445-446 ["damage to prosecution's case" from implication that witness had been coached is not "confined to" undermining that witnesses's testimony, but extends to "the thoroughness and even good

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[39] Although the evidence was not presented to the jurors, it is worth noting that it was also Buchanan to whom Lloyd Marcus allegedly recanted his prior police statement in which he had provided a detailed description of the Martin shooting and the Asian or Hispanic shooter and told him that he did not witness the shooting at all. (1 CT 154-155.)

faith of the investigation, as well"]; *United States v. Sager*, *supra*, 227 F.3d at p. 1145 ["Details of the investigative process" affect not only investigating officer's credibility, but "perhaps more importantly the weight to be given to evidence produced by his investigation"].) Hence, as more fully discussed in Argument VIII, the cumulative effect of this and the errors raised in Arguments I, II, V and VI was prejudicial, violated McKinnon's state and federal constitutional rights to a fair trial and reliable jury verdicts, and requires reversal of the entire judgment.

IV

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING CIRCUMSTANTIAL EVIDENCE VIOLATED STATE LAW, AS WELL AS MCKINNON'S RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND A RELIABLE DETERMINATION OF HIS GUILT OF A CAPITAL OFFENSE, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

As previously discussed, the prosecution presented Kimiya Gamble's testimony that McKinnon was in possession of the Martin murder weapon a week after the killing. As the prosecutor repeatedly argued, that evidence, in turn, tended to show that McKinnon was Martin's killer. Indeed, this piece of evidence was critical given the dubious nature of the other evidence against him.

This evidence was, of course, merely circumstantial evidence of McKinnon's guilt. However, the trial court failed to instruct the jury regarding the legal principles that controlled its consideration of circumstantial evidence. As demonstrated below, this instructional omission violated state law and McKinnon's rights under the Sixth, Eighth and Fourteenth Amendments.

A. The Court Erred in Failing to Instruct the Jury Regarding Its Consideration of Circumstantial Evidence

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt "standard plays a vital role in the American scheme of criminal procedure." (*In re Winship*, *supra*, at p. 363.) It gives substance to the presumption of innocence (*ibid.*), and

lies at the heart of trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"]).

It is well settled that where circumstantial evidence is reasonably susceptible of two interpretations, one of which favors guilt and the other favors innocence, the proof beyond a reasonable doubt and presumption of innocence standard requires jurors to apply the latter interpretation. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933; *People v. Wiley* (1976) 18 Cal.3d 162, 174-175; *People v. Gould* (1960) 54 Cal.2d 621, 629; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 549; see also 3 Witkin Cal. Evid.4th (2000) Presentation, § 142, p. 202.)

It is equally well-settled under California law that "even in the absence of a request, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; accord, *People v. Marks* (1988) 45 Cal.3d 1335, 1345; *People v. Wickersham* (1982) 32 Cal.3d 307, 324.) "The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]" (*People v. Wilson* (1967) 66 Cal.2d 749, 759.)

Of course, jury instructions are of vital importance in every criminal case. (See, e.g., *Carter v. Kentucky* (1981) 450 U.S. 288, 302.) In capital cases, the need for careful guidance in assessing evidence is particularly acute given the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; see also *Beck v. Alabama* (1980) 447

U.S. 625, 637-638 [guilt phase verdicts in capital cases require heightened reliability].) As the Supreme Court has emphasized, in a capital case, "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Pursuant to the foregoing authorities, where circumstantial evidence is substantially relied upon as proof of guilt, the trial court is under a sua sponte obligation to instruct the jurors on the legal principles controlling their consideration of such evidence. (See, e.g., *People v. Wiley* (1976) 18 Cal.3d 162, 174; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 174-175; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 454-456 [trial court committed prejudicial error by failing to instruct jury with CALJIC No. 2.01 where prosecutor substantially relied upon circumstantial evidence to prove defendant's identity as shooter]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [same - to prove intent]; CALJIC No. 2.01 and Use Note.)[40] Providing the jurors with the mandatory

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[40] CALJIC No. 2.01 provides as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

(continued...)

general instruction on the proof beyond a reasonable doubt standard is insufficient to satisfy this obligation. (*People v. Hatchett* (1944) 63 Cal.App.2d 144, 155, cited with approval in *People v. Bender, supra*, 27 Cal.2d at p. 174; see also *People v. Yrigoyen, supra*, 45 Cal.2d at pp. 49-50; *People v. Fuentes, supra*,183 Cal.App.3d at pp. 454-456; 5 Witkin, Cal. Crim. Law.3d (2000) Crim. Trial, § 639, p. 619.)

Assessing whether circumstantial evidence is "substantially" relied upon as proof of guilt involves not merely quantitative analysis, but also a qualitative analysis that considers the importance of the evidence to the prosecution's case. (*People v. Yrigoyen, supra*, 45 Cal.2d at p. 50 [distinguishing "substantial" reliance from merely "incidental or corroborative"]; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142; see also, *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 ["substantial," as in "substantial distance" means movement that is not merely "incidental" to the intended crime, which turns on both qualitative and quantitative nature of movement]; accord *People v. Martinez* (1999) 20 Cal.4th 225, 223.) It would follow, therefore, that when the quality of the direct evidence is weak

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[40] (...continued)

> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.
>
> If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(ACT 626; 11 RT 1410-1411.)

but the quality of the circumstantial evidence is at least *seemingly* strong, and where the prosecution so argues and relies on the seemingly strong or critical nature of the circumstantial evidence, the prosecution has "substantially relied" upon circumstantial evidence to prove guilt.

Here, as discussed in Arguments I and II, the only evidence of McKinnon's guilt of the Martin murder that was not purely circumstantial was Harold Black's testimony that McKinnon had confessed to the murder and Sergeant Palmer's testimony that Lloyd Marcus had identified McKinnon as the killer. (See *People v. Gould* (1960) 54 Cal.2d 621, 629-630 [confession not direct evidence].) For all of the reasons discussed in Arguments I and II, the quality of that evidence was exceedingly weak.

At the same time, the prosecutor argued that McKinnon's possession of the murder weapon a week after the killing was extremely strong evidence of his guilt. (4 RT 506; 9 RT 1218-1220, 1224, 1228.) Indeed, given the weakness of the other evidence due to Black and Palmer's considerable credibility problems, the gun evidence became the most critical component of the state's case. Without it, it is simply beyond dispute the prosecution would not have carried its burden of proving McKinnon's guilt beyond a reasonable doubt. Hence, the prosecution "substantially relied" upon the gun evidence to prove McKinnon's guilt of the Martin murder. Therefore, the court erred in failing to instruct the jurors regarding their consideration of circumstantial evidence.

Respondent may argue nevertheless that the trial court had no duty to so instruct because the gun evidence merely corroborated Harold Black's testimony that McKinnon had confessed to killing Martin. Any such argument must be rejected.

It is true that this Court has recognized an exception to the

circumstantial evidence instructional obligation where the evidence merely "corroborates" direct evidence of a defendant's extrajudicial admission. (*People v. Wright* (1991) 52 Cal.3d 367, 406.) The genesis of this exception is *People v. Jerman* (1946) 29 Cal.2d 189, 194, wherein this Court held that the instruction need not be given where the "circumstantial evidence is merely *incidental to and corroborative of* the direct evidence." (Italics added; see also *People v. Yrigoyen, supra*, 45 Cal.2d at p. 50 [in announcing sua sponte instructional duty where prosecution "substantially relies" on circumstantial evidence, Court recognized exception as stated in *Jerman*]; *People v. Malbrough* (1961) 55 Cal.2d 249, 250-251 [instruction unnecessary where circumstantial evidence is "incidental to, and corroborative of, direct evidence," citing *Jerman*]; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1142 [same - citing *Malbrough*].) However, even if it can be characterized as "corroborative," if the evidence is important and not merely "incidental," the exception does not apply.

Indeed, if the exception applied whenever the circumstantial evidence could be characterized merely as "corroborative" of other evidence, without regard to its importance to the state's case, the exception would swallow the rule. Unless the circumstantial evidence is the *only* evidence of guilt, it can always be characterized as corroborative of other evidence. Hence, the instructional obligation would only apply if circumstantial evidence were the *only* evidence of guilt. Of course, this is not the law. (*People v. Yrigoyen, supra*, 45 Cal.2d at p. 49.)

Certainly, the gun evidence was not merely "incidental to and corroborative of" Black's testimony that McKinnon had confessed to killing Martin. Once again, while Black testified that McKinnon told him that the gun in Gamble's purse was his, Black never suggested that the gun was the

Martin murder weapon. The gun evidence was central to the state's case. In effect, it assured the jurors that they need not be concerned with the deeply troubling questions about Black and Palmer's credibility. If McKinnon possessed the gun a week after the murder, and in the absence of *McKinnon* proving that the *only* explanation for its possession was a reasonable one, he must have been the killer, even if the jurors did not believe Black or Palmer.

To be sure, the trial court did instruct the jury regarding circumstantial evidence as it related to intent or mental state (CALJIC No. 2.02) and to the multiple murder special circumstance allegation (CALJIC Nos. 8.83, 8.83.1). (14 CT 3818, 3868-3869; 9 RT 1233-1234, 1253-1254.) However, rather than alleviating the error, these instructions only served to compound it.

It is axiomatic that lay jurors apply logic and commonsense to their understanding of instructions. (See, e.g., *Boyde v. California* (1990) 494 U.S. 370, 381; *People v. Coddington* (2000) 23 Cal.4th 529, 594.) The maxim expressio unius est exclusio alterius, or the expression of one thing is the exclusion of another, is "a product of logic and common sense" (*Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607-608; accord, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 522) and a "deductive concept commonly understood" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.)). The maxim holds that where specific items are listed, it is assumed that the omission of items similar in kind is intentional and the omitted items are therefore excluded. (*Ibid.*) Courts consistently apply the maxim in resolving how lay jurors would understand a particular instruction, whether explicitly (see, e.g., *People v. Castillo*, *supra*, at p. 1020; *People v. Watson* (1899) 125 Cal. 342, 344) or implicitly

(see, e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [instruction specifying factors jurors "may" consider necessarily implied that it "may not" consider factors that were not mentioned]; *People v. Vann* (1974) 12 Cal.3d 220, 226-227 [where standard reasonable doubt instruction omitted, provision of instruction applying reasonable doubt standard to circumstantial evidence implied that the standard did *not* apply to direct evidence]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [instruction that doubts between greater and lesser offenses are to be resolved in favor of lesser specified first and second-degree murder but did not mention second-degree and manslaughter left "clearly erroneous implication" that rule did not apply to omitted choice]; *People v. Salas*, *supra*, 58 Cal.App.3d at p. 474 [instruction on circumstantial evidence specifically directed to intent element of one charge created reasonably probability that jurors understood omission of second charge to be intentional and thus that circumstantial evidence rules did not apply to second charge].) Hence, by specifically instructing the jurors regarding their consideration of circumstantial evidence to the limited issues of mental state and the truth of the multiple murder special circumstance allegation, the court implicitly but undeniably instructed them that the rule did *not* apply to any other issues. Indeed, this is no doubt why the Use Notes to CALJIC Nos. 2.01 and 2.02 specifically state that the two instructions "should never be given together. This is because CALJIC 2.01 is inclusive of all issues, including mental state and/or specific intent, whereas CALJIC 2.02 is limited to just mental state and/or specific intent. . . . If the circumstantial evidence relates to other matters, or other matters as well as specific intent or mental state, CALJIC 2.01 should be given and not CALJIC 2.02."

In sum, the court erred under state law in failing to instruct sua

sponte with CALJIC No. 2.01. Because that instruction is essential to the due process guarantee that a defendant will not be convicted of a crime absent proof beyond a reasonable doubt and to reliable jury determinations that the defendant is guilty of a capital offense, the error also violated McKinnon's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

B. The Error Requires Reversal of the Martin Murder Conviction, the Multiple Murder Special Circumstance, and the Death Judgment

As previously discussed, because the instructional error violated McKinnon's federal constitutional rights, respondent bears the burden of proving beyond a reasonable doubt that it was harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404; *Chapman v. California* (1967) 386 U.S. 18, 24.) Once again, respondent cannot meet its burden.

As discussed in Argument I-E, above, even if McKinnon did possess the gun before it was discovered in Kim Gamble's purse, there certainly were reasonable explanations for that fact that were entirely consistent with innocence. McKinnon's girlfriend, Gamble, admitted that she was attempting to obtain a gun at that time. (7 RT 1042-1043.). McKinnon could have purchased the gun for her. Further, according to the prosecution's own evidence, McKinnon was a small time drug dealer in a community in which virtually anything and everything was bartered for drugs. (5 RT 741-742; 6 RT 811-812, 815, 940; 13 CT 3583, 3588, 3592, 3613-3614.) Hence, one logical explanation for the presence of the gun in Gamble's purse was that McKinnon bartered drugs for the gun after the murder in order to give it to her.

Indeed, this was the explanation trial counsel argued to the jurors in summation. (9 RT 1183, 1186; see also 4 RT 512 [opening statement to the same effect].) In response, the prosecutor argued that the jurors should reject this explanation because McKinnon had failed to prove it with direct evidence (in the form of a witness who would have testified that he or she had given the murder weapon to McKinnon in exchange for drugs). (9 RT 1218-1219.) The omitted circumstantial evidence instruction would have revealed this argument for the fallacy that it was: in order to prove its case with circumstantial evidence, *the prosecution* bore the burden of proving that the *only* reasonable explanation for McKinnon's possession of the gun was that he had used it to kill Martin, *not* the defendant's burden to affirmatively *prove* that the *only* reasonable explanation was an *innocent* one. It is well settled that a prosecutor's argument exploiting an instructional omission is a strong indication of prejudice. (See, e.g., *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490; *People v. Wims* (1995) 10 Cal.4th 293, 315; *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490 [instructional error prejudicial and violated defendant's right to fair trial in large part due to prosecutor's exploitation of error in argument]; *People v. Roder* (1983) 33 Cal.3d 491, 503, 505, & fn. 13 [same]; *Coleman v. Calderon* (9th Cir. 1999) 210 F.3d 1047, 1051 [same].) Particularly given the closeness of the case and the affirmative evidence that the jurors recognized it as such, as discussed in the previous arguments, respondent cannot prove the error harmless beyond a reasonable doubt. (See *People v. Fuentes*, *supra*, 183 Cal.App.3d at pp. 455-456 [failure to instruct with CALJIC No. 2.01 prejudicial even under state law standard where evidence was susceptible of reasonable interpretation favoring innocence and record of deliberations wherein jurors requested testimony read-back and

deliberated nine and one-half hours indicated close case].)

Finally, even if this Court were to disagree that the instructional error, standing alone, requires reversal, it cannot be disputed that, under any standard, the cumulative effect of this error, along with the trial court's exclusion of the Buchanan memo, was prejudicial. As discussed in Argument III, the memo would have provided yet another reasonable explanation for the discovery of the gun in Gamble's purse that was consistent with McKinnon's innocence: the gun was Gamble's and she had purchased it from someone else, as she admitted at the time of her arrest and when she later pled guilty to possessing the gun, and that she only changed her story and claimed that the gun was McKinnon's because Buchanan pressured her into doing so. Had the jurors received and considered the memo along with CALJIC No. 2.01, they would have been *bound* to accept the reasonable explanations for the discovery of the gun in McKinnon's proximity that were entirely consistent with his innocence and reject the prosecution's explanation that it meant that he must have been Martin's killer. Once again, given the unusually incredible nature of the only other evidence against him – the testimony of Harold Black and Marshall Palmer – under any standard of prejudice, it cannot be disputed that if the jurors had performed their duty in this regard, their verdicts on the Martin murder charge and the sole, multiple murder special circumstance allegation, would have been different. (See, e.g., *Alcala v. Woodford*, *supra*, 334 F.3d at pp. 883, 893 [cumulative effect of errors more likely to be prejudicial where state's case is weak].) The Martin murder conviction, the sole special circumstance of multiple murder, and the death judgment must be reversed.

V

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW, AS WELL AS MCKINNON'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY DETERMINATIONS THAT HE WAS GUILTY OF A CAPITAL OFFENSE UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY ADMITTING EVIDENCE THAT ORLANDO HUNT FAILED A POLYGRAPH EXAMINATION WHEN HE DENIED HAVING WITNESSED MCKINNON SHOOT PERRY CODER

A. Introduction

On cross-examination, Orlando Hunt admitted that in his first police interrogations, he disavowed any knowledge of the Coder murder. (4 RT 575-579.) After he spoke to some "people in San Bernardino," he again spoke to police and eventually told them that he had witnessed McKinnon shoot Coder. (4 RT 579-580.) Defense counsel questioned him about the inconsistency in these statements, and whether he eventually implicated McKinnon because the prosecutor told him that he had to "choose" between being a defendant charged with murder or being an eyewitness to the murder. (4 RT 580-582; see also 13 CT 3599 [prosecutor telling Hunt that his "choice" came down to: "you're either a defendant or you're an eyewitness"].)

At sidebar, the prosecutor explained that Hunt's reference to the San Bernardino interview was in fact a reference to a polygraph examination that he had failed. (4 RT 584.) The prosecutor moved to admit the evidence that Hunt had failed the polygraph in order to explain why he eventually changed his account and claimed to have witnessed the shooting. (4 RT 584.) Defense counsel "strongly object[ed]" to any reference to the polygraph examination or its results on the ground that it was inadmissible

and would give Hunt's testimony implicating McKinnon a stamp of approval in a "'scientific way' which has not been recognized by the courts." (4 RT 584-585.)

The court overruled the objection and admitted the evidence. (4 RT 585-586.) It reasoned that the polygraph evidence was not admissible to prove that Hunt actually failed the exam; however, the examination and communication of the results to Hunt were "relevant," and therefore admissible, to explain his "state of mind" and why he changed his story, which was "pivotal" to his credibility. (4 RT 586-587.) Defense counsel reiterated that he objected to "any use" of the polygraph evidence "in any way," to no avail. (4 RT 586.)

Thereafter, the prosecutor elicited from Hunt that, prior to the polygraph examination, he had told police that he was not present when Coder was killed. (4 RT 612.) Thereafter, he took a polygraph examination and was informed that the results showed that he had "lied on certain things." (4 RT 613.) At that point, according to Hunt, he told "the truth about . . . actually being an eyewitness to the murder" for the "first time." (4 RT 613-614.)

The prosecution introduced the tape recording and transcript of Hunt's post-polygraph interrogation in which he finally told "the truth." (5 RT 757-760; People's Trial Exhibit 35 at 13 CT 3598-3632.) As set forth in the Statement of Facts, in that interrogation, Hunt initially said that he was in front of the motel when McKinnon ran behind it and he heard the sound of gunshots. (13 CT 3600-3601.) He denied actually witnessing the shooting. (13 CT 3601.) Buchanan pointedly asked him, "wasn't one of the questions on the polygraph uh, were you there when uh, Popeye shot the victim?" (13 CT 3601.) The prosecutor added that he knew Hunt was lying

and threatened to charge him with the murder. (13 CT 3601-3603.) Hunt relented and agreed that he had witnessed McKinnon shoot Coder, the same story to which he ultimately testified at trial. (13 CT 3611-3621.)

Thus, the evidence as a whole showed that Hunt was given a polygraph examination, that the examiner not only asked him if he had witnessed the shooting, but also if he had witnessed *McKinnon* commit it, and the examiner informed him that he had failed the polygraph when he denied witnessing McKinnon kill Coder.

As discussed below, the court's admission of this evidence was egregious error in violation of black letter state law. Moreover, because polygraph evidence is unreliable and that unreliable evidence served unfairly to bolster and rehabilitate the testimony of a critical prosecution witness in this capital case, the court's error violated McKinnon's rights to a fair trial and reliable jury verdict on the question of his guilt or innocence of the Coder murder and the related multiple murder special circumstance allegation, as guaranteed by the Sixth, Eighth and Fourteenth Amendments. As respondent will be unable to prove the error harmless beyond a reasonable doubt, the Coder murder conviction must be reversed, the sole special circumstance of multiple murder set aside, and the death judgment reversed.

B. Polygraph Evidence is Unreliable and Absolutely Inadmissible Absent the Single Exception of Stipulation, a Ban to Which There is No "State of Mind" Exception

Evidence Code section 351.1, subdivision (a), enacted in 1983, unequivocally provides:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take or taking of a polygraph examination, shall not be admitted into evidence

> in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or a hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

The statute creates an absolute, categorical ban on admission of polygraph evidence and an exception to the truth-in-evidence provision of Proposition 8 (Calif. Const., art. I, § 28, subd. (d)) "that relevant evidence shall not be excluded in any criminal proceeding." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 827, 845, 848-850, and authorities cited therein [evidence inadmissible even if proponent is able to establish reliability under *Kelly/Frye* test]; *People v. Maury* (2003) 30 Cal.4th 342, 413; *People v. Fudge* (1994) 7 Cal.4th 1075, 1022; *People v. Espinoza* (1992) 3 Cal.4th 806, 816-817; *People v. Lee* (2002) 95 Cal.App.4th 772, 790-791; *People v. Basuta* (2001) 94 Cal.App.4th 370, 389-391; *In re Aontae D.* (1994) 25 Cal.App.4th 167, 176.) "This firm and broad rule of exclusion is justified by the unreliable nature of polygraph results, by the concern that jurors will attach unjustified significance to the fact of the outcome of such examination and because introduction of polygraph evidence can negatively affect the jury's appreciation of its exclusive power to judge credibility." (*People v. Basuta, supra*, 94 Cal.App.4th at p. 390; accord, *People v. Wilkinson, supra*, 33 Cal.4th at pp. 845-850; see also *United States v. Scheffer* (1989) 523 U.S. 303, 312 [categorical ban on polygraph is constitutionally acceptable due to its inherent unreliability].) Hence, polygraph evidence is inadmissible even if otherwise relevant to any issue in the case (see, e.g., *People v. Lee, supra*, 95 Cal.App.4th at pp. 790-791), even if not offered to prove the results (*ibid.*), even if only to show an offer or refusal to take the test (see, e.g., *People v. Espinoza* (1992) 3 Cal.4th

806, 816-817; *People v. Basuta*, *supra*, 94 Cal.App.4th at pp. 389-391), and even if the opponent might otherwise be said to have "opened the door" to the subject (*People v. Samuels* (2005) 36 Cal.4th 96, 127 [prosecution's evidence that defendant was not cooperative in police investigation did not open door to inadmissible evidence that she cooperated by offering to take polygraph]; *People v. Basuta*, *supra*, at pp. 390-391 [erroneously admitted evidence that witness willingly took polygraph test did not open the door to allow opponent to introduce results]). Indeed, it is inadmissible even if it would otherwise comprise a significant part of a criminal defendant's constitutionally guaranteed right to present a defense or mitigating evidence. (*People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 848-850, and authorities cited therein). Of course, "we should not have one rule for the prosecution and another rule for the defense." (*United States v. James* (9th Cir. 1999) 169 F.3d 1210, 1214.)

In *People v. Lee*, *supra*, 95 Cal.App.4th 772, for instance, a prosecution witness in a murder case denied knowing who had shot the victim. The trial court admitted evidence that he took a polygraph examination in which he again disavowed knowledge of the murder, that he was later told that he had failed the exam, and his post-polygraph police interrogation, which yielded his statement that the defendant had shot the victim. The state argued that the evidence was *not* offered to prove the truth or falsity of the witness' answers, but rather to explain "his state of mind when he changed his story and admitted seeing the defendant shoot [the victim]." (*Id.* at p. 790.) The trial court agreed the evidence was admissible on this ground and cautioned the jury: "Polygraph results are not admissible. You are not to discuss or consider the subject of polygraph, how it works (or) any facts relating to polygraph examination. Polygraph

examination has been admitted in this court for the limited purpose of showing the effect on the knowledge of a polygraph test on the listener, who is [the prosecution witness]. You are not to consider the polygraph results for any other purpose." (*Id.* at p. 791.)

The defendant appealed on the ground, inter alia, that the court violated Evidence Code section 351.1 by admitting the polygraph evidence. (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 790.) The state argued that because the evidence was relevant and expressly limited to the witness' state of mind, it was admissible notwithstanding section 351.1. (*Id.* at pp. 790-791.)

The reviewing court soundly rejected such a theory of admissibility:

> We find this argument unpersuasive for several reasons. It is disingenuous to argue the polygraph evidence was not offered to establish the defendant's guilt. If it was not offered for that purpose, then it was irrelevant. Clearly, however, the prosecution introduced the evidence because it wanted the jury to believe the test results, which showed [the witness] lied when he said he did not know who shot [the victim] so that the jury would also believe he was telling the truth when he said defendant shot [the victim]. Furthermore, there is no "state of mind" exception to the ban on polygraph evidence. Unlike hearsay evidence, which is only banned if it is offered "to prove the truth of the matter stated," [footnote omitted] polygraph evidence "shall not be admitted into evidence in any criminal proceeding." [Evid. Code, § 351.1]. Finally, whatever may have been the law on the collateral use of polygraph evidence prior to 1983 [footnote omitted], Evidence Code section 351.1 simply and unambiguously prohibits the admission of evidence that a person took a polygraph test.

(*People v. Lee*, *supra*, 95 Cal.App.4th at p. 790.)

Furthermore, the trial court's jury instruction to focus on the "effect" of the evidence on the witness and not the results did nothing to prevent the

jury from considering the results:

> Obviously, the effect of the test results was to cause [the witness] to name defendant as the killer after previously denying any knowledge about who killed [the victim]. It is impossible in this case to separate the inadmissible "results" of the polygraph test to their "effect" on [the witness]. Thus, the jurors were permitted to infer [the] polygraph caught [the witness] in a lie and caused him to abandon the lie and tell the truth – that defendant was the killer. This was tantamount to receiving into evidence the results of the polygraph examination. Its probable impact on the jury was to place the badge of credibility on [the witness'] post-polygraph statements to the police incriminating defendant . . . .

(*People v. Lee*, *supra*, 95 Cal.App.4th at pp. 791-792.) Given the "inordinately high degree of authority" lay persons tend to invest in polygraph, the court concluded that the error was prejudicial and required reversal. (*Ibid.*; accord, *People v. Basuta*, *supra*, 94 Cal.App.4th at pp. 389-391 [while results were neither admitted nor suggested, reference to witness' willingness to take polygraph examination was clear violation of section 351.1 and amounted to prejudicial error because it served to bolster credibility of key prosecution witness; at same time, while reference to prosecution witness' offer to take polygraph was improper under section 351.1 and suggested that she actually passed, it did not open door to allow defendant to present equally inadmissible evidence of results]; see also *United States v. Murray* (6th Cir. 1986) 784 F.2d 188, 189-190 [mere mention of polygraph so prejudicial as to demand reversal in case where evidence of guilt was "not overwhelming"].) This case is nearly identical to *Lee*.

C. The Trial Court's Admission of the Polygraph Evidence Under a Non-Existent and Legally Invalid "State of Mind" Exception to Section 351.1 Violated State Law, as Well as McKinnon's Federal Constitutional Rights to Due Process and Reliable Jury Verdicts That He was Guilty of a Capital Offense

Here, as in *Lee*, the state presented evidence that Hunt was told that he had failed a polygraph when he denied knowledge of the Coder murder. (4 RT 612-614.) Even worse than in *Lee*, the polygraph evidence as a whole showed that Hunt failed the polygraph when he specifically denied having witnessed *McKinnon* kill Coder. (4 RT 612-614; 5 RT 757-760; 13 CT 3601-3603.) Just as in *Lee*, the prosecution and the trial court reasoned that the evidence was admissible notwithstanding section 351.1 because it was relevant to Hunt's "state of mind" to explain why he later changed his story. (4 RT 584-587.) Just as in *Lee*, this was error as there is no "state of mind" exception to section 351.1's categorical ban on the admission of all polygraph evidence. (*People v. Lee*, *supra*, 95 Cal.App.4th at pp. 790-791.)

Furthermore, as in *Lee*, admission of the evidence led to the inevitable inference that the results "showed [Hunt] lied when he said he did not know who shot [Coder] so that the jury would also believe he was telling the truth when he said defendant shot [Coder]." (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 790.) In other words, "the jurors were permitted to infer [that the] polygraph caught [Hunt] in a lie and caused him to abandon the lie and tell the truth – that [McKinnon] was the killer. This was tantamount to receiving into evidence the results of the polygraph examination. Its probable impact on the jury was to place the badge of credibility on [Hunt's] postpolygraph statements to the police incriminating [McKinnon] . . . ." (*People v. Lee*, *supra*, 95 Cal.App.4th at pp. 791-792.) Just as in *Lee*, the court's admission of the evidence violated Evidence

Code section 351.1. In addition, admission of the evidence violated McKinnon's federal constitutional rights.

The Sixth and Fourteenth Amendments guaranteed McKinnon a fair trial by an impartial jury. "A fundamental premise of our criminal justice system is that 'the *jury* is the lie detector.'" (*United States v. Scheffer*, *supra*, 523 U.S. at p. 313, quoting from *United States v. Barnard* (9th Cir. 1973) 490 F.3d 907, 912.) The erroneous admission of polygraph evidence improperly invades the province of the jury and its "exclusive power to judge credibility." (*People v. Basuta*, *supra*, 94 Cal.App.4th at p. 390.) As the United States Supreme Court has recognized, "by its very nature, polygraph evidence may diminish the jury's role in making credibility determinations" because the "aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt." (*United States v. Scheffer*, *supra*, at p. 313.) Particularly where – as here – the state's case turns on the credibility of its witnesses, the erroneous admission of polygraph evidence that serves to bolster or rehabilitate the credibility of a prosecution witness deprives the defendant of his Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury. (Cf. *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 738 [admission of expert testimony regarding credibility of witness invaded province of jury to assess credibility and find facts and deprived defendant of fair trial]; *United States v. Rockwell* (3d Cir. 1986) 781 F.2d 985, 989-991 [trial court action which invades province of jury to assess witness credibility deprives defendant of a fair trial].)

Furthermore, the Eighth and Fourteenth Amendments guarantee heightened reliability in the guilt and penalty verdicts in a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) A fortiori, the evidence

on which the verdicts rest must be reliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [reliance on "materially inaccurate" evidence in capital case violates Eighth Amendment]; *People v. Murtishaw* (1981) 29 Cal.3d 733, 768-771 [expert predictions of future dangerousness insufficiently reliable to satisfy Eighth Amendment]; *McDowell v. Calderon* (9th Cir. 1997) 107 F.3d 1351, 1366; *United States v. Friend* (E.D. Va. 2000) 92 F.Supp.2d 534, 544-545; *United States v. Gilbert* (D. Mass 2000) 120 F.Supp.2d 147, 153 [Eighth Amendment prohibited admission of unreliable statistical evidence in guilt and penalty phases of capital trial]; *United States v. Davis* (E.D. La. 1996) 912 F.Supp. 938, 941, 943-944, 947.) Similarly, federal due process demands that criminal convictions be based upon reliable evidence. (See, e.g., *Manson v. Braithwaite* (1977) 402 U.S. 98, 104-107; *People v. Badgett* (1995) 10 Cal.4th 330, 347-348; *Clanton v. Cooper* (10th Cir. 1997) 129 F.3d 1147, 1157-1158.) With considerable support, our Legislature has declared that polygraph evidence is unreliable. McKinnon's jury received and considered this unreliable evidence in every phase of this case, from its guilt phase murder verdict on the Coder charge, to its special circumstance/death eligibility verdict that necessarily rested on the Coder murder verdict, to its death verdict, which was based upon all of the circumstances of the crimes and the sole special circumstance finding. (Pen. Code, § 190.3, subd. (a).) Hence, admission of the evidence also violated McKinnon's rights under the Eighth and Fourteenth Amendments.[41]

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[41] Once again, although defense counsel did not add federal constitutional grounds to his objections to the evidence, the trial court

(continued...)

D. As Respondent Will be Unable to Prove the Error Harmless Beyond a Reasonable Doubt, the Coder Murder Conviction, Sole Special Circumstance of Multiple Murder, and Death Judgment Must Be Reversed

Again, because the error violated McKinnon's federal constitutional rights, respondent bears the burden of proving it harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404; *Chapman v. California* (1967) 386 U.S. 18, 24.) Once again, respondent will be unable to carry its burden.

As discussed in Argument III-C, above, where the state's case rests upon the credibility of its witnesses, any error going to the critical credibility issue ordinarily demands reversal, whether under the harmless-beyond-a-reasonable-doubt standard applicable to violations of the federal constitution (see, e.g., *People v. Quartermain* (1997) 16 Cal.4th 600, 623; *People v. Taylor* (1972) 8 Cal.3d 174, 186; *People v. Schindler* (1980) 114 Cal.App.3d 178, 190), or under the more stringent state law test for prejudice, which places the burden on the appellant to prove the reasonable probability of a more favorable result in the absence of the error (see, e.g., *People v. Wagner* (1975) 13 Cal.3d 612, 620-621; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757; *People v. Taylor* (1980) 180 Cal.App.3d 622, 626). As this Court observed over 40 years ago – an observation that

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[41] (...continued)
granted – without objection from the People – his motion to consider all of his objections and motions under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (1 CT 209-213; 1 RT 9.) Moreover, McKinnon's claim is that the legal consequence of the court's state law error in admitting the evidence in violation of Penal Code section 351.1 also violated his federal constitutional rights, a claim that is not forfeited by failing to object on those grounds below. (See, e.g., *People v. Partida, supra*, 37 Cal.4th at pp. 436-439; *People v. Yeoman* (2003) 31 Cal.4th 86, 133.)

carries equal force today – when "[t]he jury was required, in order to reach a verdict, to reject the testimony produced by the defense and to accept that produced by the prosecution. . . , [i]t is apparent that anything which tended to discredit the defense . . . or to bolster the story told by [the prosecution witnesses] assumed an importance that would not be attributable to it in the ordinary situation. Thus, even though the evidence was sufficient to sustain the verdict, its nature was such as requires close scrutiny when determining the prejudicial nature of any error." (*People v. Briggs* (1962) 58 Cal.2d 385, 404 [reversing].)

Certainly, the evidence was critical to the state's case. As previously discussed, Harold Black's inexplicably belated and inconsistent claim that McKinnon confessed to shooting Coder was simply incredible. The serious reliability and credibility problems underlying Hunt and Kerry Scott's testimony identifying McKinnon as the killer and Gina Lee's prior police statement identifying him as one of the men running from the shooting, have been extensively discussed in Argument I, which is incorporated here. As discussed above, although polygraph evidence is unreliable, "lay persons tend to invest such evidence with an inordinately high degree of authority." (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 792; accord, *People v. Wilkinson*, *supra*, 33 Cal.4th at p. 845 [quoting from legislative history materials relating to section 351.1 expressing concern that jurors "assign too much credence" to polygraph notwithstanding its unreliability]; *People v. Basuta*, *supra*, 94 Cal.App.4th at p. 390; *People v. Aragon* (1957) 154 Cal.App.2d 646, 658.) Hence, the evidence was devastating to the defense in that it tended to vest Orlando Hunt's claim that McKinnon killed Coder with an enormous degree of credibility and reliability – far greater than that to which it was entitled. And, bolstering and rehabilitating Hunt's

testimony that McKinnon was Coder's killer served artificially to corroborate Scott and Lee's otherwise incredible trial testimony and prior police statement to the same effect. In short, the erroneously admitted evidence unfairly fortified the prosecution's *entire* case against McKinnon for the Coder murder – a flimsy case greatly in need of such fortification.

On this record, respondent cannot prove beyond a reasonable doubt that the Coder murder verdict "was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Even under the less stringent state law test for prejudice, it is more than reasonably probable that the result of the proceeding would have been more favorable absent the bolstering effect of the polygraph evidence. (See, e.g., *People v. Lee*, *supra*, 95 Cal.App.4th at p. 792 [error prejudicial under state law standard]; *People v. Basuta*, *supra*, 94 Cal.App.4th at p. 389-391 [same]; see also, *People v. Rivera* (1985) 41 Cal.3d 388, 393, & fn. 3 [hung jury is more favorable result]; *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [same]; *People v. Sellars* (1977) 76 Cal.App.3d 265, 271 [same].) The Coder murder conviction, the related firearm possession conviction, the sole special circumstance of multiple murder, and the death judgment must be reversed.

VI

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND MCKINNON'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BY ADMITTING HIGHLY PREJUDICIAL AND INCOMPETENT WITNESS INTIMIDATION EVIDENCE

A. Introduction

As discussed in Argument III, the trial court excluded absolutely critical and admissible *defense* evidence that *the state* had intimidated Kim Gamble into testifying that the Martin murder weapon was McKinnon's on the ground that it considered the evidence to be irrelevant. The trial court then admitted *prosecution* evidence that *McKinnon and his sister* had intimidated witnesses in attempts to suppress evidence against him. As will be demonstrated, the court erred in admitting this evidence because: 1) it was cumulative and otherwise highly prejudicial and therefore should have been excluded under Evidence Code section 352; 2) the prosecutor failed to provide notice to defense counsel; and 3) the evidence was inadmissible hearsay. These errors violated state law. Furthermore, the effect of these errors was prejudicial and violated McKinnon's Sixth and Fourteenth Amendment rights to a fair trial and a reliable jury verdict that he was guilty of a capital offense.

B. The Trial Court Erred in Admitting Highly Prejudicial Evidence That McKinnon's Sister was Involved in Threatening and Assaulting Orlando Hunt Over His Claim That McKinnon Killed Coder

On redirect examination of Orlando Hunt, the prosecutor elicited testimony that he had had a "problem" at a party shortly after his most recent release from prison and after he had implicated McKinnon in

Coder's murder. (4 RT 615-616.) Defense counsel immediately objected. (4 RT 616.) At sidebar and by way of an offer of proof, the prosecutor explained that Hunt had informed him that he was at a party when McKinnon's sister, Robin, confronted him and told him that he would get "hurt" if he testified against her brother, immediately after which he was hit and kicked and "felt very threatened." (4 RT 616-617.)

Defense counsel objected to admission of the evidence on three grounds. (4 RT 616-617.) First, he had received no notice or discovery regarding the incident. (4 RT 616-617.) Second, the evidence was not relevant because there was no evidence that McKinnon had authorized the threat or assault. (4 RT 617.) Third, if the court found that the evidence bore some relevance, for the same reasons, it was more prejudicial than probative and therefore should be excluded under Evidence Code section 352. (4 RT 617.)

The prosecutor agreed that defense counsel was "probably correct" that he had failed to provide discovery regarding the incident. (4 RT 616-617.) He recalled discussing the incident with Hunt, but "I don't remember - I'm fairly certain that there's no police report or anything that I had seen . . ." (4 RT 617.) As to the relevance of the information, the prosecutor conceded that there was no evidence that McKinnon had authorized the threat or assault, but explained that he was not offering the evidence for that purpose, but rather as evidence relevant to Hunt's credibility. (4 RT 617.)

The court agreed the evidence was admissible to the issue of Hunt's credibility and overruled counsel's objection. (4 RT 617-618.) Defense counsel requested that the jury at least receive a limiting instruction. (4 RT 617-618.) The court agreed and directed defense counsel to draft one. (4 RT 617-618.) Given that defense counsel had been given no notice of the

evidence, no opportunity to prepare an instruction, and Hunt was in the midst of his testimony, he asked the court to provide one at that time "off the cuff." (4 RT 618.) The court agreed. (4 RT 618.)

Hence, Hunt testified that in November of 1996, he went to a party where he encountered McKinnon's sister, Robin. (4 RT 615-616, 620.) Robin confronted him about implicating her brother in the Coder murder. (4 RT 620.) When Hunt turned away, he was hit over the head with a beer bottle and kicked "all over" his face. (4 RT 620.) Someone told him that something would happen to him if he went to court. (4 RT 620.) He was treated at the hospital and released. (4 RT 620-621.) While he did not report the incident to police, he claimed that he immediately reported the incident to both the prosecutor and Investigator Buchanan, or to Buchanan alone, who came to his home and took his statement. (4 RT 626-628.) No evidence was offered to corroborate Hunt's claim, such as hospital records, a report or notes of his statement, or Buchanan's testimony. The trial court instructed the jurors that: "this evidence was introduced as it bears upon the witness' state of mind and demeanor while testifying. There is no evidence that the defendant assisted or played any role in the alleged assault." (4 RT 621.)

As explained below, the court erred in admitting this evidence, an error the court's admonition did nothing to alleviate.

1. The Relevant Legal Principles.

Evidence of third party efforts to dissuade a witness from testifying may be relevant and admissible for two purposes: First, where there is evidence that the threats were authorized by the defendant, the evidence is admissible as tending to show the defendant's consciousness of guilt. (See, e.g., *People v. Hannon* (1977) 19 Cal.3d 588, 589; *People v. Terry* (1962)

57 Cal.2d 538, 565-566.) While authorization may be proved by circumstantial evidence, it is well settled that proof of mere relationship between the defendant and the third party is, as a matter of law, "no proof of authorization." (*People v. Terry*, *supra*, at p. 567; *People v. Perez* (1959) 169 Cal.App.2d 473, 478.) Similarly, "proof of a criminal defendant's 'mere opportunity' to authorize a third person to attempt to influence a witness 'has no value as circumstantial evidence' that the defendant did so." (*People v. Williams, supra*, 16 Cal.4th at p. 200, citing *People v. Terry*, *supra*, at p. 566.) Absent proof of such authorization, the evidence is irrelevant and inadmissible against the defendant. (*People v. Hannon*, *supra*, at p. 589; *People v. Terry*, *supra*, at pp. 565-566; *People v. Weiss* (1958) 50 Cal.2d 535, 554; *People v. Pitts* (1990) 223 Cal.App.3d 606, 778-781; *People v. Perez*, *supra*, at p. 478.)

Second, such evidence may be admissible on the issue of the threatened witness' credibility. When offered solely for this purpose, even unauthorized third party threats may be admissible because it is the witness' state of mind, not the defendant's conduct, that is relevant. (*People v. Yeats* (1984) 150 Cal.App.3d 983, 986.) If "the prosecution . . . first establish[es] the relevance of the witness' state of mind by demonstrating that the witness' testimony is inconsistent or otherwise suspect," third party threats may be admissible to impeach a witness on the theory that it shows a "bias, interest, or other motive" not to tell the truth. (*Ibid.*; accord, *People v. Burgener* (2003) 29 Cal.4th 833, 868; *People v. Brooks* (1979) 88 Cal.App.3d 180, 187.) On the other hand, the jury may find that "a witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; accord *People v. Stewart* (2004)

33 Cal.4th 425, 492, fn. 28.)

Evidence of third party threats relevant solely on the issue of witness credibility, however, is subject to admission under Evidence Code section 352. In other words, the evidence should be excluded if its probative value is substantially outweighed by its danger of prejudice.

With respect to prejudice, it has long been recognized that evidence of unauthorized third party threats to witnesses carries a substantial danger that the jury will attribute the third party's conduct to the defendant, infer from it that he is a bad man who is more likely than not guilty of the charged crime, and thereby creates undue prejudice. (*People v. Terry*, *supra*, 57 Cal.2d at pp. 565-566 [admission of unauthorized third party threats evidence prejudicial error]; *People v. Weiss*, *supra*, 50 Cal.2d at p. 554; *People v. Perez*, *supra*, 169 Cal.App.2d at pp. 477-478 [same]; see also *People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187 [evidence regarding threats to witnesses is "extremely prejudicial to defendant"]; *United States v. Thomas* (7th Cir. 1996) 86 F.3d 647, 654 ["evidence of threats on witnesses can be highly prejudicial"]; *Ortiz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 897 ["the potential of unfair prejudice from the introduction of threats is 'severe'"]; *United States v. Guerrero* (3d Cir. 1986) 803 F.2d 783, 785-786 [threats evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established portions of the case"].) Such evidence "can amount to an 'evidential harpoon'" which "'becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant.'" (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970, citations omitted.)

Indeed, the evidence is so prejudicial that its admission may deprive the defendant of a fair trial. (*Ibid.*)

With respect to probative value, when offered on the issue of credibility, witness intimidation evidence carries far less probative value when offered to *bolster* a witness' credibility than when offered to *impeach* a recanting witness or otherwise explain witness conduct that could *damage* the proponent's case. (*United States v. Thomas* (7th Cir. 1996) 86 F.3d 647, 654, and authorities cited therein.) Where evidence carries a substantial danger of prejudicing the jury and otherwise carries minimal probative value or is cumulative of other evidence on the same issue, any doubt should be resolved in favor of exclusion under section 352. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 423 [other crimes]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 406 [same]; *People v. Thompson* (1980) 27 Cal.3d 303, 318 [same]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905 [gang membership]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193-194 [gang membership].)

2. The Court Erred in Admitting the Evidence.

Here, it was undisputed that there was no evidence that McKinnon had authorized the alleged threat and assault upon Hunt. Hence, the evidence was admitted solely to *bolster* Hunt's credibility, on the theory that his testimony was more credible because it was given despite his fear of reprisal. In this regard, however, the evidence was cumulative of other evidence and far more prejudicial than probative.

According to Hunt, McKinnon appeared in his bedroom two to three days after the murder and threatened him if he said anything about the shooting. (4 RT 557; 13 CT 3623.) In addition, the prosecutor introduced Hunt's police statement in its entirety. In that statement, the prosecutor

himself repeatedly referred to McKinnon's dangerous and violent character and elicited Hunt's statements that he feared that McKinnon would retaliate for implicating him. (See, e.g., 13 CT 3603 [in response to Hunt's expression of concern for his family, prosecutor replies that he understands because McKinnon is "a serious dude" and "has some connections"]; 13 CT 3605-3607 [prosecutor impressing upon Hunt that he will likely have to move after testifying because he will be unable to keep family safe].) Hence, the jury already heard substantial evidence that Hunt was concerned about the consequences of implicating McKinnon as Coder's killer, making the unauthorized third party threat and assault – ostensibly admitted for that very purpose – cumulative.

In addition to its cumulative nature, the probative value of the evidence was further diminished by its dubious quality. (See, e.g., *People v. Cella* (1983) 139 Cal.App.3d 391, 405 [unreliability of evidence "offer(s) a prime subject for exclusion under Evidence Code section 352"]; accord, *People v. Maury* (2003) 30 Cal.4th 342, 432-433; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404; *People v. Milner* (1988) 47 Cal.3d 227, 238; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1100.) Hunt claimed that he had received medical treatment for his injuries and immediately reported the incident to the prosecutor and Investigator Buchanan, or Buchanan alone, who came to his home and took his statement. (4 RT 620-621, 626-628.) Although defense counsel took issue with Hunt's story, the prosecution offered no evidence whatsoever to corroborate it, such as a witness from the party, hospital records, a report or notes of his statement, or even Buchanan's testimony. (See, e.g., *People v. Ford* (1988) 45 Cal.3d 431, 442-443 [where party has power to call logical witness or present material evidence and fails to do so, it is reasonable to infer that the evidence would

be adverse to that party]; *United States v. Taylor* (9th Cir. 1995) 52 F.3d 207, 211 [same].)

At the same time, the evidence carried a tremendous danger of prejudice. The threat and assault were not committed by any third party, but by McKinnon's *own sister*. Hence, there was a substantial danger that the jurors would speculate from their familial relationship that McKinnon had orchestrated the attack, notwithstanding the absence of other evidence to prove as much. (Cf. *United States v. Auerbach* (8th Cir. 1984) 745 F.2d 1157, 1161-1162 [emphasizing danger of prejudicially associating defendant with bad acts of family members]; *United States v. Dickens* (9th Cir. 1985) 775 F.2d 1056, 1058 [recognizing danger of guilt by association in admitting evidence of crimes committed by defendant's family member]; *People v. Mitchell* (1969) 1 Cal.App.3d 35, 38-39.) Indeed, prosecutors have time and again insisted that relationship alone is sufficient to prove authorization. (*People v. Terry*, *supra*, 57 Cal.2d at p. 567 [attorney general argued that sister-in-law's relationship to defendant was proof that he had authorized her efforts to intimidate witness]; *People v. Golden*, *supra*, 55 Cal.2d at p. 370 [same - wife's connection to disappearance of witness]; *People v. Perez*, *supra*, 169 Cal.App.2d at p. 478 [same - brother's efforts to suppress testimony].) While this position is legally unsound (*ibid.*), its repetition by those trained in the law is a compelling indication that lay jurors would improperly and unfairly reach the same conclusion from evidence that a close relative of the defendant's threatened and assaulted a witness against him.

Certainly, the court's limiting instruction did nothing to ameliorate the danger of prejudice. The court admonished the jurors: "[t]his evidence was introduced as it bears upon the witness' state of mind and demeanor

while testifying. There is no evidence that the defendant assisted or played any role in the alleged assault." (4 RT 621.) While the court's admonition was correct that there "was no evidence that the defendant assisted or played any role in the alleged assault," it did not further direct the jurors that they could not infer that the defendant authorized or orchestrated it, they could not consider it in any way against the defendant, and could only consider it to determine whether it rendered Hunt fearful of testifying and, if so, could only consider that fear insofar as it affected Hunt's credibility. (Compare, e.g., *People v. Wharton* (1991) 53 Cal.3d 522, 565 [trial court admonished jurors, inter alia, "You shall not draw any adverse inferences against (the defendant) from the fact that any witness was injured while in or out of jail"]; *People v. Yeats*, *supra*, 150 Cal.App.3d at p. 986 [trial court admonished jurors not only that there was no evidence that defendant caused threat, but also that the threat "cannot be considered by you for any other purpose other than the limited purpose" of the witness' "credibility"].) The court's overly legalistic and unelaborated statement that "the evidence was introduced as it bears upon the witness' state of mind and demeanor while testifying" (4 RT 621) simply did not ameliorate the harm from admitting the evidence.

C. The Court Erred in Admitting Hearsay Evidence That McKinnon Allegedly Threatened Gina Lee Immediately After the Coder Murder

As discussed in the preceding arguments, Gina Lee was an admitted crack addict whose habitual use of the drug affected her memory and distorted her perception of time and reality. Given the damage wrought by her addiction, the five-year interim between the murder and her trial testimony, and the more than four-year interim between her final police statement and her trial testimony, she understandably had difficulty

recalling various statements and events. (4 RT 671-674; see also, 4 RT 655-659, 701-702.) However, when the prosecutor asked Lee about specific prior statements, for the most part her recollection was refreshed and she admitted to having made them and attempted to explain any inconsistencies with her trial testimony. (See, e.g., 4 RT 649-650, 656-659, 667-668, 701-702.) Lee was never asked whether McKinnon had ever threatened her, nor was she ever asked about any statements she had made to her cousin, Johnetta Hawkins.

Immediately following Lee's testimony, the prosecutor informed the court that Johnetta Hawkins had told Investigator Buchanan that on the night of, but sometime after, the Coder shooting, Lee seemed scared and told her that McKinnon had threatened to kill her if she "said something." (5 RT 711.)[42] He argued that Lee's statement was inconsistent with her trial testimony and therefore admissible for its truth. (5 RT 710-711.) Defense counsel objected that Lee's alleged statement was inadmissible hearsay. (5 RT 709.) The court asked the prosecutor if he had specifically questioned Lee about whether McKinnon had threatened her. (5 RT 710-711.) The prosecutor admitted that he had not, but represented that he had asked her if McKinnon "said anything else to her. She actually said he didn't say anything. He put his fingers up to his lips and went 'shhhhhh, there's a dead guy outside." (5 RT 711.) Furthermore, he said, "I think we asked her, was there any other contact with Popeye or what else happened and she said nothing else." (5 RT 712.) Defense counsel responded that her testimony was simply vague. (5 RT 712.) The court agreed that it "was

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[42] Despite having spoken several times with police and the district attorney investigator, this was the only evidence that Lee had ever indicated that McKinnon had threatened her.

vague" and she was "all over the board." (5 RT 712.)

Hence, the court ruled that the prosecutor had failed to lay the necessary foundation for admitting Lee's statement to Hawkins as a prior inconsistent statement. Emphasizing that the evidence was "pretty damaging," the court ruled that it was "incumbent upon" the prosecutor "to directly ask her that question" in order to admit the evidence for its truth as a prior inconsistent statement under Evidence Code section 1235. (5 RT 712.)

Immediately thereafter, the prosecutor called Hawkins to testify. The prosecutor asked Hawkins if Lee seemed scared that night. (5 RT 734.) She replied that she could not recall since it had been several years since the shooting, but they were probably all scared given that a murder had just occurred. (5 RT 734.) The prosecutor again asked her if Lee seemed scared. (5 RT 734.) Hawkins replied, "No, you cannot make me say I seen her being scared." (5 RT 734.) The prosecutor also asked Hawkins if she was afraid of testifying and Hawkins replied that she was not. (5 RT 734.)

On its own motion, the court immediately called counsel to sidebar. (5 RT 734.) The judge advised the prosecutor, "based upon her [Hawkins's] testimony in response to your last several questions, I'm going to allow you to ask whether or not Gina Lee said that the defendant threatened her because that's contradiction to her testimony. So you can inquire in that area." (5 RT 735.) Defense counsel reiterated his objection, which the court overruled. (5 RT 735.)

Thus, the prosecutor elicited from Hawkins that within hours of the shooting, she and Lee were together in a car on their way to obtain more crack, when Lee told her that McKinnon had told Lee that if she (Lee) "said anything," he would kill her. (5 RT 736-737.) Hawkins emphasized that

she never saw McKinnon on the night of the shooting and therefore could not know if what Lee had told her was true. (5 RT 736-737.) The court erred in admitting this testimony.

As the court initially and correctly recognized, Lee's out of court statement that McKinnon had threatened her was hearsay, inadmissible for its truth, absent an exception to the hearsay rule. (Evid. Code, § 1200.) One such exception is a prior statement that is inconsistent with a witness' testimony if it meets the requirements of Evidence Code sections 1235 and 770.[43]

"The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness' trial testimony. (*People v. Sam* (1969) 71 Cal.3d 194, 210.)" (*People v. Johnson* (1993) 3 Cal.4th 1183, 1219 [expression of uncertainty at trial is not inconsistent with prior statement]; see also, *People v. Hawthorne* (1992) 4 Cal.4th 43, 55 [honest lack of recollection at trial is not inconsistent with prior statement]; *People v. Parks* (1971) 4 Cal.3d 955, 960 [same].) While a witness' *deliberate* evasion, such as feigned memory loss, may create an implied inconsistency with a prior statement, that foundation must first be established before the prior statement may be admitted. (See, e.g., *People v. Parks*, *supra*, 4

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

Section 770 provides in relevant part that extrinsic evidence of a prior inconsistent statement shall be excluded unless "(a) The witness was so examined while testifying so as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action."

Cal.3d at p. 960; *People v. Green* (1970) 3 Cal.3d 981, 985, 988.) The trial court must find, based on substantial evidence, that "professed memory lapses are false, evasive devices to avoid the truth" before admitting a prior statement as "inconsistent" with the purported memory loss. (*People v. Arias* (1996) 13 Cal.4th 92, 152.) In the absence of such a foundation, admission of the prior statement under section 1235 is erroneous. (*Ibid.* ["despite her frequent evasiveness and assertions of memory loss, (the witness) did ultimately recount her current recollection of her conversation with defendant" and her testimony was not inconsistent with prior statements; admission of prior statements for truth was erroneous].)

As the court initially and correctly ruled, Lee was never asked if McKinnon threatened her or about any statements she made to Hawkins and thus her statement to Hawkins was not directly inconsistent with her trial testimony. (4 RT 657-659, 666, 687-691.) Nor, contrary to the prosecutor's representation, was it implicitly inconsistent with her testimony on the ground that she was being deliberately evasive by feigning memory loss. (4 RT 657-659, 666, 687-691.) While she did have difficulty recalling certain details, it seemed clear that her memory lapses were honest ones. Once again, her years of daily crack cocaine use had affected her memory and five years had passed between the murder and her trial testimony. (See, e.g., *People v. Sam*, *supra*, 71 Cal.2d at p. 210 [prior statement not inconsistent with trial testimony where witness claimed lack of recollection and a "two-year interval and considerable liquor have intervened between the incident and trial"].) Perhaps most significantly, when he attempted to do so, the prosecutor *successfully* refreshed her recollection with her prior statements regarding the encounter and other matters. (Cf. *People v. Arias*, *supra*, 13 Cal.4th at p. 152 ["despite her

frequent evasiveness and assertions of memory loss, (the witness) did ultimately recount her current recollection of her conversation with defendant" and therefore her testimony was not inconsistent with prior statements].) Finally, the court never found that *Lee* was being deliberately evasive. (*Ibid.*) Indeed, by ruling that her prior statement was not inconsistent with her testimony, the court implicitly ruled that she was not.[44]

What the court apparently did find was that *Hawkins* was being evasive and that her evasion was inconsistent with her *own* prior statement to Buchanan that Lee seemed frightened and told her that McKinnon had threatened to kill her. The flaw in the court's reasoning was that even if *Hawkins's own* prior statement that Lee appeared to be frightened was inconsistent with her evasive trial testimony in this regard, *Lee's* out-of-court statement that McKinnon had threatened to kill her was still not inconsistent with her *own* trial testimony and therefore was not admissible for its truth under section 1235.

For at least two reasons, it is no answer to say that Lee's out-of-court statement regarding the threat was admissible for the limited, nonhearsay purpose of showing that she was afraid to testify. First, the court admitted her statement for its truth, not for a limited, nonhearsay purpose. Second, to the extent that this evidence – which the court acknowledged was "pretty damaging" (5 RT 712) – was relevant to Lee's fear of testifying, it was cumulative and unnecessary because, in the admitted transcript of her police

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[44] In fact, it does not appear that Lee was *ever* being evasive about any alleged threat McKinnon made to her. When she was interrogated by Caldwell and freely acknowledged that she was "scared" of McKinnon (13 CT 3581) and purported to recount in great (albeit incoherent) detail the events surrounding the shooting, she never suggested that McKinnon had ever threatened to kill or harm her. (See 13 CT 3580-3596.)

interrogation, Lee told Detective Caldwell that she was "scared, cause Popeye he's the type of person that you know just goes off" (13 CT 3593) and reiterated her fear of testifying at trial. (4 RT 647; see, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905 [where prosecution had already presented evidence on issue of witness' bias, admission of damaging other evidence to prove same issue was cumulative and therefore should have been excluded]; accord, *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1495; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 77-79.) The court clearly erred in admitting Gina Lee's incompetent out-of-court statement that McKinnon had threatened to kill her if she said anything about Coder's murder.

D. The Errors Require Reversal

As discussed in part B-1 (pages 205-208), above, the erroneous admission of witness intimidation evidence may be so unduly prejudicial that it deprives a defendant of his due process right to a fair trial. (U.S. Const., Amend. 14; *Dudley v. Duckworth*, *supra*, 854 F.2d at p. 970.) For the same reason, it may violate a capital defendant's Eighth and Fourteenth Amendment rights to reliable jury determinations of guilt. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; cf. *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [recognizing that erroneous admission of evidence may violate Eighth and Fourteenth Amendment right to reliable guilt phase verdicts in capital case].) This is just such a case.

As discussed in great detail in Argument I, the cases against McKinnon for both murders were close. (See, e.g., *Kotteakos v. United States* (1946) 328 U.S. 750, 763 [under federal "harmless error statute," errors "that may be altogether harmless in the face of clear error" may nevertheless require reversal when they "might turn scales otherwise

level"]; *United States v. Agurs* (1976) 427 U.S. 92, 112-113 ["where the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt"]; *People v. McDonald* (1984) 37 Cal.3d 351, 363; *People v. Briggs* (1962) 58 Cal.2d 385, 407.) Into this close case was injected evidence well recognized as being highly inflammatory. (See, e.g., *People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187; *United States v. Thomas*, *supra*, 86 F.3d at p. 654 [same]; *Dudley v. Duckworth*, *supra*, 854 F.2d at p. 970; *United States v. Guerrero*, *supra*, 803 F.2d at pp. 785-786.) As to the Coder murder, the alleged witness intimidation of Gina Lee and Orlando Hunt suggested that McKinnon was guilty of that crime. (See, e.g., *People v. Hannon*, *supra*, 19 Cal.3d at p. 599; *Ortiz-Sandoval v. Gomez*, *supra*, 81 F.3d at p. 897.)

Furthermore, for all of the reasons discussed in Argument I, evidence suggesting McKinnon's guilt of one murder tended unfairly to bolster the state's case for the other, particularly given the prosecutor's closing argument urging the jurors to consider the charges in concert. Furthermore, the evidence tended to suggest McKinnon's generally violent character, from which the jurors would draw the unfair inference that it was more likely than not that he committed *both* of the charged crimes of violence. As such, it struck a devastating blow to his sole defense of innocence. It is well recognized that errors which undercut an accused's sole defense are extraordinarily prejudicial and rarely harmless under any standard. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 325-326; *People v. Roe* (1922) 189 Cal. 548, 565-566; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 873-874; *People v. Hayes* (1985) 172 Cal.App.3d 517, 525; *People v. Galloway* (1979) 100 Cal.App.3d 551, 561; *Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954, 962; *United States v. Lawrence* (9th Cir. 1999) 189 F.3d 838,

842; *United States v. Flynt* (9th Cir. 1985) 756 F.2d 1352, 1361; *United States v. Arroyave* (9th Cir. 1972) 465 F.2d 962, 963.)

For all of these reasons, the erroneous admission of the witness intimidation evidence was so unduly prejudicial as to violate McKinnon's Eighth and Fourteenth Amendment rights to a fair trial and reliably jury verdicts. Even if the effect of the errors did not rise to federal constitutional violations, reversal is nevertheless required because it is reasonably probable that the verdicts would have been different in their absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The entire judgment must be reversed. At the very least, the errors require reversal of the Coder murder conviction, sole special circumstance of multiple murder, and death judgment.

VII

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED STATE LAW AND MCKINNON'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO INSTRUCT THE JURY TO VIEW THE EVIDENCE OF HIS ORAL ADMISSIONS WITH CAUTION

The prosecution presented evidence that McKinnon made various oral statements in which he directly admitted his guilt or which evidenced a consciousness of guilt. His only tape recorded oral statements were contained in his in-custody police interrogation, in which he denied complicity in the Coder murder and to possessing the gun found in Kim Gamble's purse. (People's Exhibit 42; 13 CT 3765-3800.)

McKinnon's other alleged statements were unrecorded and came solely from the mouths of drug addict felon informants Harold Black, Orlando Hunt, and Johnetta Hawkins. As discussed in Argument I, according to Harold Black, McKinnon had made unrecorded jailhouse confessions to both crimes. (6 RT 963-964, 992.) According to Johnetta Hawkins, Gina Lee had told her that McKinnon threatened to kill her "if she said something" on the night of the Coder murder, a statement the prosecutor offered as evidence of his consciousness of guilt. (5 RT 736-737.) According to Orlando Hunt, McKinnon appeared in his bedroom two to three days after the Coder murder and threatened that "this could happen to you" if he said anything. (4 RT 557; see also 13 CT 3623 [Hunt described same statement as, "it can happen again if somebody opens their mouth"]; see, e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 180 [admissions include oral statements that expressly or implicitly tend to prove guilt when considered with other evidence].)

During the instructional conference, the court considered application of the standard cautionary instructions regarding evidence of a defendant's oral admissions. (8 RT 1111; CALJIC Nos. 2.70, 2.71.)[45] Observing that the cautionary instruction does not apply to recorded statements, the court provided the jurors with CALJIC No. 2.71, defining an admission, but struck the cautionary language from the charge. (14 CT 3834; 9 RT 1238.) As will be demonstrated below, by omitting the cautionary instruction, the court violated state law, as well as McKinnon's Eighth and Fourteenth Amendment rights to a fair and reliable determination of guilt in this capital case. Under any standard, the error requires reversal.

A. The Trial Court Violated Its *Sua Sponte* Instructional Duty to Instruct the Jurors to View Evidence of McKinnon's Unrecorded Oral Statements With Caution

It is well settled that trial courts are under a *sua sponte* duty to instruct jurors to consider with caution evidence of a defendant's oral admissions. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200; *People v. Carpenter* (1997) 15 Cal.4th 312, 392; *People v. Heishman* (1988) 45 Cal.3d 147, 166; *People v. Stankewitz* (1990) 51 Cal.3d 72, 93; *People v. Lang* (1989) 49 Cal.3d 991, 1021, and authorities cited therein; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224; *People v. Beagle* (1972) 6 Cal.3d 441, 455.) As this Court has explained, oral admissions must be:

> received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses

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[45] CALJIC No. 2.70 defines confessions and admissions and cautions "evidence of an (oral confession) (or) (an oral admission) of the defendant not made in court should be viewed with caution." CALJIC No. 2.71 defines an admission only and provides the same cautionary admonition.

> 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.

(*People v. Bemis* (1949) 33 Cal.2d 395, 398-399; accord, *People v. Frye* (1998) 18 Cal.4th 894, 959; *People v. Ford* (1964) 60 Cal.2d 772, 800.)

The need for cautious consideration of oral statements does not apply where the statement is tape recorded for the obvious reason that tape recordings, unlike witnesses, are not deliberately dishonest and do not suffer from flawed memories. (See, e.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 776; *People v. Gardner* (1961) 195 Cal.App.2d 829, 832-833.) Where there is evidence of *both* recorded and unrecorded admissions, the court must instruct the jurors to cautiously consider unrecorded oral statements but not recorded statements. (See, e.g., *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352-353 [where evidence of both recorded and unrecorded admissions, court erred in striking cautionary language from CALJIC No. 2.71]; see also *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 775-776 [approving instruction which directed jurors to consider evidence of oral admissions with caution but explaining instruction did not apply to tape recorded admissions].)

Of course, as discussed in the previous arguments, in capital cases, the need for careful guidance in assessing evidence is particularly acute given the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; accord, *Gilmore v. Taylor* (1993) 508 U.S. 333,

342 ["the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case"]; see also *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase verdicts in capital cases require heightened reliability].)

Pursuant to these authorities, it is beyond dispute that the court erred under state law in striking the cautionary language from its provision of CALJIC No. 2.71. Furthermore, because McKinnon's alleged oral admissions were crucial to the state's cases and a cautionary instruction was vital to the accuracy of the factfinding process in this capital trial, the error violated McKinnon's Eighth Amendment and Fourteenth Amendment rights to a fair and reliable verdict that he was guilty of a capital offense.

B. As Respondent Will Be Unable to Prove the Error Harmless Beyond a Reasonable Doubt, the Judgment Must Be Reversed

As discussed in the preceding arguments, to the extent that the court's instructional error violated McKinnon's federal constitutional rights, respondent bears the burden of proving it harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404; *Chapman v. California* (1967) 386 U.S. 18, 24.) To the extent the error violated state law only, it requires reversal if it is reasonably probable that the result would have been more favorable in its absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

While the prejudice arising from the omission of cautionary instructions on oral admissions turns on the unique facts of each case, courts typically examine several factors in assessing prejudice. The first is the significance of the defendant's oral admissions to the state's case. Where they are "vitally important" evidence in the case, "it is likewise vitally important that the jury be guided as to the manner in which it [is] to

view [and evaluate] that evidence," and the omission is likely to be prejudicial. (*People v. Ford*, *supra*, 60 Cal.2d 772, 800, quoting from *People v. Daloney* (1953) 41 Cal.2d 832, 840, cited with approval in *People v. Beagle*, *supra*, 6 Cal.3d at p. 455 [error prejudicial where statements, *inter alia*, formed a "substantial part" of state's case]; accord, *People v. Bemis*, *supra*, 33 Cal.2d at p. 400 [error prejudicial where, *inter alia*, statement "was the only evidence that connected defendant with the crime"]; *People v. Hudson* (1981) 126 Cal.App.3d 733, 742 [error prejudicial where statements were "very damaging" part of state's case]; *People v. Lopez* (1975) 47 Cal.App.3d 8, 14 [error prejudicial where, inter alia, statements had "vital bearing" on case].) On the other hand, if the defendant's oral admission played a relatively minor role in light of the evidence as a whole, the error is more likely to be deemed harmless. (See, e.g., *People v. Padilla* (1995) 11 Cal.4th 891, 923 [error harmless where, inter alia, statement played a "comparatively marginal role" in light of the entire record].)

Another factor reviewing courts consider is the strength of the evidence that the defendant made the statements attributed to him. (See, e.g., *People v. Beagle*, *supra*, 6 Cal.3d at p. 456 [error harmless where, inter alia, oral statement heard by two witnesses, one of whom was defendant's friend and the second of whom was disinterested]; *People v. Blankenship* (1970) 7 Cal.App.3d 305, 311-313 [same where reporting witness was highly credible and statements corroborated]; compare *People v. Ford*, *supra*, 60 Cal.2d at p. 800 [error prejudicial where, inter alia, statements "reported by hostile witnesses whose testimony showed a number of obvious conflicts and apparent inconsistencies"]; *People v. Lopez*, *supra*, 47 Cal.App.3d at p. 14 [error prejudicial where, inter alia, reporting witnesses

were biased against defendant]; see also *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268-1269 [assessment of prejudice considers strength of evidence of oral admissions and whether there was any dispute statement made or accurately reported].) Similarly, courts consider whether there was any material dispute that the statement was made or accurately reported. (See, e.g., *People v. Padilla* (1995) 11 Cal.4th 891, 922-923 [error harmless where, inter alia, no real dispute that defendant had made essential statement and only dispute went to immaterial matters]; *People v. Stankewitz*, *supra*, 51 Cal.3d at p. 94 [error harmless where, inter alia, no dispute regarding words used, context or meaning and no evidence statement was fabricated or inaccurately reported]; *People v. Beagle*, *supra*, at p. 456 [error harmless where, inter alia, there was "no conflicting evidence or issue concerning the statements"]; compare, e.g., *People v. Ford*, *supra*, 60 Cal.2d at p. 800; *People v. Bemis*, *supra*, 33 Cal.2d at pp. 400-401 [error prejudicial where, inter alia, evidence directly conflicting]; *People v. Lopez*, *supra*, 47 Cal.App.3d at p. 14 [same].) Finally, courts consider whether other instructions adequately informed the jury to view the evidence with caution. (See, e.g., *People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1268-1269 [erroneous instructional omission harmless in penalty phase because jurors received the instruction in guilt phase].)

Here, there is no question that McKinnon's alleged oral admission to Harold Black that he killed Martin was "vitally important" to the state's case. Given that the only other evidence offered to prove McKinnon's guilt of the Martin murder was Kim Gamble's testimony that the Martin murder weapon found in her purse a week after the killing was McKinnon's, and Marshall Palmer's patently false claim that Lloyd Marcus had identified McKinnon as the killer, McKinnon's alleged confession to Black was the

centerpiece of the state's case against him. Certainly, it was vigorously disputed that McKinnon made the statement at all. Indeed, the evidence that he did so was exceedingly weak. As previously discussed, that evidence came solely from Black, a felon and in-custody informant who not only expected, but actually received, extraordinary benefits for attributing the confession to McKinnon, and whose account of McKinnon's alleged description of the Martin shooting was inconsistent with the true facts. Given the enormous significance of the evidence, its dubious nature, and the vigorous dispute over its truth, the court's failure to instruct the jurors to view the evidence with caution cannot be considered harmless under any standard.

Similarly, McKinnon's alleged Coder murder confession to Black was important to the state's case. True, there was more evidence connecting McKinnon to the Coder murder than to the Martin murder. However, as discussed in Argument I, there were deeply troubling questions about the reliability of that evidence. McKinnon's alleged confession, therefore, was significant because it tended to corroborate the state's other, more problematic evidence.

To be sure, the jury did receive an instruction to view the testimony of in-custody informants, such as Harold Black, with caution. (14 CT 3826; 9 RT 1236.) Respondent may argue that this instruction rendered the instructional error harmless. Any such argument should be rejected.

The instruction provided simply informed the jurors that Harold Black was the *kind of person* whose credibility should be viewed with great care; the omitted instruction would have told the jurors in addition that the *kind of evidence* he offered should also be viewed with great care. For instance, a juror might determine that a witness would not deliberately lie

due to his in-custody informant status, yet should still consider the kind of evidence he offers with caution due to the possibility of mistaken recollection or misunderstanding. At bottom, it is one thing to say that the *source* of evidence should be subject to particular scrutiny and quite another to say that the *evidence itself* is suspect.

The logic of this conclusion is buttressed by the passage of Penal Code section 1127a. By definition under California law, an in-custody informant is a "person . . . whose testimony is based upon statements made by the defendant . . ." (Pen. Code, §1127a, subd. (b), and Assem. Com. on Public Safety, Rep. on Assem. Bill No. 278 (1989-1990 Reg. Sess.) as amended May 4, 1989 [§1127a enacted because "[n]umerous county jail informants have testified to confessions or admissions allegedly made to them by defendants while in custody"].) And, as discussed in part A, above, trial courts are required sua sponte to instruct jurors that oral admissions and confessions are to be viewed with caution. The Legislature was presumably aware of this well settled, mandatory instructional obligation when it enacted Penal Code section 1127a. (See, e.g., *People v. Cruz* (1996) 13 Cal.4th 764, 775 [Legislature presumed to be aware of existing law when it enacts statute].) However, the Legislature determined that the cautionary instruction regarding evidence of oral admissions does not go far enough when informants are involved; *further* instruction is needed to fully apprise jurors of the care with which they are to consider the informant *source* of that evidence. If the Legislature has determined that an instruction cautioning jurors regarding the *kind* of evidence to which informants testify is not sufficient to fully caution them about the *source* of that evidence, a fortiori the opposite must be true.

Furthermore, the jurors were given no such instruction to view with

caution McKinnon's alleged, incriminating statements to which Johnetta Hawkins and Orlando Hunt testified. Hence, there is no basis from which to presume that the jurors viewed with caution their testimony regarding McKinnon's alleged oral threats about implicating him in the Coder murder. Given the closeness of the case, as fully discussed in Argument I, the court's instructional error was prejudicial and requires reversal.

Even if the instructional error was not prejudicial alone, the cumulative effect of this and other guilt phase errors certainly was, as discussed in Argument VIII, below. The entire judgment must be reversed.

VIII

THE JUDGMENT MUST BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE FOREGOING ERRORS WAS PREJUDICIAL AND VIOLATED MCKINNON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS THAT HE WAS GUILTY OF A CAPITAL OFFENSE

It is well settled that a series of errors that might individually be harmless may nevertheless "rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844; accord *People v. Purvis* (1963) 60 Cal.2d 323, 348, 353.) Where errors of federal constitutional magnitude combine with non-constitutional errors, the combined effect of the errors should be reviewed under the federal harmless beyond a reasonable doubt standard. (*United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1394-1397; *In re Rodriguez* (1981) 19 Cal.App.3d 457, 469-470; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) Finally, the cumulative effect of a series of errors may render a case "one wherein there is lacking that element of fairness essential to due process" under the state and federal Constitutions. (*People v. Stephens* (1953) 117 Cal.App.2d 653, 663; accord, *People v. Hill* (1993) 17 Cal.4th 800, 844-847 [effect of series of errors violated defendant's right to a fair trial and required reversal]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [combined effect of errors violated defendant's right to fair trial].) Indeed, as the Ninth Circuit has recognized, "in cases where 'there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant.' [Citations.]." (*Alcala v. Woodford*

(9th Cir. 2003) 334 F.3d 862, 883.) And where, as here, "'the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.' [Citation]." (*Ibid.*) This is just such a case.

As discussed in great detail in Argument I, the state's cases against McKinnon for both murders were exceptionally weak. Certainly, the strength of the cases was unfairly and artificially bolstered by the court's refusal to sever them. (Argument I.) And the prejudicial effect of the joinder was seriously compounded by the court's erroneous admission of the gang evidence. (Argument II.)

Furthermore, McKinnon's sole defense was that he was completely innocent of both crimes and that the prosecution's evidence against him was fabricated, while the prosecution's case rested entirely on the credibility of its witnesses. The guilt phase errors went directly to these critical issues, thus undermining McKinnon's defense and bolstering the prosecution's case. The erroneous joinder (Argument I), admission of the gang evidence (Argument II), and admission of the witness threats evidence (Argument VI) all served to paint McKinnon as a violent and dangerous man more likely than not to have committed the charged crimes and thus seriously compromised his defense. Moreover, Buchanan's memo (Argument III) was a critical component of the fabrication defense in that it tended to show that he had pressured and manipulated Kim Gamble into changing her story, evidence that no doubt would have diminished the jurors' view of the veracity of all witness statements and testimony that Buchanan's interrogations produced or had a hand in producing, including that from Harold Black (6 RT 980-982, 987-992; 7 RT 1019, 1020), Orlando Hunt (4 RT 559, 567, 577, 612, 629-630; 13 CT 3598-3632), Johnetta Hawkins (5 RT 726, 732, 735-737), and Gina Lee (4 RT646-647; 13 CT 3636, 3629).

(See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 445-446 ["damage to prosecution's case" from implication of improper witness interrogation tactics is not "confined to" undermining that witnesses's testimony, but extends to "the thoroughness and even good faith of the investigation, as well"]; *United States v. Sager*, *supra*, 227 F.3d at p. 1145 ["Details of the investigative process potentially affected" not only investigating officer's "credibility (but) perhaps *more importantly the weight to be given to evidence produced by his investigation*"].)

Bolstering the prosecution's case, the erroneous admission of the polygraph evidence served unfairly and unreliably to rehabilitate Orlando Hunt's otherwise suspect testimony that McKinnon was Coder's killer. (Argument V.) That error's bolstering effect on Hunt's testimony implicating McKinnon, in turn, served to corroborate the otherwise suspect evidence from Kerry Scott, Gina Lee, and Harold Black tying McKinnon to the murder. Black's testimony was not only bolstered by that error, but imbued with a greater degree of reliability than that to which it was entitled to due to the court's erroneous failure to instruct the jury to view with caution McKinnon's alleged oral admission to him. (Argument VII.) Adding further weight to the prosecution's side of the scale was the court's erroneous admission of evidence that Hunt and Lee had been intimidated by McKinnon or his family, and the court's erroneous failure to instruct the jury to view with caution evidence of McKinnon's alleged oral threats to Hunt and Lee, all of which tended to suggest McKinnon's consciousness of guilt. (Arguments VI, VII.)

Even assuming for the sake of argument that the cumulative effect of the errors was not sufficiently prejudicial to require reversal of the Coder murder conviction, it is beyond dispute that it was sufficiently prejudicial to

violate McKinnon's right to a fair trial and reliable jury verdict on the Martin murder charge and hence requires reversal of that conviction. As previously discussed and as the jurors clearly indicated by their announcement of deadlock as to the Martin murder, the evidence against McKinnon for that murder was flimsy at best. And, for the reasons stated in Argument I, any errors that bolstered the strength of the state's case for the Coder murder necessarily, and improperly, bolstered its case for the Martin murder. The Martin murder case came down to three pieces of evidence: 1) Kim Gamble's testimony that the Martin murder weapon in her purse actually belonged to McKinnon; 2) Harold Black's testimony that McKinnon confessed to the Martin murder; and 3) Marshall Palmer's patently false testimony that Lloyd Marcus identified McKinnon by name as Martin's killer. Weighed against this evidence was Marcus's compelling *and disinterested* description of someone *clearly other than McKinnon* as Martin's killer. The court's refusal to admit Investigator Buchanan's memo (Argument III) had a devastating effect on McKinnon's defense, as it surely would have raised doubt as to the veracity of Gamble's testimony placing the murder weapon in McKinnon's hands. The court's failure to instruct the jurors on circumstantial evidence regarding the inferences to be drawn from the gun evidence (Argument IV) further damaged McKinnon's defense and bolstered the state's case. And the jury's view of the strength of Harold Black's testimony regarding McKinnon's alleged confession to the Martin murder was surely altered by the court's erroneous failure to instruct the jury to view such evidence with caution (Argument VII).

Had the cases been severed and in the absence of the errors, there is little doubt that the jurors would have seen the astonishingly weak case against McKinnon for the Martin murder for what it was. At least a year

after McKinnon was arrested and taken into custody for the Coder murder, standard ballistics testing on the gun Kim Gamble possessed revealed that it was the Martin murder weapon. Authorities traced it back to the arrest and discovered that McKinnon was with Gamble when she was arrested with the gun. Police were well acquainted with McKinnon, aware that he was in custody for another murder, and therefore decided he was their man despite the absence of any evidence pointing to him as the killer – indeed, despite the existence of compelling evidence from a neutral eyewitness pointing to *someone else* as the killer. In the face of Gamble's admission that the gun was hers when she was arrested and her subsequent guilty plea to that effect, Investigator Buchanan concluded that the gun must have been McKinnon's, and therefore threatened to charge Gamble as an accessory to murder if she refused to change her story to fit his theory. In the face of Lloyd Marcus's documented description of the shooter as an Asian or Hispanic man who was taller and heavier than the very obviously African-American McKinnon, Sergeant Palmer simply lied and claimed that Marcus also identified McKinnon by name as the shooter. And to seal the case against McKinnon, authorities bought and paid for the incredible testimony of in-custody informant Harold Black by giving him a get out of jail free card that he was free to use, *and indeed did use*, at will. It is simply beyond dispute that the cumulative effect of the errors was prejudicial as to the Martin murder conviction, deprived McKinnon of a fair and reliable determination of his guilt, and demands reversal of that conviction and related firearm possession conviction.

For the foregoing reasons, reversal of the entire judgment is required. At the very least, reversal of the Martin murder and related firearm

possession convictions is required, which, in turn, requires reversal of the sole special circumstance of multiple murder and the judgement of death.

IX

THE CUMULATIVE EFFECT OF A SERIES OF INSTRUCTIONAL ERRORS WAS PREJUDICIAL, VIOLATED MCKINNON'S RIGHTS TO A FAIR TRIAL, TRIAL BY JURY, AND RELIABLE VERDICTS, AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

The trial court instructed the jury with CALJIC Nos. 2.02, 2.03, 2.21.2, 2.22, 2.27, 2.51, and 8.20. (14 CT 3818-3819, 3827-3831; 9 RT 1233-1235, 1237-1238, 1244.) As discussed below, provision of these instructions violated McKinnon's constitutional rights to due process (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17). (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

McKinnon recognizes that this Court has previously rejected these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to raise the claims in subsequent proceedings.

A. The Court Erred in Instructing the Jurors With CALJIC No. 2.03, Over McKinnon's Objection, That They Could Consider His "False Statements" as Evidence of His Consciousness of Guilt

At trial and over defense objection, the prosecution presented evidence that, when Detective Caldwell and Sergeant Palmer interrogated McKinnon, he initially said that he was not in Banning in January 1994, the month of Coder's murder. (13 CT 3645-3652, 3768-3769, 3776-3777; 7

RT 995-999.) Almost immediately thereafter, he admitted that he was briefly in Banning in January to see his daughter, but explained that he had lied because his presence there violated a condition of his parole. (13 CT 3769, 3779, 3782, 3784.)

At the conclusion of the guilt phase and over defense objection, the trial court instructed the jury that it could consider any false statements by McKinnon as evidence of his consciousness of guilt. (8 RT 1107; 9 RT 1234; 14 14 CT 3819.) The instruction, CALJIC No. 2.03, referred to false statements and read as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(14 CT 3819; 9 RT 1234.)

CALJIC No. 2.03 permitted the jury to use McKinnon's statements to Caldwell and Palmer as evidence "to show his consciousness of guilt and therefore his guilt." (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1841.) Although this Court has upheld the instruction in other cases (see, e.g., *People v. Jackson*, *supra*, 13 Cal.4th at pp. 1223-1224), it should reconsider its previous opinions. In particular, this Court should find that the instruction was argumentative and unfairly undermined evidence supportive of McKinnon's defense of innocence.

1. CALJIC No. 2.03 Should Not Have Been Given Here Because it Was Impermissibly Argumentative

A trial court must refuse to deliver any instructions which are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) Such an

instruction presents the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See generally *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those which "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused (ibid).

Judged by this standard, the consciousness of guilt instruction given in this case is impermissibly argumentative. Structurally, it is almost identical to instructions found to be impermissibly argumentative in other cases. (See *People v. Mincey*, *supra*, 2 Cal.4th 408, 437, fn. 5 [instruction advising the jury that if it found certain facts, it could consider that evidence for a particular purpose argumentative and properly denied].)

In *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128, this Court approved CALJIC No. 2.03 on the ground that it "properly advised the jury of inferences that could rationally be drawn from the evidence." Yet, what this Court deemed "proper" when the rational inference was one adverse to the defendant, this Court has deemed improper when the inference was one adverse to the prosecution. (See *People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions based on an analogy to *People v. Mincey*, *supra*, 2 Cal.4th 408, holding that Mincey was "inapposite for it involved no consciousness of guilt instruction," but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense. [Citation omitted].'" However, that holding does not explain why two instructions that are identical in structure should be analyzed differently, or why instructions that highlight the prosecution's version of the facts are permissible while ones highlighting the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895)157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and of equal protection of the law (*Lindsay v. Normet* (1972) 405 U.S. 56, 77).

To insure fairness and equal treatment, this Court should reconsider its decisions that have found California's consciousness of guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]),

and a defense instruction held to be argumentative because it "improperly implie[d] certain conclusions from specified evidence" (*People v. Wright, supra*, 45 Cal.3d at p. 1137).

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th. 495, 531-532, and several subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In Kelly, this Court focused on the allegedly protective nature of the consciousness of guilt instructions, noting that they tell the jury that consciousness-of-guilt evidence is not sufficient by itself to prove guilt. Based on that fact, this Court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly, supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned the Kelly rationale that consciousness of guilt instructions are protective or neutral when it held that failing to give such instructions was harmless error because those instructions "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the notion that such instructions have a protective aspect is weak at best, and often entirely illusory. The instructions do not specify what else is required beyond the suggested inference that the defendant feel conscious of his or her guilt before the jury can find that guilt has been established beyond a reasonable doubt. The instructions thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use it in combination with the consciousness of guilt evidence to find that the defendant is guilty.

Finding that a consciousness of guilt instruction based on flight

unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction will always be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, that court joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[46]

The reasoning of two of those cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such

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[46] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

> evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case disapproving a flight instruction (*id.* at p. 748), and extended the reasoning of that case to cover all similar consciousness of guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons for disapproving flight instructions also applied to an instruction on the defendant's false statements].)

The argumentative consciousness of guilt instruction given in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution and placing the trial court's imprimatur on the prosecution's theory of the case. The instruction therefore violated McKinnon's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., Amends 5 & 14; Cal. Const., art. I, §§ 7 & 15), his right to be acquitted unless found guilty beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17.)

2. CALJIC No. 2.03 Also Embodies Irrational Permissive Inferences

The consciousness of guilt instruction given here was also constitutionally defective because it embodied an improper permissive inference. Those instruction permitted the jury to infer one fact, such as McKinnon's consciousness of guilt, from other facts, i.e., that he allegedly made false statements. (See *People v. Ashmus* (1991) 54 Cal.3d. 932, 977.) An instruction which embodies a permissive inference can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence, and to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to the need to "consider all evidence will not cure this defect." (*United States v. Warren, supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (Ibid; see also id. at p. 900 (conc. opn. Rymer, J.) ["inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal, supra*, 967 F.2d at p. 926.) The due process clause of the Fourteenth Amendment "demands that

even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) The rational connection required is not merely a logical or reasonable one, but rather a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, & fn. 28; see also Schwendeman v. Wallenstein (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Constitution requires "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of a specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

Here, the consciousness of guilt evidence was relevant to whether McKinnon committed the charged homicides. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) The irrational inference permitted by these instructions concerned McKinnon's mental state at the time he committed those crimes – namely, whether he committed them with premeditation and deliberation, as required for first degree murder. The improper instructions permitted the jury to use the consciousness of guilt evidence to infer not only that McKinnon killed Coder and Martin but that he did so while harboring the mental state. Although consciousness of guilt evidence in a murder case may bear on a defendant's state of mind *after* the killing, it is not probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)

Therefore, McKinnon's actions after the crimes, upon which the consciousness of guilt inference was based, were simply not probative of whether he harbored the mental state for first degree premeditated murder. There was no rational connection between McKinnon's alleged making of false statements and premeditation and deliberation

This Court has previously rejected the claim that the consciousness of guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [CALJIC Nos. 2.03 & 2.06].) However, McKinnon respectfully asks this Court to reconsider and overrule these holdings, and to hold that delivering the consciousness of guilt instructions given in this case was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, 871, which noted that the consciousness of guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

However, *Crandell*'s analysis is mistaken, and inapplicable here, for three reasons. First, consciousness of guilt instructions do not speak of "consciousness of some wrongdoing;" but of "consciousness of guilt," and *Crandell* does not explain why jurors would interpret such instructions to mean something they do not say. Elsewhere in the standard instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 14

CT 3839 [CALJIC No. 2.90, stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [] guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that McKinnon was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship* (1970) 397 U.S. 358, 364; see *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Second, although the consciousness of guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences, or otherwise hint that there are any applicable limits on the jury's use of the evidence. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad since they expressly advise the jurors that the "weight and significance" of the consciousness of guilt evidence, "if any, are matters for your" determination.

Third, this Court has itself drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness of guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.) Since this Court considered consciousness of guilt evidence in finding substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

Because the consciousness of guilt instruction permitted the jury to draw an irrational inference of guilt against McKinnon, its provision undermined the reasonable doubt requirement and denied McKinnon a fair

trial and due process of law. (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, §§ 7 & 15.) The instruction also violated McKinnon's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, violated McKinnon's right to a fair and reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17).

B. Other Instructions Impermissibly Undermined and Diluted the Requirement of Proof Beyond a Reasonable Doubt

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363), and at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is [one] of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the Winship standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court here gave a series of standard CALJIC

instructions, each of which violated the above principles and enabled the jury to convict McKinnon on a lesser standard than constitutionally required. Because those instructions violated the federal 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. 275.)

1. The Instruction on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt.

The jury was instructed with CALJIC No. 2.02 that if one interpretation of the evidence regarding mental state "appears to be reasonable, you must accept [it] and reject the unreasonable" interpretation. (14 CT 3818; 9 RT 1233-1234.) Thus, that instruction informed the jurors, in effect, that if McKinnon reasonably appeared to be guilty, they were to find him guilty as charged of first-degree premeditated murder even if they entertained a reasonable doubt as to whether he had premeditated the killings. The instruction undermined the reasonable doubt requirement in two separate but related ways, violating McKinnon's constitutional rights to due process (U.S. Const., Amend 14; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)[47]

First, the instruction not only allowed, it compelled, the jury to find

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[47] Although defense counsel did not object to the giving of CALJIC No. 2.02, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

McKinnon guilty on both counts, and to find the sole special circumstance of multiple murder to be true, using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instruction directed the jury to find McKinnon guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (14 CT 3818.) However, an interpretation that appears reasonable is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278, emphasis added ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction and findings of fact necessary to a conviction on a degree of proof less than the constitutionally required one. Second, the circumstantial evidence instruction was constitutionally infirm because it required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instruction created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless McKinnon rebutted it by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, fn. omitted.) Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime.

(*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instruction plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (14 CT 3818.) In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction which required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instruction had the effect of reversing the burden of proof, since it required the jury to find McKinnon guilty of first-degree murder as charged unless he came forward with evidence explaining the incriminatory evidence regarding premeditation put forward by the prosecution. The erroneous instruction was prejudicial with regard to guilt in that it required the jury to convict McKinnon if he "reasonably appeared" guilty of premeditated murder, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict McKinnon because he likely premeditated, rather than because they believed him guilty of premeditated murder beyond a reasonable doubt.

The constitutional defects in the circumstantial evidence instruction are likely to have affected the jury's deliberations, since there was little, if any, direct evidence that the killings were premeditated. To the contrary, if McKinnon were the killer, the evidence as a whole clearly suggested that the killings were spontaneous. Thus, the jury could have accepted the

prosecution's account of the incident as a reasonable one, and found McKinnon guilty, without being convinced that the prosecution had met its burden of establishing premeditation beyond a reasonable doubt.

Moreover, the focus of the circumstantial evidence instruction on the reasonableness of evidentiary inferences also prejudiced McKinnon in another way – by suggesting that McKinnon was required to present, at the very least, a "reasonable" defense to the prosecution case. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find McKinnon's guilt of both charges of first degree murder on a standard which was less than the Constitution requires.

2. The Provision of CALJIC Nos. 2.21.2, 2.22, 2.27, 2.51, and 8.20 Also Vitiated the Reasonable Doubt Standard.

The trial court gave five other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.2 (witness wilfully false), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), 2.51 (motive), and 8.20 (deliberate and premeditated murder). (14 CT 3828-3831, 3849-3850; 9 RT 1237-1238, 1244.) Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard

with the "preponderance of the evidence" test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[48]

The jury was instructed with former CALJIC No. 2.51 (5th ed.) as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will, therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(14 CT 3831; 9 RT 1238.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from another standard evidentiary

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[48] Although defense counsel failed to object to these instructions, McKinnon's claims are still reviewable on appeal. (See fn. 47, above, which is incorporated by reference here.)

instruction, CALJIC No. 2.03, which expressly admonished the jury that a wilfully false or deliberating misleading statement was "not sufficient by itself to prove guilt." The motive instruction thus appeared to include an intentional omission allowing the jury to determine guilt based on motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase inclusio unius est exclusio alterius could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also People v. Salas (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. This instruction conflicted with other instructions regarding criminal intent for finding premeditated murder by suggesting to the jurors that they need not find that premeditation in order to convict appellant of first degree murder or, in turn,

to find true a multiple murder special circumstance. Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all 12, of the jurors so concluded. (See, e.g., *Francis v. Franklin*, *supra*, 471 U.S. at p. 322.)

Moreover, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It 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, [they believed] the probability of truth favors his or her testimony in other particulars." (14 CT 3828; 9 RT 1237.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (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"].)[49] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must 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. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

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[49] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, which found no error in an instruction which 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.

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(14 CT 3829; 9 RT 1237.) That instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (14 CT 3830; 9 RT 1237-1238), was likewise flawed. That instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact."

Finally, CALJIC No. 8.20, which defines premeditation and

deliberation, misled the jury regarding the prosecution's burden of proof. That instruction told the jury that the necessary deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (14 CT 3849-3850, emphasis added; 9 RT 1244.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find McKinnon guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in Section A of this argument.

C. The Court Should Reconsider its Prior Rulings Upholding the Defective Instructions

Although each of the challenged instructions violated McKinnon's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the

instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial evidence instructions].) While recognizing the shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction which dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction 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* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

D. Reversal is Required

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated McKinnon's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its cases

for the murders were weak for all of the reasons previously discussed. Given the paucity of reliable direct evidence, instructions on the importance of circumstantial evidence and how it was to be considered were crucial to the jury's determination of guilt. Similarly, the need for strict adherence by the jury to the reasonable doubt burden of proof was crucial. Because these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, the reliability of the jury's findings is cast into substantial question.

Further, CALJIC No. 2.51 permitted the prosecution to only establish motive for the jury to conclude that McKinnon was guilty. The instructional error was particularly prejudicial in this case given that the prosecution's theory of the Martin murder was that it was gang-motivated, as an act of retaliation against the Bloods for the murder of a Crip. The instruction allowed the jury to convict McKinnon on the motive evidence alone and this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of McKinnon's conviction.

The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) The instructions also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing McKinnon to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) Accordingly, McKinnon's conviction and death sentence must be reversed.

X

THE PROVISION OF CALJIC NO. 17.41.1 VIOLATED MCKINNON'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRES REVERSAL

The jury in this case was instructed in the guilt phase with CALJIC 17.41.1 as follows:

> The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

(14 CT 3885; 9 RT 1262-1263.)

In *People v. Engelman* (2002) 28 Cal.4th 436, this Court disapproved CALJIC No. 17.41.1, but also concluded that its provision does not violate the federal constitution. McKinnon respectfully submits that its provision in his case did violate his rights under the Sixth and Fourteenth Amendments and therefore raises the issue here in order for this Court to reconsider its decision in *Engelman* and to preserve the error for review in federal court.

Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 127; *United States v. Brown* (D.C. Cir. 1987) 823 Fd.2d 591, 596.) However, CALJIC 17.41.1 pointedly tells each juror that he or she is not guaranteed privacy or secrecy. At any time, the deliberations may be interrupted and a fellow juror may repeat his or her words to the judge and allege some impropriety, real or imagined, which the

juror believed occurred in the jury room.

The instruction, in short, assures the jurors that their words might be used against them and that candor in the jury room could be punished. The instruction therefore chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (*Attridge v. Cencorp* (2d Cir. 1987) 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268.) Accordingly, the instruction improperly inhibits free expression and interaction among the jurors which is so important to the deliberative process. (See, e.g., *People v. Collins* (1976) 17 Cal.3d 687, 693.) Where jurors find it necessary or advisable to conceal concerns from one another, they will not interact and try to persuade others to accept their viewpoints. "Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086 citing Note, *Public Disclosures of Jury Deliberations* (1985) 98 Harv. L. Rev. 886, 889.) Long ago, Justice Cardozo noted, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (*Clark v. United States* (1933) 289 U.S. 1, 13.)

The free discourse of the jury has been found to be so important that, as a matter of policy, post-verdict inquiry into the internal deliberative process has been precluded even in the face of allegations of serious improprieties. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 120-121, 127 [inquiry into juror intoxication during deliberations not permitted]; *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 747 [no evidence permitted as to juror compromise].) Under Evidence Code section 1150,

'"[n]o evidence is admissible to show the effect of [a] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." These same policy considerations should bar CALJIC 17.41.1 so that it may not be allowed to chill free exchange and discourse during deliberations.

Jury trial is a fundamental constitutional right. The federal right to trial by jury is secured by the Sixth and Fourteenth Amendments to the Constitution of the United States. (*Ring v. Arizona* (2002) 536 U.S. 584; *Duncan v. Louisiana* (1968) 391 U.S. 145.)

The state right to trial by jury, which also includes the requirement that the jury in felony prosecutions consist of 12 persons and that its verdict be unanimous, is secured by article I, section 16 of the California Constitution (*People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). That right is abridged by CALJIC 17.41.1 because it coerces potential holdout jurors into agreeing with the majority. (See, e.g., *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426-1428.)

It is not a satisfactory answer to say that the matter is moot because no juror called any such problem to the court's attention. Such an answer ignores the likelihood that a juror would hold fast to an unpopular decision if he knew that he could not be hauled before the court to account for it. He may, nevertheless, be unwilling to do so if he knows his fellow jurors are going to report him to the judge. The likelihood of such a "chilling effect" is a strong argument in favor of simply not giving an instruction such as CALJIC No. 17.41.1 in the first place. There is no way to assess how much

the instruction chilled speech in the jury room. There is no way to determine what thoughts and arguments were squelched by jurors who anticipated, feared and wished to avoid sanctions at the hands of the trial court.

The giving of this instruction also removed from the jurors their right to function as the final barrier between an unjust prosecution and conviction. The Sixth and Fourteenth Amendments, as well as the California Constitution, bestow upon a defendant the right to jury nullification, which is integral to the concept of a fair jury trial. (*People v. Dillon* (1983) 34 Cal.3d 441, 490-493 (conc. opn. of Kaus, J.), 493 (conc. opn. of Kingsley, J.); see *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1136 [noting approval of nullification's existence as a necessary check against judges and prosecutors but holding the jury need not be affirmatively informed of the power to nullify].)

The federal and state constitutions both provide for the right to a jury trial in a criminal case. (U.S. Const., Amends. 6 & 14; *Duncan v. Louisiana* (1968) 391 U.S. 145, 156); Cal. Const., art. 1, § 16.) "A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government." (*Duncan v. Louisiana, supra,* 391 U.S. at p. 155.) The right to jury nullification underlies the very concept of the right to trial.

The United States Supreme Court has observed that a system without the discretionary power of jury nullification in a defendant's favor would be "alien to our notions of criminal justice" and unconstitutional. (*Gregg v. Georgia* (1976) 428 U.S. 153, 199, fn. 50.) The existence of jury nullification in mandatory death penalty jurisdictions was an indication of evolving standards of decency leading to the repudiation of automatic death sentences. (*Enmund v. Florida* (1982) 458 U.S. 782, 818, fn. 32, dissenting

opn. O'Connor.) Thus, should a juror feel during deliberations of the facts that the law is contrary to the juror's conscience, that juror has a constitutional right to follow his or her conscience and vote for acquittal. This right derives from a penumbra of constitutional provisions, including the juror's First Amendment right to freedom of political speech, the Sixth Amendment right to a jury trial, and the Fourteenth Amendment right to due process. (Cf.*Griswold v. Connecticut* (1965) 381 U.S. 479, 481-484 [holding that the right of marital privacy finds its source in a penumbra of constitutional provisions].)

This Court has held that a defendant has no right to have the jury affirmatively advised that it may nullify. (*People v. Williams* (2001) 25 Cal.4th 441, 457.) However, the instruction given not only advises the jury that it must follow the law but implies serious consequences inflicted by the judge should a juror choose to suggest nullification. "That shoving the jury in the direction of nullification is something the trial court need not do does not mean that it is permitted to pressure the jury into stifling a spontaneous urge to nullify." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 492-493 (conc. opa. of Kaus, J.); but see *Sparf v. United States* (1895) 156 U.S. 41, 74-80 [upholding trial court that told jurors they had the power to nullify but that they should not exercise that power].)

A jury should not be instructed "in a manner that affirmatively conceals" the truth. (*People v. Arias* (1996) 13 Cal.4th 92, 173; see also *People v. Gainer* (1977) 19 Cal.3d 835, 851-852 [court may not misinstruct the juries that a hung jury means the case will be retried because hung juries do not always result in re-trial].) The instruction given not only deprived the defendant and jurors of the right of nullification but affirmatively concealed the truth that the right exists. Moreover, the instruction

misinformed the jurors by suggesting that if they disregard the law and are found out, they are in trouble. (See *People v. Dillon*, *supra*, 34 Cal.3d 441, 490 ["As far as the average lay juror is concerned, failure to follow the court's instructions invites legal sanctions of some kind and unless the juror is willing to risk a fine, jail or heaven knows what, he or she feels bound to follow the instructions."].) But this is not the truth: "Yet the essence of the jury's power to `nullify' a rule or result which it considers unjust is precisely that the law cannot touch a juror who joins in a legally unjustified acquittal or guilty verdict on a lesser charge than the one which the proof calls for. [Footnote]." (*Ibid.*; see also § 1150 [jury's right to enter a general verdict].)

The right to trial by jury is eviscerated if a juror is denied the right to apply the facts of the case to the law in a manner consistent with that juror's personal sense of morality. As the Ninth Circuit recognized, "the jury must not be reduced to the position of a mere ministerial agent by a direction on their very thought, thereby withholding of a vital right due them." (*Morris v. United States* (9th Cir. 1946) 156 F.2d 525, 529.) As Justice Rosen of the Third Circuit Court of Appeals has observed: "We must bear in mind that the confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their deliberations are the soul of the jury system." (*United States v. Antar* (3d Cir. 1994) 38 F.3d 1348, 1367 (conc. opn. of Rosen, J.).

The giving of the instruction on "the integrity of a trial" amounted to a "structural" defect in the trial mechanism, much like a complete denial of a jury. (*Rose v. Clark* (1986) 478 U.S. 570, 579; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) Automatic reversal of the judgment is the appropriate remedy because where this novel and threatening instruction is given, "there has been no jury verdict within the meaning of the Sixth

Amendment." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; *People v. Cahill* (1993) 5 Cal.4th 478, 502.)

To be sure, McKinnon recognizes that the appellate courts of this state have followed the Court of Appeal's decision in *People v. Molina* (2000) 82 Cal.App.4th 1329, which held that the provision of CALJIC number 17.41.1 does not require automatic reversal, but rather is subject to harmless error analysis. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1331-1332.) In *Molina*, *supra*, the appellate court held that the giving of the instruction was harmless beyond a reasonable doubt because the jury deliberated less than an hour with no indication of deadlock or holdout jurors. (*Ibid.*)

As a preliminary matter, the *Molina* court's holding that the error is subject to harmless error analysis is incorrect for the reasons set forth above. Furthermore, if the error were subject to harmless error analysis, the *Molina* court's application of the harmless error test was erroneous. Because the instruction abridges the federal Constitution, if a harmless error analysis applies, then the state bears the burden of proving that its provision was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Therefore, the question is not whether there is any indication that the use of instruction 17.41.1 affected the verdict in any way, as the *Molina* Court held, but rather whether the state can prove beyond a reasonable doubt that use of the instruction did *not* affect the verdict in any way. In this regard, it is not a satisfactory answer to say that the instruction did not affect the verdict because there was no indication of deadlock or a holdout juror and no juror reported any "misconduct." (See *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1331-1332.) Such an answer ignores that the fundamental vice in the instruction is that it deters minority or

holdout jurors from revealing themselves for fear of punishment or removal.

In any event, even applying the *Molina* analysis to this case, the error cannot be deemed harmless as to the Martin murder charge and related firearm possession charge. Here, the jurors did express deadlock (14 CT 4098, 10 RT 1278), they did indicate there was a holdout juror when they indicated that the vote was 11 to 1 (10 RT 1280), their expression of deadlock occurred on the fourth day of deliberations (10 RT 1283-1284), and they did not reach their guilty verdicts until the fifth day of deliberations (10 RT 1285). he judgment must be reversed.[50]

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[50] While defense counsel did not object to the instruction, no such objection was required to preserve the error for appeal. (Pen. Code, § 1259.)

XI

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S DISMISSAL OF PROSPECTIVE JURORS FOR CAUSE WITHOUT SUFFICIENT EVIDENCE THAT THEIR PERSONAL FEELINGS ABOUT THE DEATH PENALTY WOULD PREVENT OR SUBSTANTIALLY IMPAIR THEIR ABILITIES TO SERVE AS JURORS VIOLATED MCKINNON'S RIGHT TO A FAIR AND IMPARTIAL JURY, DUE PROCESS OF LAW, AND A RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

The prospective jurors in this case each completed a 45-question questionnaire. The trial court informed the parties that in order to "reduce the number" of prospective jurors who would be subject to voir dire, it would review the questionnaires for "very extreme" answers and dismiss those jurors "where it's obvious to me they are impaired" and disqualified under the standard announced in *Wainwright v. Witt* (1985) 469 U.S. 412 based on those written answers alone. (1 RT 29; 2 RT 206.) In fact, the parties eventually stipulated to dismissing several jurors for cause based on their written answers alone because they concluded that those answers demonstrated that their feelings about the death penalty were so strong that they could not set them aside and follow the law and their oaths as jurors. (3 RT 212-217; see *People v. Avila* (2006) 38 Cal.4th 491, 530-533 [jurors may be dismissed for cause based upon their "unambiguous" questionnaire responses alone if those answers state that they will "automatically" vote for one penalty over another].)

Unfortunately for McKinnon, however, the court did not limit its dismissals for cause to such prospective jurors. Instead, based on their

questionnaire responses alone, the court excused, sua sponte, prospective jurors Addington, Smith, Griggs, Fogg, and Harpster, whose written responses did *not* establish that they were disqualified to serve under the *Witt* standard. (3 RT 209-214.) Unlike the other challenges, McKinnon refused to stipulate to excusing those prospective jurors for cause. (3 RT 211-213, 217-218, 221.)

In excusing those jurors for cause "solely upon the prospective jurors' checked answers and brief written comments on the juror questionnaire, the [court] apparently acted on the premise that those answers and comments were fully adequate, standing alone, to support a determination by the court that each prospective juror's views would prevent or substantially impair the performance of his or her duties as a juror in the case before the juror." (*People v. Stewart* (2004) 33 Cal.4th 425, 445-446.) As will be demonstrated below, "this premise was mistaken." (*Id.* at p. 446.) The record reveals that the trial court did not "proceed with [the] great care, clarity, and patience" demanded of jury selection in a capital case. (*People v. Heard* (2003) 31 Cal.4th 946, 968.)

In the end, the jury that voted to execute McKinnon did not contain a single member who voiced the slightest hesitation to impose such a judgment in any case. Having been "culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas* (1980) 448 U.S. 38, 43), the jury that fixed McKinnon's punishment at death was one "uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois* (1968) 391 U.S. 510, pp. 520-521). Accordingly, its death judgment cannot be executed. (*Ibid.*)

B. The Controlling Legal Principles

A criminal defendant is entitled to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. (See, e.g., *Morgan v. Illinois* (1992) 504 U.S. 719, 727, and authorities cited therein; *People v. Wheeler* (1978) 22 Cal.3d 258, 272.) In capital cases, if the state has excluded from the jury members of the community with any reservations about capital punishment, the sentencing body is not impartial. Of course, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-522, fn. 20.) When the "pro-life" side of the spectrum is excluded, the state "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Id.* at pp. 520-521.) Hence, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522, fn. omitted.)

The Court in *Witherspoon* suggested that a prospective juror may be excused for cause only if he makes it "unmistakably clear" that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial in the case before" him. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522, fn. 21.) Revisiting the issue 18 years later, the Court reaffirmed the fundamental principles underlying the *Witherspoon* decision and "clarified" the test for determining when a juror may be excluded for cause. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424-426.) Under the *Witt* standard, a prospective

juror may be excused for cause based upon his or her views of the death penalty only if the juror's answers convey a "definite impression" (*id.* at p. 426) that his or her views "would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424, adopting test applied in *Adams v. Texas* (1980) 448 U.S. 38, 45; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting *Witt* standard]; accord, *People v. Stewart*, *supra*, 33 Cal.4th at pp. 440-441; *People v. Heard*, *supra*, 31 Cal.4th at p. 963; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.)

A prospective juror would be "prevented or substantially impaired" in the performance of his or her duties as a California juror and is properly excluded only if "he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447; accord, *People v. Avila*, *supra*, 38 Cal.4th at pp. 529-530; *People v. Heard*, *supra*, 31 Cal.4th at p. 958.) "Those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; accord, *Adams v. Texas*, *supra*, 448 U.S. 38, 50; *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 514, fn. 7; *People v. Stewart*, *supra*, 33 Cal.4th at p. 447; *People v. Heard*, *supra*, 31 Cal.4th at pp. 959-965.) Hence, "'[t]he crucial inquiry is whether the venireman could follow the instructions and obey his oath" to fairly and impartially consider both penalties "notwithstanding his views on capital punishment.' *Dutton v. Brown* , 788 F.2d 669, 675 (10th Cir. 1986)." (*United States v.*

Chatnhadara (10th Cir. 2000) 230 F.3d 1237, 1270.)

Ordinarily, "[a]ssessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation]." (*People v. Weaver* (2001) 26 Cal.4th 876, 910; see also *Wainwright v. Witt*, *supra*, 469 U.S. at p. 429.) Where the court conducts live voir dire, its ruling is entitled to deference because of the trial judge's unique ability to observe demeanor and assess credibility, and will be upheld on appeal if supported by substantial evidence. (See, e.g., *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 426-430; *People v. Stewart*, *supra*, 33 Cal.4th at p. 451; *People v. Heard*, *supra*, 31 Cal.4th at p. 965; *People v. Memro* (1995) 11 Cal.4th 786, 817-818.) However, where the court does not conduct live voir dire, its ruling is not subject to deferential review. (*People v. Avila*, *supra*, 38 Cal.4th at p. 529; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 451-452; *United States v. Chanthadara*, *supra*, 230 F.3d at pp. 1269-1270.) Finally, the improper exclusion of even a single qualified juror for cause requires reversal per se. (See, e.g., *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *Davis v. Georgia* (1976) 429 U.S. 122, 123 (per curium); *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.)

C. The Death Judgment Must Be Reversed Because the Prospective Jurors' Questionnaire Answers Did Not Provide Sufficient Evidence to Support the Court's Rulings That They Were Disqualified Under the *Wainwright v. Witt* Standard

1. Prospective juror Addington.

Not one of the questions in the juror questionnaire "directly address[ed] the pertinent constitutional issue" under *Witt* – i.e., whether the prospective jurors could temporarily set aside their personal feelings about

the death penalty and follow the law as stated in the "court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447; see also *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law"]; *Adams v. Texas*, *supra*, 448 U.S. at p. 50 [issue is whether jurors are willing and able to "follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"]; *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 514, fn. 7 [issue is whether juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a jury and to obey the law of the State"]; *People v. Heard*, *supra*, 31 Cal.4th at pp. 959-965 [issue is whether prospective juror's "views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror"]; *Brown v. Lambert* (9th Cir. 2005) 431 F.3d 661, 665 ["excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law"]; *United States v. Chanthadara*, *supra*, 230 F.3d at p. 1270 ["'the crucial inquiry is whether the venireman could follow the instructions and obey his oath" to fairly and impartially consider both penalties "notwithstanding his views on capital punishment'"].)

Instead, the questionnaire asked a series of questions calling for answers presumably designed to be considered *as a whole* in making a *preliminary* assessment of the prospective jurors' qualifications, some of which were directed to the prospective jurors' abilities to be impartial and

subordinate their views to the court's instructions on the law as a general matter, and some of which were directed to their feelings regarding the death penalty in particular. Thus, the key *Witt* query was never put to those jurors who were not subjected to voir dire.

This Court has recently held that when the critical *Witt* question *is* included in a juror questionnaire and potential jurors provide "unambiguous" written responses that they will "automatically" vote for one penalty over the other or are "unwilling to temporarily set aside [their] . . . own beliefs and follow the law," the written responses will support a finding of disqualification. (*People v. Avila*, *supra*, 38 Cal.4th at pp. 530-5332.) However, when the questionnaire does *not* directly address "the pertinent constitutional issue" under *Witt*, a trial court should not dismiss a prospective juror for cause based upon his or her written responses alone because it is unlikely that the responses will provide sufficient information for the court to reliably determine that the juror is disqualified under *Witt*. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 447, 449-450 [where juror questionnaire did not "directly address the pertinent constitutional issue" under *Witt*, the trial court erred in dismissing juror for cause based upon questionnaire responses alone]; accord, *United States v. Chanthadara*, *supra*, 230 F.3d at pp. 1271-1272, & fn. 7, followed by *Stewart*, *supra* ["although we do not wish to foreclose the possibility that some responses to juror questionnaires would sufficiently support excusing a prospective juror for cause," when "none of the questions . . . articulates the proper legal standard under *Witt*," a prospective juror's ambiguous or conflicting answers is not sufficient to justify her dismissal under *Witt*].) In other words, when the questionnaire omits the critical *Witt* question, it suffers from a "material flaw" and generally cannot alone sustain a finding of

substantial impairment without follow up questioning. (*People v. Avila*, *supra*, 38 Cal.4th at p. 530.) This is just such a case.

In the first section of the questionnaire directed to both phases of the trial, question 22 asked, "Do you have any feeling about the nature of the charges in this case that would make it difficult or impossible for you to be fair and impartial?" (6 CT 1620.) Prospective juror Addington answered no to this question. (6 CT 1620.)

Question 23 asked, "Do you have any religious or moral feeling that would make it difficult or impossible for you to sit in judgment of another person?" (6 CT 1620.) Again, Addington answered no to this question. (6 CT 1620.)

Finally, question 24 asked, "if the judge gives you an instruction on the law that differs from your beliefs and opinions, will you follow the law as the judge instructs you?" (6 CT 1620.) Addington answered yes to this question. (6 CT 1620.)

In the so-called "death qualification" section, question 44 asked the prospective jurors to describe their "general feelings about the death penalty." (6 CT 1627; 8 CT 2077.) Addington responded, "I don't agree with it. I think the state shouldn't take a life nor do I think an individual should take anothers [*sic*] life." (6 CT 1627.) Subdivision (a) of question 44 asked potential jurors to rank themselves on a scale of one to 10, one being strongly opposed to the death penalty and 10 being strongly in favor of it. (6 CT 1627.) Addington ranked himself as a one. (6 CT 1627.) Subdivision (b) asked the jurors if they had any "particular reason" for their feelings about the death penalty and, if so, to explain. (6 CT 1627.) Addington answered yes and explained, "it's wrong to kill people." (6 CT 1627.) Subdivision (c) asked, "if you are against the death penalty, would

your opinion *make it difficult* for you to vote for the death penalty in this case, regardless of what the evidence was?" (6 CT 1627, italics added.) Addington replied yes and explained that "it would *be hard* to vote for the death penalty under any condition." (6 CT 1627, italics added.)

Question 46 explained generally that it was "important" to have an "open mind and a willingness to fairly consider all of the evidence" and that jurors are never required to vote for death but rather are "always given the option in a penalty phase of choosing life without parole." (6 CT 1628.) Following this general explanation, the question asked the prospective jurors to assume that a defendant was convicted of "special circumstances murder" and, based on that assumption, select which of three options reflected their views. (6 CT 1628; 8 CT 2078.) Option (a) was "no matter what the evidence was, ALWAYS vote for the death penalty." (6 CT 1628.) Option (b) was "no matter what the evidence was, ALWAYS vote for life without possibility of parole." (6 CT 1628.) Option (c) was "I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (6 CT 1628.) Addington checked *option (c)*. (6 CT 1628.)

Questions 47 and 48 explained that the jurors would receive instructions on the law explaining that death and life without parole "meant exactly that" and prohibiting them from considering the costs of imprisonment or execution and asked if they could follow those instructions. (6 CT 1629.) Addington replied yes to both questions. (6 CT 1629.)

In sum, prospective juror Addington acknowledged his strong personal opposition to the death penalty, which would make it "difficult" or "hard" to vote for death. (6 CT 1627.) At the same time, he agreed that he

would follow the court's instructions on the law even if they differed from his personal opinions. (6 CT 1620, 1629.) He further indicated that he would *not* "always" vote for life without parole regardless of the evidence, but rather "would consider all of the evidence and the jury instructions as provided by the court and impose the penalty [he] personally fe[lt was] appropriate." (6 CT 1628.) Based solely upon these written responses, the court concluded that prospective juror Addington was "substantially impaired" and dismissed him for cause. (3 RT 212-213.) The court erred.

As this Court has observed, it "is clear that a prospective juror's personal conscientious objection to the death penalty is *not* a sufficient basis for excluding that person from jury service in a capital case under *Witt*, *supra*, 469 U.S. 412." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) This is so because "not all those 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 clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; accord *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522 ["a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"]; *People v. Avila*, *supra*, 38 Cal.4th at p. 530 [a potential juror is improperly excused for cause based upon his or her questionnaire answers alone when they "indicate[] strong reservations about the death penalty but [do] not negate the possibility the jurors could set aside their feelings and deliberate fairly"].)

In this regard, a juror who would simply find it "difficult" or "hard" to impose the death penalty is not necessarily disqualified under the *Witt* standard. As this Court has explained:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it 'very difficult' *ever* to vote to impose the death penalty. . . . [H]owever, a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror. . . . .
>
> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412. . . . A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, italics added; accord, *People v. Avila*, *supra*, 38 Cal.4th at p. 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties"]; see also *Adams v. Texas*, *supra*, 448 U.S. 38, 50 [in applying the "prevent or substantially impair" standard, "neither nervousness, emotional involvement, nor inability to deny or confirm any

effect whatsoever is equivalent to an unwillingness on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"].)

Pursuant to the foregoing authorities, prospective juror Addington's written questionnaire responses simply did not convey a "definite impression" that his personal opposition to the death penalty was such that he could not subordinate it to follow the law and his oath as a juror. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424, 426.) To the contrary, his questionnaire answers as a whole indicated that he would be an ideal juror. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 488 ["a juror . . . who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so"].) The court clearly erred in dismissing him for cause. For this reason alone, the death judgment must be reversed. (See, e.g., *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *Davis v. Georgia*, *supra*, 429 U.S. at p. 123; *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.)

2. Prospective Juror Smith.

In response to questions 22 and 23, prospective juror Smith agreed that his "feelings" would make it "difficult *or* impossible" to be "fair and impartial" and to "sit in judgment of another person," explaining in the written comment section, "difficulty with death penalty." (8 CT 2070, italics added.) Asked in question 44 to describe his general feelings about the death penalty, Smith responded, "don't think another human has the right to determine anothers [*sic*] death." (8 CT 2077.) On a scale from one to 10, he rated himself as a one, indicating that he was strongly opposed to the death penalty (question 44(a)). (8 CT 2077.) Furthermore, he agreed

with question 44, subdivision (c) that his feelings about the death penalty would "make it difficult for [him] to vote for the death penalty in this case, regardless of what the evidence was," explaining in the written comment section, "couldn't agree to put another person to death." (8 CT 2077.)

At the same time, prospective juror Smith agreed with question 24 that he would follow the law as stated in the court's instructions, even if the law differed from his personal beliefs and opinions. (8 CT 2071.) Similarly, he answered yes to questions 47 and 48 and took care to emphasize in the written comment section, "will follow rules as stated." (8 CT 2079.)

Finally, of the three options under question 46, Smith initially checked option (b) – "no matter what the evidence was, ALWAYS vote for life without possibility of parole." (8 CT 2078.) However, he then *scribbled out* that check mark and checked *only* option (c) – "I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (8 CT 2078.) Once again, the trial judge found that prospective juror Smith was "substantially impaired based upon his answers" to the questionnaire alone and dismissed him for cause. (3 RT 212.) Once again, the court erred.

Similar to prospective juror Addington, Smith indicated that while his "difficulty" with the death penalty would make it "difficult" to vote to impose that penalty, he would *not* "ALWAYS vote for life without possibility of parole" "no matter what the evidence was." (8 CT 2078.) Instead, he would "follow the rules as stated" (8 CT 2071, 2079) and "consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (8 CT 2078; see *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["those who firmly

believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law"]; accord, *Adams v. Texas*, *supra*, 448 U.S. at p. 50; *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 514, fn. 7; *People v. Stewart*, *supra*, 33 Cal.4th at p. 447; *People v. Heard*, *supra*, 31 Cal.4th at pp. 959-965; *Dutton v. Brown* (10th Cir. 1986) 788 F.2d 669, 675.)

To be sure, in his written comments to question 44 and subdivision (c), Smith wrote, "don't think another human has the right to determine anothers [*sic*] death" and "couldn't agree to put another person to death." (8 CT 2077.) However, as this Court has observed of similar statements, these remarks indicated only a "general opposition to the death penalty, and approval of life in prison without possibility of parole." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 448 [discussing juror's written comments, "I do not believe a person should take a person's life. I do believe in life without parole."].) Such expressions are *not* the equivalent of a refusal or inability to follow the law or substantial impairment under *Witt*. (*Ibid.*, and authorities cited therein].) In other words, Smith's written responses "indicated strong reservations about the death penalty but did not negate the possibility [he] could set aside [his] feelings and deliberate fairly." (*People v. Avila*, *supra*, 38 Cal.4th at p. 530.) Hence, they did not support the trial court's finding of substantial impairment. (*Ibid.*; accord, *People v. Stewart*, *supra*, 33 Cal.4th at pp. 444-449.)

At a minimum, considering Smith's answers as a whole – as the court was required to do (*People v. Ghent*, *supra*, 43 Cal.3d at p. 768) – they were conflicting and ambiguous. While a trial judge is entitled to resolve conflicts and ambiguity in favor of disqualification *following live*

voir dire in which it assesses demeanor and credibility (see, e.g., *People v. Heard*, *supra*, 31 Cal.4th at p. 958), ambiguity in written responses alone is *not* sufficient to satisfy the *Witt* standard and justify dismissing a juror for cause. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 449, 454; *United States v. Chanthadara*, *supra*, 230 F.3d at p. 1271, followed by *Stewart*, *supra*; compare *People v. Avila*, *supra*, 38 Cal.4th at pp. 530-533 [jurors properly dismissed for cause based on "unambiguous" questionnaire answers leaving "no doubt" that they will "automatically" vote for one penalty over the other or are "unwilling to temporarily set aside [their . . . own beliefs and follow the law"].)

It is entirely possible that follow-up questioning, in which the court explained the law and assessed prospective juror Smith's ability to subordinate his personal views and faithfully and impartially weigh a death penalty decision, *may* have revealed that his feelings would prevent or substantially impair his ability to serve as a juror. (See *People v. Stewart*, *supra*, 33 Cal.4th at pp. 450-451.) However, having limited its disqualification determination to the written answers to a "material[ly] flaw[ed]" questionnaire (*People v. Avila*, *supra*, 38 Cal.4th at p. 530), the trial court simply did not have "sufficient information regarding the prospective juror's state of mind to permit a reliable determination" as to the impact of his views on his ability to follow the court's instructions and his oath as a juror. (*People v. Stewart*, *supra*, at p. 445, 447 [prospective juror's ambiguous written responses were insufficient to justify his dismissal for cause under *Witt*, particularly because the questionnaire did not directly ask the "pertinent constitutional issue" – whether he was unwilling or unable to set aside personal feelings and follow the law]; *United States v. Chanthadara*, *supra*, at pp. 1271-1272 [prospective juror's

ambiguous written responses were insufficient to justify her dismissal for cause under *Witt*, particularly because "none of the questions which (she) answered articulated the proper legal standard under *Witt*"].) The court erred in dismissing prospective juror Smith for cause. Once again, this erroneous dismissal, standing alone, demands reversal of the death judgment. (See, e.g., *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *Davis v. Georgia*, *supra*, 429 U.S. at p. 123; *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.)

3. Prospective Jurors Griggs, Fogg, and Harpster

As discussed above, no one of the questions in the questionnaire "directly address[ed] the pertinent constitutional issue" under *Witt* – i.e., whether the prospective jurors could temporarily set aside their personal feelings *about the death penalty* and follow the "court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447; accord *People v. Avila*, *supra*, 38 Cal.4th at p. 530 [a questionnaire that does not ask if a juror can set aside his personal feelings and follow the law is "material(ly) flaw(ed)"].) Instead, the questionnaire asked a series of questions calling for answers presumably designed to be considered *as a whole* in making a preliminary assessment of the prospective jurors' qualifications. As a result, several prospective jurors provided written responses that were directly inconsistent with regard to the critical constitutional question. Once again, while a trial judge is entitled to resolve inconsistent responses in favor of disqualification following live voir dire, it is error to do so based upon written responses alone. This is just such a case. The trial court focused on answers indicating disqualification, while ignoring answers

indicating qualification, in dismissing prospective jurors Griggs, Fogg, and Harpster for cause on its own motion. In so doing, the court erred.

As discussed above, question 46 explained generally that it was "important" to have an "open mind and a willingness to fairly consider all of the evidence" and that jurors are never required to vote for death but rather are "always given the option in a penalty phase of choosing life without parole." Question 46 then asked the jurors to assume that a defendant was convicted of "special circumstances murder" and, based on that assumption, select which of three options reflected their views. Question 46 did *not* explain that the law requires sitting jurors to keep "an open mind and a willingness to fairly consider" *both penalties* by weighing aggravating circumstances against mitigating nor did it inquire into the prospective jurors' willingness or abilities to *follow that law.* Hence, question 46 could fairly be construed as asking how a potential juror would vote if guided by *only* his or her *personal feelings* rather than the critical question of how he or she would approach the task of determining penalty if guided by *the law.* Indeed, this reading is buttressed by the language used in option (c), which specifically referred to the imposition of penalty the potential jurors "*personally* feel is appropriate." (Italics added.) Several of the jurors, including prospective jurors Griggs, Fogg, and Harpster, selected option (b) – "no matter what the evidence was, ALWAYS vote for life without possibility of parole." (5 CT 1303, 1378; 9 CT 2603.)

Question 44, subdivision (c), asked the prospective jurors who were generally opposed to their death penalty if their opinions would "*make it difficult* for you to vote for the death penalty in this case, regardless of what the evidence was?" (Italics added.) Again, several of the prospective jurors, including Griggs and Fogg, answered yes to this question. (5 CT

1302, 1377; 9 CT 2602.)

Weighed against these questions and answers were questions 24, 47, and 48 – the *only* questions directed to the issue of the prospective jurors' willingness or abilities to subordinate their personal views *to the law* (albeit not specifically directed to the critical issue of whether they could subordinate the personal views about *the death penalty* to follow the law). Once again, question 24 asked, "if the judge gives you an instruction on the law that differs from your beliefs and opinions, will you follow the law as the judge instructs you?" Questions 47 and 48 explained that the jurors would receive instructions on the law explaining that death and life without parole "meant exactly that" and prohibiting them from considering the costs of imprisonment or execution and asked if they could follow those instructions. Some jurors answered no to these questions, explaining that they would not follow the law if it meant imposing the death penalty. (See, e.g., 10 CT 2796, 2804 [prospective juror Townsend's responses to question 24, "depends on morality of the law – I will not sentence someone to death" and question 47, "but I will not vote for the death penalty"].) For purposes of this argument alone, McKinnon assumes that these jurors were properly excluded based on their questionnaire responses alone. (3 RT 209 [court dismissing Townsend for cause based on questionnaire responses].) However, others, including Griggs, Fogg, and Harpster, answered *yes* to all of these questions. (9 CT 2596, 2604; 5 CT 1296, 1304, 1371, 1379-1380.)

Thus, based on the questionnaire responses alone, Griggs, Fogg, and Harpster provided inconsistent answers regarding the critical *Witt* issue. While they were personally opposed to the death penalty and, therefore, would vote for life without parole regardless of the evidence if guided by their personal feelings, they also generally indicated that they could set

aside their personal feelings if they conflicted with the court's instructions and follow the law. Once again, while the court is entitled to resolve such conflicts in favor of disqualification following live voir dire, such conflicts in written questionnaire responses alone are not sufficient to meet the disqualification standard articulated in *Witt*. Indeed, the court here failed entirely to appreciate this significant conflict. Instead, the court cited the prospective jurors' selection of option (b) under question 46, along with their written comments expressing personal opposition to the death penalty and the "difficulty" they would have in voting for death, in support of its finding that "it's clear to me that" those prospective jurors "are substantially impaired," while ignoring entirely their written assurances that they would follow the law as stated in the instructions even if inconsistent with their personal beliefs. (3 RT 211; see also 3 RT 213-214.) Therefore, the record clearly indicates that "the court erroneously equated (i) the non-disqualifying concept" of a juror always voting for life without parole if guided by his or her personal feelings against the death penalty, "with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her *legal* duty, and failed to recognize that [the questions], standing alone, did not elicit sufficient information from which the court could properly determine whether a particular juror suffered from a disqualifying bias under *Witt*, *supra*, 469 U.S. 412, 424, 105 S.Ct. 844." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447; accord, *People v. Avila*, *supra*, 38 Cal.4th at p. 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties. The prospective juror might nonetheless be able to put aside his or her personal views and deliberate fairly under the death penalty law. Yet the . . . questionnaire did not inquire whether the prospective juror could do

so [and] hence . . . follow up questioning was essential . . . ."].)

Certainly, the prospective jurors' brief written comments did not clarify the conflict in their answers to such an extent that the court could reliably determine that they were disqualified. For instance, in response to question number 23 asking if it would be "difficult *or* impossible to be fair and impartial," prospective juror Fogg responded, "I don't believe I could be impartial. I find it hard to sit in judgment of another person." (5 CT 1295, italics added.) At the same time, he never indicated that he would never vote for death, but rather indicated his personal "belief[]" that "it is wrong to take a life," and therefore "[i]t would be *very hard* for me to pass judge [*sic*] for death." (5 CT 1302, italics added.) Furthermore, in addition to his affirmative response to question 24 that he would follow the law if it conflicted with his personal beliefs, Fogg explained in response to question number 48, "I will follow the rules explained to the best of my ability." (5 CT 1304.) Once again, so long as a juror can "follow the rules" of law, the fact that he would find it "very hard" or "very difficult" to vote for the death penalty is not, standing alone, a ground for disqualification. (*People v. Avila*, *supra*, 38 Cal.4th at p. 530; *People v. Stewart*, *supra*, 33 Cal.4th at p. 446; accord *Adams v. Texas*, *supra*, 448 U.S. at p. 50.)

Similarly, prospective juror Griggs provided responses reflecting religious scruples against the death penalty, indicating that it would be "difficult *or* impossible to be fair and impartial" because "I don't believe in killing period," describing his general feelings about the death penalty as "though shalt not kill," and explaining that he was personally opposed to the death penalty because "man is not god." (9 CT 2595, 2602, italics added.) However, weighed against these expressions of religious scruples against the death penalty, Griggs also consistently indicated a willingness to

follow the law as stated in the instructions, even if inconsistent with his religious beliefs. (9 CT 2596, 2604.) Of course, a prospective juror with "conscientious or religious scruples against" capital punishment who "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a jury and to obey the law of the State" is not disqualified to serve under *Witt*. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 514, fn. 7 and p. 522; accord, *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176; *Adams v. Texas*, *supra*, 448 U.S. at p. 48; *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

Prospective juror Harpster's questionnaire provided a particularly striking example of inconsistency with regard to the *Witt* query. Indeed, Harpster's answers were inconsistent with respect to the preliminary question of whether she even opposed capital punishment at all. On the one hand, she ranked herself as an eight *in favor* of the death penalty. (5 CT 1377.) Asked why she supported the death penalty, she explained, "if it was my family member, it would be difficult not wanting that person to suffer." (5 CT 1377.) In accord with these expressions of support for capital punishment, in response to question 44, subdivision (c), which asked death penalty *opponents* if their feelings would "make it difficult" to "vote for the death penalty in this case," Harpster replied, "not able to answer," while in response to number 44, subdivision (d), which asked death penalty *supporters* if their feelings would "make it difficult" to vote for "life without the possibility of parole in this case," Harpster replied yes, explaining, "again we are not to take a life." (5 CT 1377.) However, in seeming contrast to the above answers, Harpster explained her general feelings about the death penalty as: "only God has the right to take a life." (5 CT 1377.) And, asked if her views had changed over time, she

explained, "The more I study the word of our Lord, I find it more difficult to put someone else in a position to die." (5 CT 1377.) Of course, as discussed above, she also indicated her general willingness and ability to follow the instructions of the court, answering yes to questions 24, 47 and 48. (5 CT 1371, 1379-1380.) Finally, in an optional explanatory section at the end of the questionnaire, Harpster wrote, "when one believes that God created us to follow him and Jesus by faith - it would be difficult to follow man's law. I understand the law is [unintelligible] and must continue for man to survive," thus again signaling a willingness to follow "man's law" despite its seeming conflict with her understanding of biblical doctrine. (5 CT 1380.)[51] Reading them as a whole, Harpster's answers cannot be characterized as anything other than conflicting and ambiguous with regard to the pertinent constitutional question of whether her feelings about the death penalty were such as to prevent or substantially impair her ability to follow the law requiring her to weigh aggravating against mitigating circumstances and to fairly and impartially consider both penalty options.

In sum, "none of the questions [Griggs Fogg, and Harpster] answered articulated the proper legal standard under *Witt*. [Citations.] Nothing in [their] responses on the record indicate[d] an intention to disregard or circumvent the law or the court's instructions." (*United States v. Chanthadara*, *supra*, 230 F.3d at p. 1272; accord, *People v. Avila*, *supra*, 38 Cal.4th at p. 530; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 445, 447; *People v. Heard*, *supra*, 31 Cal.4th at pp. 963-964 [prospective juror's written response "given without the benefit of the trial court's explanation

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[51] As the court observed, it is difficult to make out this word in Harpster's written response, but it appears to be "need" or "needed" or perhaps "real." (5 CT 1380; 3 RT 214.)

of the governing legal principles" did not provide adequate basis to dismiss for cause].) While live voir dire might have "'clarif[ied] . . that [they] were opposed to the death penalty to a degree which would have made it impossible for [them] to follow the law,'" their conflicting and ambiguous questionnaire responses alone simply did not. (*Chanthadara*, *supra*, 230 F.3d at p. 1272; accord, *People v. Stewart*, *supra*, 33 Cal.4th at pp. 445-447; compare, e.g., *People v. Avila*, *supra*, 38 Cal.4th at pp. 531-533 [where questionnaire contained critical *Witt* question and potential juror provided "clear, unequivocal, and *internally consistent*" written responses that she would "automatically" vote for life regardless of the evidence and would not set aside her feelings and follow the law, court properly excused her for cause based on written responses alone].) The court erred in dismissing these jurors for cause. (3 RT 211-214.) Once again, for this reason alone, the death judgment must be reversed. (See, e.g., *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *Davis v. Georgia*, *supra*, 429 U.S. 122; *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.)

D. Trial Counsel's Non-Opposition to the Court's Dismissal of the Prospective Jurors for Cause Did Not Waive McKinnon's Right to Challenge Them on Appeal

As discussed in the Introduction, the parties stipulated to excusing several prospective jurors for cause based on their questionnaire responses alone. However, as to others – including those discussed in this argument – the defense refused to stipulate. (3 RT 211-214; compare, e.g., *People v. Ervin* (2000) 22 Cal.4th 48, 72-73 [counsel's stipulation to excusing jurors for cause based upon their questionnaire answers waived client's right to challenge dismissals on appeal].) At the same time, it is true that counsel did not specifically object or oppose the court's dismissal of those venirepersons for cause. Respondent may argue that counsel therefore

waived McKinnon's right to challenge the court's erroneous dismissals on appeal. Any such argument must be rejected.

Voir dire in this case was conducted in 1998. At the time, the law did not require an objection or opposition to the erroneous dismissal of a juror for cause under *Witherspoon-Witt* in order to preserve the error for appeal. In *People v. Velasquez* (1980) 26 Cal.3d 425, 443, this Court rejected the Attorney General's argument that the defendant waived a *Witherspoon* error by failing to object to the juror's dismissal. As this Court stated, "the decisions of the United States Supreme Court and of the California courts have unanimously ruled that *Witherspoon* error is not waived by mere failure to object." (*Ibid.*, citing, inter alia, *Maxwell v. Bishop* (1970) 398 U.S. 262, *People v. Risenhoover* (1968) 70 Cal.2d 39, 56, and *In re Anderson* (1968) 69 Cal.2d 613, 618-619.) Thereafter, in *People v. Lanphear* (1980) 26 Cal.3d 814, 844, this Court relied on *Velasquez* in again rejecting the Attorney General's argument that the defendant waived *Witherspoon* error for failing to object. In *People v. Cox* (1991) 53 Cal.3d 618, 648, fn. 4, this Court again cited *Velasquez* in noting with respect to a claim that the trial court erroneously dismissed a juror for cause that "*the failure to object does not waive the issue for appeal . . .*, italics added." However, in a 1997 footnote, this Court curiously observed that – despite *Velasquez*'s clear reliance on California authority – "[w]e have not decided whether 'nonopposition' to a *Witherspoon-Witt* challenge for cause waives any claim of error on appeal. . . . We recognized controlling federal precedent holds that *Witherspoon* error is not waived by 'mere' failure to object in *People v. Velasquez . . . .*" (*People v. Holt* (1997) 15 Cal.4th 619, 651, fn. 4.) Most recently, the Court observed that it is now "unclear" as to whether an objection is required to preserve an erroneous

challenge for cause; because the question is a "close and difficult" one, it should be resolved in favor of preservation. (*People v. Lewis* (2006) ___ Cal.4th ___, ___ Cal.Rtpr.3d. ___, fn. 8, 2006 *Daily Journal* D.A.R. 11, 291, and authorities cited therein.) Hence, because the law did not impose an objection requirement at the time of voir dire in this case – and indeed because the only cases directly on point held that no such objection was required – defense counsel's failure to object or oppose the court's dismissal of prospective jurors for cause did not waive McKinnon's right to challenge the errors on appeal. (Cf. *People v. Weaver*, *supra*, 26 Cal.4th at pp. 910-911 [where law in state of flux at time of voir dire as to whether expression of dissatisfaction necessary to preserve erroneous denial of for-cause challenge, absence of expression did not waive error for appeal]; accord, *People v. Boyette*, *supra*, 29 Cal.4th at p. 416; see also *People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["defendant should not be penalized for failing to object where existing law overwhelmingly said no such objection was required"]; *People v. Collins* (1986) 42 Cal.3d 378, 384-385, 388 [declining, on fundamental fairness grounds, to apply waiver rule that did not exist at time of trial despite possibility lack of trial objection was strategic sandbagging]; *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1151-1152.)

Although counsel generally requested live voir dire of all of the jurors (1 CT 251-268), it is also true that he did not specifically request live voir dire, or object to the court's failure to conduct live voir dire, of the prospective jurors discussed above. If McKinnon's challenge were a procedural one going to the court's failure to conduct live voir dire, his counsel's failure to object might *arguably* amount to waiver. (But see *People v. Benavides* (2005) 35 Cal.4th 69, 87-88 [by *stipulating* to

dismissing certain jurors for cause based upon questionnaire answers alone, counsel waived appellate claim of *procedural defect* in failing to conduct live voir dire].) However, his challenge is a *substantive* one going to the sufficiency of the evidence to support the court's determination – a determination to which counsel *did not* stipulate – that prospective jurors Addington, Smith, Fogg, Griggs, and Harpster were disqualified to serve under *Witt*. (See, e.g., *United States v. Chanthadara*, *supra*, 230 F.3d at p. 1269 [declining to resolve *procedural* question of whether court erred in failing to conduct live voir dire and instead reversing on *substantive* ground that information in jurors's written questionnaire responses was insufficient to justify dismissal under *Witt* standard].) Once again, as the law in 1998 did not require counsel to oppose the erroneous dismissal of a juror for cause in order to preserve the error for appeal, and indeed the weight of authority was that non-opposition did *not* amount to waiver, McKinnon's right to challenge the court's erroneous dismissals for cause was not waived. For all of the reasons stated above, the death judgment must be reversed.

XII

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRONEOUS ADMISSION OF, AND INSTRUCTIONS ON, OTHER "CRIMINAL ACTIVITY" EVIDENCE UNDER FACTOR (b) VIOLATED STATE LAW, AS WELL AS MCKINNON'S RIGHTS UNDER THE FOURTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

As mentioned in the Statement of Facts, apart from the crimes themselves and their impact on the victims' families, the prosecution offered a series of trivial episodes of prior criminal activity in aggravation. While petty and difficult to reconcile with the jury's death judgment, it seems clear that the jury accorded them a substantial amount of aggravating weight, given that the circumstances of the crimes themselves were not particularly aggravating while the mitigating evidence was both substantial and compelling.

In its notice of aggravation, the prosecution stated its intention to introduce evidence under Penal Code section 190.3, subdivision (b), of, inter alia: 1) an unadjudicated 1988 arrest of McKinnon and Orlando Hunt for drug and weapon possession; 2) the facts underlying a 1992 misdemeanor conviction for battery upon McKinnon's sister, Robin; and 3) an unadjudicated 1984 battery and robbery in a school cafeteria, committed when McKinnon was 17 years old. (3 CT 760-761.) Thereafter, the prosecution orally notified the court and counsel that it intended to introduce evidence that a "shank" had been found secreted behind a light fixture affixed to the ceiling of McKinnon's jail cell. (11 RT 1338-1343.)

As discussed in detail below, McKinnon moved to exclude and

objected to this evidence on various grounds. (13 CT 3665-3675, 3679-3692; 10 RT 1305-1306, 1317-1318; 11 RT 1330-1347, 1428-1434; 12 RT 1441-1447, 1450-1452.) The court denied the motions, overruled the objections, admitted the evidence, and instructed the jurors on the elements of the alleged crimes. (10 RT 1305-1306, 1317-1318; 11 RT 1323-1337, 1338-1347, 1425, 1430-1432, 1434; 12 RT 1439-1440, 1448, 1451-1453.) Unfortunately, however, its instructions were neither accurate nor complete.

As will be demonstrated, the court's admission of this evidence and its instructional errors violated state law, as well as McKinnon's rights under the Sixth, Eighth and Fourteenth Amendments. Given the astonishing closeness of the penalty phase case and the significance that the other crimes evidence clearly played in the jurors' determination that McKinnon should be put to death, respondent will be unable to prove beyond a reasonable doubt that the cumulative effect of the errors was harmless. The death judgment must be reversed.

B. The Court Erred in Admitting Evidence That McKinnon Possessed Bullets and Rock Cocaine During a 1988 Arrest

As mentioned above, the prosecution sought to admit under factor (b) evidence that McKinnon was arrested for possession of suspected rock cocaine in 1988. (3 CT 760-761; see also 7 SCT 55-56, 65-66.) When he was arrested, police discovered .357 caliber bullets on his person. (13 CT 3667.) He was arrested while in the park with several other men, including Orlando Hunt, who possessed a .357 handgun. (13 CT 3667.) According to the prosecution's theory, McKinnon's possession of the bullets was sufficient to prove that he constructively possessed the gun found on Hunt's person or aided and abetted Hunt's gun possession. (10 RT 1317.)

McKinnon moved to exclude the evidence on two primary grounds.

First, the evidence was the product of an unreasonable search and seizure, in violation of the Fourth Amendment. (13 CT 3665-3675; 10 RT 1312-1316.) Second, the evidence did not show "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" under Penal Code section 190.3, subdivision (b). (13 CT 3680-3681; 10 RT 1317.) As will be demonstrated, the court's denial of the motion was erroneous.

1. The Evidence Should Have Been Suppressed Because the Search That Produced it was Unreasonable Under the Fourth Amendment.

a. The Evidence Presented at the Suppression Hearing and the Court's Ruling.

The court held a hearing on counsel's motion to suppress the drug and bullet evidence pursuant to Penal Code section 1538.5. (10 RT 1313-1318; 11 RT 1323-1337.) In ruling on the motion, the court considered the police report relating to the arrests and heard Sergeant Marshall Palmer's testimony. (10 RT 1313-1318; 11 RT 1323; 7 SCT 43-72 [Court's Exhibit 1].)

According to the police report and Marshall's testimony, at about 4:00 p.m. on November 12, 1988, Banning Police officers were dispatched to Eastside Park based upon an anonymous tip. (7 SCT 54.) The dispatcher relayed that the anonymous informant had reported that a group of black men were in the park, standing around a blue Mercedes. (7 SCT 54; 11 RT 1324-1325.) Two of the men had handguns; one was not wearing a shirt and the other was wearing all black, including a black cap. (7 SCT 54; 11 RT 1324-1325.) The park was described by the reporting officer, Officer Shubin, as a "known hang-out for drug users & dealers where street sales is [*sic*] commonplace." (7 SCT 54.)

However, when the police arrived at the park, there was no blue Mercedes. (11 RT 1325, 1328-1329; 7 SCT 55.) Nor were there any shirtless black men. (11 RT 1325, 1328-1329; 7 SCT 55.) Nor were any men holding visible guns. (11 RT 1323-1325, 1328-1329; 7 SCT 55.) There was a group of black men standing around a red Toyota pickup truck, including McKinnon, who was wearing all black and a cap. (11 RT 1325-1326; 7 SCT 55.) Orlando Hunt and another man were sitting on a bench about 10 to 15 yards from the group. (7 SCT 55.) Although none of the anonymous tipster's information was corroborated apart from his description of a man wearing all black, police detained the men, including McKinnon, and ordered them to place their hands on the truck, an order with which they complied. (7 SCT 55.)

Immediately after the other men were detained, Orlando Hunt stood up from the bench and began to walk away. (7 SCT 55; 11 RT 1326.) He immediately stopped when Shubin ordered him to do so. (7 SCT 55; 11 RT 1326.) Another officer - neither Palmer nor Shubin - saw Hunt pull a handgun from his waistband and throw it on the ground. (7 SCT 55-56; 11 RT 1326-1327.) As that officer arrested Hunt, Shubin and Palmer "covered the group" of detained men and searched them all for weapons. (7 SCT 55-56; 11 RT 1326.)

Shubin searched McKinnon and found several .357 bullets in his jacket pocket. (7 SCT 56.) He continued to search McKinnon for weapons and, in so doing, felt a closed container in the same pocket. (7 SCT 56.) He retrieved the tupperware container, opened it, and discovered six rocks "resembling rock cocaine." (7 SCT 56; 11 RT 1327, 1329.) Shubin arrested McKinnon for possession of cocaine for sale. (7 SCT 57.) Hunt was arrested for carrying a loaded .357 magnum. (7 SCT 48, 57; RT 1327.)

Based upon this evidence, defense counsel argued that the seizure and search of McKinnon was unreasonable under the Fourth Amendment. (11 RT 1330-1334; see also 13 CT 3667-3675.) First, the anonymous tip and the police observations at the park were insufficient to create reasonable suspicion that McKinnon was involved in criminal activity and therefore his initial detention when officers ordered him to place his hands on the truck was unlawful. (11 RT 1331; see also 13 CT 3667-3670, citing, inter alia, *Alabama v. White* (1990) 496 U.S. 325.) Nor did Hunt's subsequent act of dropping his gun create the reasonable suspicion necessary to frisk McKinnon for weapons. (11 RT 1331-1332; see also 13 CT 3671-3674.) Finally, even if the initial detention and patdown for weapons were not unlawful, Shubin's discovery of bullets in McKinnon's pocket did not provide probable cause for the further search of McKinnon and the closed container in his pocket. (11 RT 1332; see also 13 CT 3674-3675.) Because McKinnon's possession of bullets was not unlawful, there was no reason to arrest him at that point, and therefore the search producing the container with cocaine could not be justified as a search incident to arrest. (11 RT 1331.) Furthermore, the search of the closed tupperware container exceeded the permissible scope of the patdown for weapons. (11 RT 1332; see also 13 CT 3674-3675.)

The court disagreed. First, it held that because the anonymous tipster's information was corroborated by the fact that McKinnon was wearing all black, it alone was sufficient to justify the detention and patdown for weapons. (11 RT 1335.) The fact that Hunt was armed provided further corroboration of the tip and therefore further justification for the detention and weapons searches of the other men. (11 RT 1335-1336.) Furthermore, because the bullets found in McKinnon's pocket were

.357 caliber and Hunt's gun was a .357, once Shubin found the bullets, that provided probable cause to arrest McKinnon for aiding and abetting Hunt's gun possession. (11 RT 1336-1337.) Therefore, the subsequent search and seizure of the tupperware container with cocaine was lawful as a search incident to arrest. (11 RT 1336-1337.) The court was wrong on all counts.

b. The Anonymous Tip Did Not Create Reasonable Suspicion That McKinnon was Engaged in Criminal Activity and Therefore the Initial Detention and Weapons Search were Unlawful.

The Fourth Amendment of the United States Constitution protects citizens from unreasonable government seizures and searches. (See, e.g., *Rakas v. Illinois* (1978) 439 U.S. 128, 143; *United States v. Sokolow* (1989) 490 U.S. 1, 7.) "[S]earches and seizure 'conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" [Citations.]" (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 372, and authorities cited therein.) One such exception exists for *brief* investigatory stops, which are reasonable under the Fourth Amendment if supported by reasonable suspicion that criminal activity is occurring or about to occur, and for "carefully limited" searches of a detained person's clothing for weapons, which are reasonable if supported by reasonable suspicion that he is armed and dangerous. (*Terry v. Ohio* (1968) 392 U.S. 1, 30; accord, *Florida v. J.L.* (2000) 529 U.S. 266, 269-270; *Sibron v. New York* (1968) 392 U.S. 40, 65-66.) "As with all warrantless intrusions, the burden lies with the state to justify" the *Terry* stop and frisk exception. (See, e.g., *People v. Bower* (1979) 24 Cal.3d 638, 644.) Evidence produced from an unreasonable

search or seizure in violation of the Fourth Amendment must be suppressed. (See, e.g., *Wong Sun v. United States* (1963) 371 U.S. 471, 488; *Silverman v. United States* (1961) 365 U.S. 505, 511; see also *People v. Woods* (1999) 21 Cal.4th 668, 674 [California challenges to the admissibility of evidence obtained by police search or seizure are measured under federal constitutional standards].)

Reasonable suspicion must be assessed based on the "totality of the circumstances," which requires the consideration of both the quantity and quality of all the information known to police at the time of the stop or search. (*Alabama v. White*, *supra*, 496 U.S. at pp. 328-330; *Florida v. J.L.*, *supra*, 529 U.S. at p. 271.) Under that standard, an anonymous tip of criminal activity, without more, is insufficient to create reasonable suspicion of criminal activity. (*Florida v. J.L*, *supra*, at p. 272; *Alabama v. White*, *supra*, at p. 329; *United States v. Morales* (9th Cir. 2001) 252 F.3d 1070, 1074; *People v. Jordan* (2004) 121 Cal.App.4th 544, 553-556.) This is so because "unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated (citation), 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity' (citation)" and thus is not sufficiently reliable to justify an intrusion on a person's liberty and privacy. (*Florida v. J.L.*, *supra*, 529 U.S. at p. 270.) Thus, an anonymous tip must otherwise bear particular indicia of reliability regarding the reported criminal activity in order to support a *reasonable* suspicion and justify an intrusion. (*Id.* at pp. 270-272; *Alabama v. White*, 496 U.S. at p. 329; *People v. Jordan*, *supra*, 121 Cal.App.4th at pp. 554, 559-560; *United States v. Thomas* (9th Cir. 2000) 211 F.3d 1186, 1190.)

If the tipster's information is detailed and corroborated, and if it

contains significant, verified predictive information, it may be sufficiently reliable to create reasonable suspicion because it may indicate that the informant has some inside knowledge about the suspect and his or her criminal activities. (*Florida v. J.L.*, *supra*, 529 U.S. at pp. 270-272; *Alabama v. White*, *supra*, 496 U.S. at p. 332; *United States v. Morales*, *supra*, 252 F.3d at pp. 1074-1076; *People v. Jordan*, *supra*, 121 Cal.App.4th at pp. 554-555, 559.) In addition, other circumstances relevant to the reliability assessment include whether the tipster has explained how he or she purports to come by the information, whether the tipster is "truly anonymous" or his or her anonymity has been compromised to such a degree that he could be held accountable for a false report – such as when the information is imparted in person and immediately followed-up – thereby increasing his reliability, or where the informant's voice is recognized as someone who has provided reliable, verified information in the past. (*People v. Jordan*, *supra*, 121 Cal.App.4th at p. 560, and authorities cited therein; *Florida v. J.L.*, *supra,* 529 U.S. at p. 275 (conc. opn. of Kennedy, J.).) Of course, if officers respond to an anonymous tip and actually observe the described suspect engage in suspicious or criminal activity, the totality of the circumstances may create reasonable suspicion of criminal activity to justify a *Terry* stop and frisk.

In *Alabama v. White*, *supra*, 496 U.S. 325, an anonymous telephone informant told the police the name of a woman who would leave a specific apartment at a specific time, carrying a brown attaché case with about an ounce of cocaine inside. The informant described what the woman would drive and the motel that would be her destination. Police officers waited outside the apartment and observed a woman, who was not carrying anything, get into a car matching the informant's description. They

followed her as she took the most direct route to the motel and stopped her just short of it. With the woman's consent, officers searched the vehicle and found a locked brown attaché case containing marijuana. (*Id.* at p. 327.) Although it was a "close case," the Court held that under the totality of the circumstances – most particularly, the specific, verified details and predictive information that permitted a reasonable conclusion that the informant had inside information about the woman and her criminal activities – the corroborated anonymous tip bore sufficient indicia of reliability to justify the *Terry* stop. (*Id.* at p. 332.)

In contrast, in *Florida v. J.L.*, *supra*, an anonymous caller reported to police that a young black man, wearing a plaid shirt and standing at a particular bus stop, was carrying a gun. Two officers went to the bus stop. They saw three black males, including J.L., who was wearing a plaid shirt. The officers saw no firearms, and noticed no threatening or unusual movements. Nonetheless, they ordered J.L. to put his hands on the car, frisked him, and seized a gun. (*Florida v. J.L.*, *supra*, 529 U.S. at p. 268.) The Supreme Court held that these facts did not establish that the tip was sufficiently reliable to justify the stop and frisk of J.L. for several reasons.

First, there was no evidence as to how the informant purportedly knew about the gun or the basis for his inside information about the suspect. (*Florida v. J.L.*, *supra*, 529 U.S. at p. 271.) Furthermore, in contrast to the detailed, predictive information that was corroborated in *White*, the Court emphasized, the anonymous tip in *J.L.* lacked any significant predictive information. (*Id.* at pp. 270-271.) At bottom, the "bare report of an unknown, unaccountable informant" did not bear sufficient indicia of reliability to justify the stop and frisk. (*Ibid.*)

In reaching this conclusion, the Court specifically rejected the

argument that an anonymous tipster's accurate, verified description of the appearance and location of a particular person is sufficiently reliable to create reasonable suspicion that the informant's report of criminal activity is correct. (*Florida v. J.L.*, *supra*, 529 U.S. at p. 272.) As the Supreme Court has explained:

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

(*Florida v. J.L.*, *supra*, 529 U.S. at p. 272.) Furthermore, the Court soundly rejected a proposed "firearm exception" under which an anonymous "tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing." (*Florida v. J.L.*, *supra*, 529 U.S. at p. 272; accord, *People v. Jordan*, *supra*, 121 Cal.App.4th at pp. 558-562 [anonymous tip that a black man in park had a concealed gun and was wearing black jacket, white shirt, tan pants, and red boots, without any indication of how informant came by information or other indicia of reliability, was insufficient to justify stop and frisk of defendant despite the fact that he was in place described by informant and fit description]; *People v. Pitts* (2004) 117 Cal.App.4th 881, 886 ["be on the lookout" bulletin identifying defendant by name based solely on "untested informant's" allegation that he was involved in the sales of methamphetamine that provided "no particularized information," no predictive information, and did not demonstrate basis for informant's knowledge, was "void of any indicia of reliability" and insufficient to justify investigative detention];

People v. Saldana (2002) 101 Cal.App.4th 170, 172-176 [anonymous tip that provided description of station wagon in parking lot of restaurant at specified location and reported driver was carrying cocaine was insufficiently reliable to justify detention because it contained no internal indicia of reliability, no predictive information; despite fact description and location were corroborated, the criminal element of tip was not corroborated].)

Here, the trial court expressly ruled that the anonymous telephone tip, along with the officers' observation when they arrived at the park that McKinnon's race and clothing fit the tipster's description of one of the men with a gun, was sufficient in itself to justify his seizure and search. (11 RT 1335.) Under *Florida v. J.L.* and its progeny, the court was clearly incorrect.

The court further ruled that the fact that Hunt had a gun provided specific corroboration of the tip's report of criminal activity to justify the stop and frisk of McKinnon. (11 RT 1335-1336.) The first and most important problem with this ruling is that Hunt was not discovered with the gun until *after* McKinnon had been detained and ordered to place his hands on the car, a "show of authority" with which he complied. (1 CT 55; *Terry v. Ohio*, *supra*, 392 U.S. at p. 19, fn. 16; *Florida v. Royer* (1983) 460 U.S. 491, 502 [person is detained when reasonable person would conclude he is not free to leave]; *People v. Pitts*, *supra*, 117 Cal.App.4th at p. 884 [ordering suspect to place hands on car is a detention]; *People v. Jones* (1991) 228 Cal.App.3d 519, 523 [officer's command to "stop" constituted detention]; *People v. Verrin* (1990) 220 Cal.App.3d 551, 557 [officer's command,"hold on. Police," constituted detention].) Of course, facts learned *after* a detention cannot be used to justify the detention;

reasonableness is assessed by the information known to the officer at the time of the seizure and search. (See, e.g., *Florida v. J.L.*, *supra*, 529 U.S. at p. 271; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188; *People v. Sanders* (2003) 31 Cal.4th 318, 334, and authorities cited therein.) Because the anonymous tip was insufficiently reliable to justify the detention, the detention was unreasonable under the Fourth Amendment. And because the search of McKinnon which produced the evidence was the direct product of that illegality, the search was unlawful and the evidence should have been suppressed. (*Wong Sun v. United States*, 371 U.S. 471, 488; see also, *United States v. Royer* (1983) 460 U.S. 491, 501-508; *United States v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, 727; *People v. Saldana*, *supra*, 101 Cal.App.4th at p. 176.)

In any event, the fact that Hunt possessed a gun did not make the tip sufficiently reliable to justify the search of McKinnon. The court reasoned that the tipster's information that one man in the park was carrying a gun proved to be correct when Hunt was discovered with a gun. (11 RT 1335-1336.) The corroboration of that aspect of the tip, in turn, provided grounds to conclude that the other component of the tip – that a second black man wearing black was also carrying a gun – was sufficiently reliable to justify the search of McKinnon. (11 RT 1335-1336.) There are at least two problems with this reasoning.

The first is that Hunt's possession of the gun did not necessarily corroborate the tip. The tipster described a group of men standing around a blue Mercedes, one of whom was not wearing a shirt and was carrying a gun. (1 CT 54; 11 RT 1324-1325.) When officers arrived at the park, there was no blue Mercedes. (11 RT 1328-1329; 1 CT 55.) There were no shirtless men. (11 RT 1328-1329; 1 CT 55.) In other words, it simply

cannot be said that the tipster's information that a shirtless man near a blue Mercedes had a gun proved to be correct when Hunt, who was wearing a shirt and sitting on a bench in a park where no blue Mercedes was found, was discovered with a gun.

The second problem with the court's reasoning is that even if Hunt's possession of a gun corroborated the informant's tip about one man carrying a gun, it was still insufficiently reliable to justify the stop and frisk of a second man, McKinnon. In order to conduct a *Terry* stop and frisk, the officer must not only have reasonable suspicion that criminal activity is occurring or about to occur, but also that the person he intends to detain and frisk is involved in that activity. (See, e.g., *People v. Loewen*, *supra*, 35 Cal.3d at p. 123; *People v. Pitts*, *supra*, 117 Cal.App.4th at p. 889 [defendant's mere presence in public place located in "high crime" area where others were involved in criminal activity, even combined with anonymous tip that defendant was engaged in ongoing criminal activity, insufficient to create reasonable suspicion].) In this regard, the tip was insufficiently reliable in its assertion that *the man wearing black* (purportedly McKinnon) was involved in criminal activity. There was not a scintilla of evidence to indicate that the informant ever indicated how he purported to know that McKinnon had a gun, such as whether he personally saw it, inferred its from other facts he observed, inferred its presence from McKinnon's reputation, inferred its presence from McKinnon's association with Hunt, or received the information from some third party. (1 CT 55; *Florida v. J.L.*, *supra*, 529 U.S. at p. 271 [absence of any indication of how informant came by information undermined reliability]; *People v. Jordan*, 121 Cal.App.4th at pp. 559-560 [same]; *People v., Pitts*, *supra*, 117 Cal.App.4th at p. 886 [same].)

Moreover, the record was devoid of any evidence from which the reliability of the informant might otherwise be inferred. (1 CT 55.) There was no indication that the informant was known to police, that he provided any information about himself that would subject him to accountability for making a false report, or even that his tip was recorded or transcribed. (*Florida v. J.L.*, *supra*, 529 U.S. at pp. 270-271; *People v. Jordan*, *supra*, 121 Cal.App.4th at pp. 560-561.)

Finally, the fact that Shubin described the park as a "high crime area" (1 CT 54) did not "'elevate [these] facts into a reasonable suspicion of criminal activity'" (*People v. Loewen*, *supra*, 35 Cal.3d at p. 124). As this Court has observed, "[t]he 'high crime area' is not an 'activity' of an individual. Many citizens of this state are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas . . ." (*People v. Loewen*, *supra*, 35 Cal.3d at p. 124; accord, *People v. Pitts*, *supra*, 117 Cal.App.4th at p. 887.) While a "high crime" area "setting can lend meaning to the person's behavior," such as flight (*People v. Limon* (1993) 17 Cal.App.4th 524, 532; see also *People v. Souza* (1994) 9 Cal.4th 224), the officers observed *nothing* even remotely suspicious about McKinnon's behavior prior to the stop and frisk (see 1 CT 55-56).

For all of these reasons, both the initial detention and subsequent search of McKinnon were unreasonable under the Fourth Amendment. Hence, the bullets and cocaine produced therefrom should have been suppressed.

c. Even Assuming That the Initial Detention and Weapons Search was Lawful, the Seizure and Search of the Closed Tupperware Container with Cocaine was Not and Therefore that Evidence Should Have Been Suppressed.

Finally, even assuming for sake of argument that the seizure and search that produced the bullets was lawful, the subsequent search and seizure of the tupperware container with cocaine was not. A *Terry* frisk must be "carefully limited" to a search for weapons. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 30; see also *Minnesota v. Dickerson*, *supra*, 508 U.S. at p. 373; *Sibron v. New York* (1968) 392 U.S. 40, 65-66.) A search that exceeds that limited scope, such as a search for contraband, is unreasonable. (*Minnesota v. Dickerson*, *supra*, at p. 373.) The exception to this rule is the so-called "plain touch" or "plain feel" doctrine, which is a variant of the "plain view" doctrine. Under the plain feel doctrine, if - in a lawful weapons search - an officer feels an item that is *immediately apparent* as contraband, he may continue the search by retrieving and seizing it. (*Minnesota v. Dickerson*, *supra*, at pp. 374-376.) However, if the object is not immediately apparent as a weapon or contraband, the officer cannot continue to search without *probable cause*. In other words, any continued search and seizure exceeds the limited scope of the weapons frisk and is unreasonable. (*Minnesota v. Dickerson*, *supra*, at pp. 377-378 [police officer conducting weapons frisk felt small, hard object in pocket that did not feel like weapon and was not *immediately* apparent as contraband; nature of item as contraband only became apparent after officer squeezed and manipulated it and determined it was crack cocaine; search and seizure of drugs exceeded scope of *Terry* frisk and was unlawful].)

To be sure, some containers are so distinctive that they are

immediately apparent as containing contraband and therefore may be seized and searched under the plain view or plain feel doctrines. (*People v. Limon* (1993) 17 Cal.App.4th 524, 537, collecting cases.) "However, where the container is a common one with legitimate purposes, its presence is not enough to establish probable cause" to retrieve and search it. (*Ibid.*; *People v. Valdez* (1987) 196 Cal.App.3d 799, 804 [search of film canister during weapons frisk was unreasonable because canister is not immediately apparent as contraband but rather can hold variety of legal items].) Here, a tupperware container is not immediately apparent as contraband, nor did Officer Shubin suggest otherwise in his report. (7 SCT 54-57.) Hence, as counsel argued below, his retrieval and search of the closed container exceeded the scope of any otherwise lawful weapons frisk. (11 RT 1332; see also 13 CT 3674-3675.)

The trial court did not disagree. Instead, it ruled that the additional seizure and search of the container was justified as one incident to arrest. (11 RT 1336-1337; see, e.g., *United States v. Robinson* (1978) 414 U.S. 218, 235-236 [warrantless search incident to lawful arrest supported by probable cause not unreasonable].) According to the court's rationale, because Hunt's gun was a .357 and the ammunition found in McKinnon's pocket was .357 caliber, there was probable cause to arrest McKinnon for aiding and abetting Hunt's gun possession or constructively possessing Hunt's gun. (11 RT 1336-1337.) Hence, the subsequent search that produced the cocaine was a lawful one incident to arrest. (11 RT 1336-1337.) Once again, the court's ruling was incorrect.

As a preliminary matter, Officer Shubin's report made it abundantly clear that he did *not* determine that there was probable cause to arrest McKinnon for gun possession, that he did *not* arrest McKinnon until *after*

he conducted the search that produced the tupperware container, and, in fact, *never arrested* McKinnon for gun possession. (7 SCT 55-57.) Instead, after he continued to search McKinnon and found the cocaine in the closed container, he arrested McKinnon for cocaine possession, *not* weapon possession. (7 SCT 57.)

Nor did the facts *known to Shubin at the time of the search* provide an objective basis on which to conclude that probable cause existed to arrest McKinnon for aiding and abetting Hunt's gun possession. (See, e.g., *Whren v. United States* (1996) 517 U.S. 806, 814 [probable cause for arrest must be based on facts known to officer at time of arrest].) According to both Shubin's report and Palmer's testimony, it was Officer *Hagans* who saw Hunt drop the gun to the ground, not either of them. (7 SCT 55-56; 11 RT 1326-1327.) And there was no evidence at all that Hagans communicated to the other officers that Hunt's gun was a .357 before Shubin searched McKinnon and found bullets and the container. (See 7 SCT 55-57; 11 RT 1326-1327.) Hence, what the court perceived to be the factual nexus between the gun and the bullets critical to support probable cause for arrest – the fact the gun and bullets were .357 caliber – was *not* known to Shubin when he retrieved and searched the container. (11 RT 1336-1337; *Florida v. J.L.*, *supra*, 529 U.S. at p. 271 [facts justifying search must be known to officers at time of search].)

Certainly, the mere facts that Hunt was carrying *a* gun and McKinnon possessed bullets did not provide probable cause to arrest McKinnon. Nothing in Shubin's report or Palmer's testimony suggested that they were aware of any connection between McKinnon and Hunt at the time. (7 SCT 55-57; 11 RT 1324-1327.) Indeed, they were not even sitting or standing together when police arrived – McKinnon was with one group

of men while Hunt was sitting on a bench with another man 30 to 45 feet away. (7 SCT 55.) The fact that Shubin was not aware of any facts to connect McKinnon and the bullets he possessed to Hunt and the gun he possessed was amply demonstrated by the fact Shubin *never* arrested McKinnon for gun possession under an aiding and abetting or constructive possession theory. (1 CT 56-57, 65-66.)

In sum, the only information known to officers at the time McKinnon was detained was that provided by the anonymous informant, which was unverified other than his description of a black man wearing all black. These facts were insufficient to justify the detention under the Fourth Amendment and therefore all evidence produced as a result of that unlawful detention was illegally obtained and should have been suppressed. The only additional fact known to Shubin after McKinnon was detained and before he conducted the intial patdown producing the bullets was that another officer had seen Orlando Hunt – a man who did not match the informant's description and who was unconnected to McKinnon by any evidence apart from their mutual presence in the park with several other men – throw *a* gun on the ground. This additional fact did not create reasonable suspicion for the frisk under the totality of the circumstances and therefore the frisk was unlawful and the evidence obtained as a result should have been suppressed. Nor did that additional fact provide probable cause to arrest McKinnon for aiding and abetting Hunt's possession of his gun and to conduct the further search, which exceeded the scope of any permissible weapons frisk that produced the cocaine. The bullets and cocaine should have been suppressed.

Without the unlawfully obtained bullets and cocaine, the 1988 incident amounted to nothing more than McKinnon being present in the

park with several other men when Hunt was arrested for gun possession. Obviously, that evidence would not be admissible aggravating evidence under Penal Code section 190.3, and the court erred in admitting it.

2. Possession of the Bullets and Suspected Cocaine Did Not Amount to Criminal Activity Involving Force or Violence or the Threat of Force or Violence and Therefore was Inadmissible.

McKinnon also moved to exclude the evidence on the ground that it was insufficient to prove the commission of criminal activity involving force or violence or the threat of force or violence under factor (b). (10 RT 1304-1305, 1317; 13 CT 3678-3681.) Citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1235 as "the closest case I could come to the facts in this case," the court denied the motion. (10 RT 1317-1318.) After the evidence was admitted, the prosecutor requested instructions that the jury could consider the evidence under factor (b), as well as on the Penal Code violations the evidence arguably established. (12 RT 1450.) Again, defense counsel reiterated his objection that McKinnon's possession of bullets and cocaine did not qualify as criminal activity involving force or violence or the threat of force or violence under factor (b). (12 RT 1451.) Again, the court disagreed, explaining that the basis of its ruling admitting the evidence under factor (b) was that it was sufficient for the jury to find beyond a reasonable doubt that McKinnon had aided and abetted Hunt's carrying of the gun in violation of Penal Code section 12025 under factor (b). (12 RT 1451-1452.) Thereafter and over defense counsel's objection, the court instructed the jurors on the elements of section 12025, as well as on aiding and abetting, and further explicitly instructed the jurors that they could consider this incident under factor (b). (14 CT 4072-4075; 12 RT

1451-1452; 13 RT 1607-1608.)[52] Once again, the court erred.

Penal Code Section 190.3 contains a description of the aggravating and mitigating factors that a jury may take into consideration when determining whether to impose a sentence of death or life without possibility of parole. The prosecution may not introduce aggravating evidence that is not relevant to the statutory factors listed in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) With respect to factor (b), at issue here, section 190.3 states in relevant part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. . . .
>
> However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

This Court has held that evidence of prior violent criminality is relevant to the decision to impose capital punishment. (*People v. Jennings* (1988) 46 Cal.3d 963, 982.) The purpose of section 190.2, subdivision (b) is to show the defendant's propensity for violence. (*People v. Avena* (1996) 13 Cal.4th 394, 426; *People v. Wright* (1990) 52 Cal.3d 367, 432.) This assists the jury in determining whether the defendant is the type of person who deserves to die. (*People v. Ray* (1996) 13 Cal.4th 313, 349-350.)

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[52] As the trial court observed, McKinnon was not an ex-felon at the time, so his conduct did not violate Penal Code section 12021, prohibiting actual or constructive possession of a firearm by an ex-felon. (12 RT 1450.)

The evidence of other criminal activity introduced pursuant to section 190.3, subdivision (b), requires proof of conduct constituting the commission of an actual crime that is defined in a specific penal statute. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 148; *People v. Grant* (1988) 45 Cal.3d 829, 850; *People v. Thompson* (1988) 45 Cal.3d 86, 127; *People v. Phillips* (1985) 41 Cal.3d 29, 72; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013, 1015.) It may be admitted in aggravation only if it can support a finding by a rational trier of fact as to its existence beyond a reasonable doubt. (*People v. Clair* (1992) 2 Cal.4th 629, 672-673.) It is the responsibility of the trial court to determine that the evidence meets this high standard of proof before admitting it. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 778.)

As noted above, the court admitted the evidence that McKinnon possessed not only bullets, but also cocaine, when he was arrested in 1988 on the theory that it was sufficient to prove beyond a reasonable doubt that he aided and abetted Hunt's violation of Penal Code section 12025. The court's ruling was incorrect for at least two reasons. First, the evidence was simply insufficient to prove McKinnon's aiding and abetting liability. Second, even if it were, neither a violation of Penal Code section 12025 nor possession of cocaine involves force or violence or the threat or force or violence.

Penal Code section 12025 prohibits a person from carrying a concealed firearm on his person. Aiding and abetting requires proof beyond a reasonable doubt that the defendant had "(1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages, or instigates, the commission of the

crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) Based on the court's rationale in denying the motion to suppress, it concluded that McKinnon's possession of bullets was sufficient to prove beyond a reasonable doubt that he aided and abetted Hunt's possession of a gun merely because the bullets and gun were .357 caliber. The court was incorrect.

There was no evidence to connect McKinnon and Hunt that day apart from their mutual presence in the park with *several* other men. As discussed above, they were not even standing or sitting together. McKinnon was with one group of men and Hunt was sitting on a bench with another man 30 to 45 feet away from McKinnon's group. There was no evidence that McKinnon and Hunt even *knew* each other at the time. Indeed, the only evidence that the jury (or the court) ever heard regarding the amount of time that the men had known each other came from Hunt's recorded statement to the prosecutor and Buchanan that he had known McKinnon since *1989, one year after* their 1988 arrests. (13 CT 3600.) McKinnon was merely one man in a large group of men in a park where Hunt happened to have a weapon concealed on his person. (See *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 550, and authorities cited therein ["defendant's mere proximity to [item], her presence on the property where it was located, and her association with the person who controls it are insufficient to" prove possession under either direct or aiding and abetting liability theory]; *In re David K.* (1978) 79 Cal.App.3d 992, 999-1000 [evidence insufficient to prove that defendant aided and abetted robbery although he was with man identified as perpetrator in victim's automobile three hours after robbery].) While McKinnon did possess .357 bullets and Hunt's gun was a .357, there was no evidence to connect those

bullets to that gun. For instance, there was no evidence that the bullets were even of the same manufacture as those found in Hunt's loaded gun. Furthermore, .357 guns and bullets are hardly rare. In short, the connection between McKinnon and his bullets to Hunt and his gun was nothing more than speculation. (*People v. Waidlaw* (2000) 22 Cal.4th 690, 735 ["'speculation is not evidence'"]; *People v. Martin* (1973) 9 Cal.3d 687, 695.)

In any event, even if McKinnon were vicariously liable for Hunt's gun possession, neither it, the cocaine possession, nor the combination of the two was criminal activity involving *force or violence or the threat of force or violence*. In support of its ruling to the contrary, the court relied on *People v. Jackson*, *supra*, 13 Cal.4th 1164. (10 RT 1317-1318.) Ironically, *Jackson* supported McKinnon's argument that the evidence was not proper factor (b) evidence rather than defeated it.

As this Court observed in *People v. Jackson*, criminal "firearm possession is *not*, in every circumstance an act committed with actual or implied force or violence." (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1235, italics added.) Indeed, this Court has consistently held that "mere possession" of a single gun in a non-custodial setting does *not* involve force or violence or a threat of force or violence under factor (b). (*People v. Cox* (2003) 30 Cal.4th 916, 973; *People v. Belmontes* (1988) 45 Cal.3d 744, 809; *People v. Dyer* (1988) 45 Cal.3d 26, 76.)

To be sure, "*other* factual circumstances surrounding the weapon possession" may be such as to demonstrate an implied threat of force or violence. (*People v. Jackson*, *supra*, at p. 1235, italics added.) In *Jackson*, for instance, this Court distinguished garden-variety non-violent weapon possession from the possession in that case based on the additional facts

that "defendant was an escaped prisoner fleeing from a murder charge at the time he was discovered with a gun . . . " (*Ibid.*) Hence, this Court concluded, "a defendant who arms himself after having escaped from custody can be presumed to be in possession of the gun to assist his continued flight rather than for legitimate self-defense or some other lawful purpose. Possession under these circumstances amounts to 'substantial evidence of an implied threat of violence' admissible under section 190.3." (*Ibid.*; see also, *People v. Garceau* (1993) 6 Cal.4th 140, 203 [defendant's possession of "*arsenal*" of weapons, including machine gun, silencer, and handguns, qualified as factor (b) evidence]; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588-589 [possession of deadly weapon *while in custody* involves implied threat of force or violence].) Here, however, there were no additional factors to suggest that McKinnon's possession of bullets, even assuming that possession was with the intent to aid in Hunt's possession of a gun, involved an implied threat of violence under factor (b), nor did the court cite any such factors.

Furthermore, the mere possession of drugs like cocaine, without additional criminal activity involving force or violence or the threat of force or violence, does not qualify under factor (b). (*People v. Boyde* (1988) 46 Cal.3d 212, 249 [evidence of defendant's marijuana possession in jail did not qualify as factor (b) evidence and thus was improperly admitted]; *People v. Dyer*, *supra*, 45 Cal.3d 26, 76 [characterizing evidence that defendant sold drugs as "nonviolent crime evidence" for factor (b) purposes]; compare *People v. Livaditis* (1992) 2 Cal.4th 759, 777 [possession of cocaine in itself does not involve force or violence, but was properly admitted *only* because it directly related, and was necessary to give context to, arrest for cocaine possession and resulting *violent* resistance to

arrest].) Pursuant to the foregoing authorities, the court erred in admitting evidence of the 1988 arrest.

a. Even if the Evidence were Legally Sufficient to Prove That McKinnon Aided and Abetted Hunt's Gun Possession, and Even if That Conduct Did Qualify Under Factor (b), the Court Erred in Failing to Provide Complete and Accurate Instructions on the Aiding and Abetting Theory of Liability

It is, of course, well settled that, "though there is no *sua sponte* duty at the penalty phase to instruct on the elements of 'other crimes' introduced in aggravation (citation), when such instructions are given, they should be accurate and complete." (*People v. Montiel* (1993) 5 Cal.4th 877, 942; accord, *People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Cummings* (1993) 4 Cal.4th 1233, 1337; *People v. Malone* (1988) 47 Cal.3d 1, 49.) It is equally well settled that trial courts have a sua sponte duty "to instruct on general principles of law that are closely and openly connected to the facts of the case and that are necessary for the jury's understanding of the case." (*People v. Carter* (2003) 30 Cal.4th 1116, 1219.)

Here, and over defense counsel's objection, the trial court instructed the jurors on the elements of Penal Code section 12025 and on aiding and abetting liability. (14 CT 4072-4075; 12 RT 1451-1452; 13 RT 1607-1608.) The court's theory of aiding and abetting liability rested entirely on circumstantial evidence – i.e., from McKinnon's mere possession of .357 bullets while in the same park with Hunt, who possessed a .357 caliber gun, the jurors could infer that he knew Hunt was carrying a concealed firearm and intended to encourage or facilitate Hunt's crime by carrying bullets that could be used in his firearm. (See *People v. Beeman, supra,* 35 Cal.3d at p. 561.) Unfortunately, the trial court failed to instruct the jury on the limits of

circumstantial evidence.

As discussed in Argument IV, above, where circumstantial evidence is substantially relied upon as proof of guilt, the trial court is under a sua sponte obligation to instruct the jurors on the legal principles controlling their consideration of such evidence. (See, e.g., *People v. Wiley* (1976) 18 Cal.3d 162, 174; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 174-175; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 454-456 [trial court committed prejudicial error by failing to instruct jury with CALJIC No. 2.01 where prosecutor substantially relied upon circumstantial evidence to prove defendant's identity as shooter]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [same – to prove intent]; CALJIC No. 2.01 and Use Note.) That is, the jurors must be instructed that when circumstantial evidence is reasonably susceptible of two interpretations, one of which points to guilt and one of which to innocence, they are *bound* to adopt the interpretation favoring innocence. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933; *People v. Gould* (1960) 54 Cal.2d 621, 629; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 549; see also 3 Witkin Cal. Evid.4th (2000) Presentation, § 142, p. 202.) Hence, the court erred in omitting such instruction from its instructions on aiding and abetting liability for violating section 12025 .

Under any standard, the error cannot be deemed harmless. As previously discussed, if the evidence were legally sufficient to support the aiding and abetting instruction, it was weak at best. Certainly, a more than reasonable interpretation of the evidence was that McKinnon's possession of bullets had no connection at all to Hunt and his gun but was mere coincidence. Had the jurors received a circumstantial evidence instruction

and followed it, there is no question that they would have been bound to accept that interpretation, reject the tenuous interpretation favoring guilt, and hence would not have considered this evidence as aggravation weighing in favor of executing McKinnon.

C. The Court Erred in Admitting Evidence That McKinnon Broke His Television Set and Later Made a Statement to Police That Could Be Construed as an Implied Threat Against His Sister Because Those Acts Did Not Qualify as Criminal Activity Involving Force or Violence Under Factor (b)

The prosecution presented evidence that McKinnon hit his sister, Robin, during an argument at their home, to which police officers responded. (13 RT 1558-1559.) Over McKinnon's objection, the prosecution also introduced evidence that, well after the incident ended and about 20 minutes after police left, Robin telephoned police to report that McKinnon was "breaking her property." (13 RT 1559.) When officers returned to the house, one of them witnessed McKinnon break a small television set. (13 RT 1559.) They arrested McKinnon and transported him to the police station. (13 RT 1559-1560.) At the station, he said, "you can keep me for a week or a month, but when I get out I'm going to take care of it." (13 RT 1560.)

Defense counsel objected that McKinnon's statement was ambiguous at best and in any event the evidence did not amount to criminal activity involving force or violence or the threat of force or violence under factor (b). (11 RT 1429-1432). According to the prosecutor, the evidence was admissible under factor (b) because "him going around breaking up all her things are acts of violence. Doesn't have to be acts of violence against a person." (11 RT 1429.) Further, McKinnon's statement was "a threat or implied threat, which is admissible." (11 RT 1429.)

As to the damage to McKinnon's sister's property, the court ruled, "as far as battering his sister, that's an act of violence. And if he thereafter starts destroying her property, that's an act of violence, as well. I don't see the separation. It's all one continuous transaction. . . . It's an act of violence. He assaults his sister and breaks up her property. I think it's all admissible." (11 RT 1430; see also 12 RT 1437-1438.) As to McKinnon's statement to police, the court agreed that it was ambiguous, but could be construed as an implied threat against his sister. (11 RT 1433-1434; 12 RT 1438.) At the same time, the court also agreed that, even if construed as a threat against his sister, McKinnon's statement to police did not violate a specific penal statute – namely Penal Code section 422. (11 RT 1432-1433; 12 RT 1438.) Therefore, if "taken in isolation," it would not be admissible under factor (b). (12 RT 1438.) However, because it was not made in isolation, but rather was "made in reference to the battery upon his sister that occurred earlier," it was "part and parcel of the battery" and therefore admissible. (12 RT 1438-1439.) Thereafter, in his summation to the jurors, the prosecutor encouraged them to consider the battery, the subsequent property damage, and the later "threat" at the police station as "*separate* aggravating factors . . . . " (13 RT 1629, italics added; see part F, below.) The court erred in admitting this evidence.

Contrary to the prosecutor and court's understanding, the criminal violence or threats of violence described in factor (b) must be directed toward people; violence to property does not qualify. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1015; *People v. Stanley* (1995) 10 Cal.4th 764, 823-825; *People v. Boyd, supra,* 38 Cal.3d at p. 776.) Hence, McKinnon's act of breaking the television set did not itself qualify as factor (b) evidence.

Furthermore, as defense counsel argued below and as the court found, McKinnon's statement to the police was ambiguous at best. (11 RT 1433-1434; 12 RT 1438.) Thus, as defense counsel further argued below, the court should have excluded it for this reason alone. (11 RT 1433-1434; see *People v. Walker* (1988) 47 Cal.3d 605, 639 [court erred in admitting defendant's statement as threat under factor (b) because it "was at best ambiguous and equally supportive of an inference" that it did not amount to a crime].)

In any event, even if construed as a threat, McKinnon's statement did not amount to criminal activity because it did not violate a specific penal statute. (*People v. Tuilaepa, supra*, 4 Cal.4th at p. 569 [threat to commit an act of force or violence not admissible under factor (b) if it does not violate a specific penal statute]; accord *People v. Wright* (1990) 52 Cal.3d 367, 426-429.) Hence, as the court correctly observed, it was not itself admissible under factor (b). (11 RT 1432-1433; 12 RT 1438-1439.)

In ruling that the evidence was nevertheless admissible because it was "part and parcel of the initial battery and part of a "continuous transaction," the court apparently relied upon this Court's previous decisions holding that when a series of violent crimes is admitted under factor (b), evidence of other non-violent or non-criminal acts committed in a "continuous course of criminal activity" with the violent crimes may be admitted as part of the "surrounding circumstances" in order to give "context to" the violent crimes. (*People v. Cooper* (1991) 53 Cal.3d 771, 840-841; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013- 1014.) However, those principles were inapplicable to the evidence presented here.

McKinnon's damages to his sister's property and later statement at the police station simply were not part of a "continuous course of" violent

"criminal activity." To the contrary, the violent "criminal activity"qualifying under factor (b) – i.e., the battery upon his sister – terminated even before police first responded to the scene. When Robin called *20 minutes after police left*, she did *not* report that the battery – or the violent criminal activity – had continued, but rather reported only that McKinnon was "breaking her property." (13 RT 1559.) Certainly, there is no question that the violent criminal activity terminated long before McKinnon's subsequent arrest and transport to the police station, where he made his ambiguous, *non-criminal* statement. (13 RT 1559-1560; compare *People v. Kipp* (2001) 26 Cal.4th 1100, 1133-1134 [non-criminal "threats made while in custody *immediately after* an otherwise admissible violent incident are themselves admissible under factor (b)"].) Thus, neither the damage to his sister's property nor McKinnon's later statement to police was part of a continuous, violent criminal transaction.

Moreover, neither act was necessary or relevant "to give context to" the earlier battery. The "context" in which the battery episode occurred was introduced in its entirety to the jurors. Nothing about McKinnon's later act of breaking the television or still later ambiguous statement at the police station explained or shed any light on the battery. (Compare *People v. Sully* (1991) 53 Cal.3d 1195, 1215, 1243 [non-criminal act of killing ducks by tearing their heads off was admissible to explain defendant's subsequent criminal threats to do the same thing to estranged wife and her daughter]; *People v. Livaditis* (1992) 2 Cal.4th 759, 777 [non-violent possession of cocaine was admitted to explain why defendant was arrested, which in turn was necessary to give context to his violent criminal act of resisting arrest].) The court erred in admitting the evidence.

D. The Court Erred in Admitting Evidence of a Disagreement in a High School Cafeteria When Appellant Was a Teenager

The prosecution introduced evidence that in December 1984, when McKinnon was only 17 years old, he bought some beef jerky at his high school cafeteria. (11 RT 1363-1364; 12 RT 1476, 1480.) Discovering that it was stale, he asked for a refund of his money. (11 RT 1364-1365; 12 RT 1476.) When the cashier refused, he told her that if she would not return his money, he would take her money box. (11 RT 1366; 12 RT 1476.) She replied that the box only had $10.00 in it and told him to "go ahead" and take it, but if he did he would "go to jail." (11 RT 1366.) The teenaged McKinnon took the box and started to walk out of the cafeteria. (11 RT 1366; 12 RT 1477.) A teacher blocked his exit; the boy either gave the box to the teacher or allowed her to take it without incident, before pushing her aside so that he could exit the cafeteria. (11 RT 1366, 1369; 12 RT 1477.)

The prosecution offered this evidence under factor (b) as a "battery and robbery." (3 CT 760-761.) McKinnon moved *in limine* to exclude it on the grounds that it did not amount to criminal activity involving force or violence and otherwise amounted to "trivial," "ephemeral," and "marginal" conduct on which a sentence of death could not reliably rest under the Eighth Amendment. (13 CT 3680-3692; 10 RT 1305.) The court denied the motion on the ground that "it certainly demonstrates a pattern of violent criminality." (10 RT 1305-1306.) Furthermore, over defense counsel's later insistence that the evidence ultimately presented was insufficient for a reasonable jury to find the elements of robbery beyond a reasonable doubt (12 RT 1443-1444), the court granted the prosecution's motion to instruct the jurors that they could find that it did amount to a robbery, as well as a battery, under factor (b). (12 RT 1460; 14 CT 4076-4077, 4079-4080.)

After the evidence was admitted and the jury was instructed, however, the trial court made significant statements undermining its rulings. During summation, the prosecutor twice argued that McKinnon's history of violence demonstrated his future dangerousness. (13 RT 1628, 1631.) Both times, the court sustained defense counsel's objections. (13 RT 1628, 1631.) Outside of the jury's presence, the prosecutor contended that he was entitled to argue future dangerousness based upon McKinnon's history of violence. (13 RT 1636.) The court agreed as a point of law that future dangerousness is an appropriate argument *if based upon evidence of the defendant's history of violence.* (13 RT 1636-1637, italics added; see, e.g., *People v. Ray* (1996) 13 Cal.4th 313, 353, and authorities cited therein.) Significantly, however, the court characterized the cafeteria incident as nothing more than a "quasi-robbery," during which McKinnon "pushed" a teacher, which, even combined with the other factor (b) evidence of the battery upon Robin and gun possession, simply did not demonstrate a history of violence on which a future dangerousness argument could legitimately be made. (13 RT 1636-1637.)

The court's later remarks were quite correct and lead ineluctably to the conclusion that it erred in admitting the high school cafeteria incident, and allowing the jurors to consider it under factor (b), for at least two reasons. First, contrary to the prosecutor's offer and the court's instructions, and as the court later observed, it did not amount to a robbery; evidence of a "quasi-robbery" was insufficient to permit the jurors to consider it as a robbery. Second, while McKinnon's act of putting his hands on the teacher amounted to a technical misdemeanor battery, it did not involve the "force or violence" or threat of force or violence required under factor (b). To the contrary, the trivial, remote, technical battery

committed when McKinnon was a mere child, which neither caused nor threatened injury, was constitutionally irrelevant under the Eighth and Fourteenth Amendments.

1. The Evidence was Legally Insufficient to Prove the Elements of Robbery

Penal Code section 211 defines robbery as: "the felonious taking of personal property in the possession of another, from his or her immediate presence, and against his will, accomplished by means of force or fear." Force or fear and lack of consent are essential elements of the crime. (See, e.g., *People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056; *People v. Werner* (1940) 16 Cal.2d 216, 224-225; *People v. Bolander* (1994) 23 Cal.App.4th 155, 163; *People v. Morales* (1975) 49 Cal.App.3d 134, 139.)

Here, by the cafeteria cashier's own admission, McKinnon did not touch her, threaten her, or engage in any other conduct amounting to force or fear. (11 RT 1366.) Also by her own admission, she effectively *consented* to the taking. She told him to "go ahead and take it" and he simply picked it up. (11 RT 1366.) Thus, as the court later observed in characterizing it as a "quasi-robbery," the evidence was legally insufficient to prove the essential elements of robbery. (Cf. *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [error to instruct jurors on nonqualifying factor (b) conduct].)

To be sure, McKinnon's later act of putting his hands on the teacher in order to exit after he gave her the box amounted to a technical misdemeanor battery under Penal Code section 242. Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another" (Pen. Code, § 242), but in fact requires nothing more than "the least touching," which "need not be violent or severe," need not

cause pain or injury, and need not even be likely to cause pain or injury. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn. 4.) However, for the reasons set forth below, this incident simply did not amount to an act involving the degree or force or violence required to qualify under factor (b) or to be deemed relevant to the penalty determination under the Eighth and Fourteenth Amendments.

2. Minor Acts of Technical, Misdemeanor Battery Committed When the Defendant was a Child Do Not Reflect a Degree or Force, Violence, or Culpability Envisioned by Factor (b) as Reasonable Basis on Which to Conclude That the Defendant Should Die.

a. Constitutional Considerations.

Where, as in California, aggravating circumstances are "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment" (*Walton v. Arizona* (1990) 497 U.S. 693, 648, quoting from *Poland v. Arizona* (1986) 476 U.S. 147), they must provide a principled basis for doing so (*Arave v. Creech* (1993) 507 U.S. 463, 474). To be acceptable under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, an aggravating factor in a death penalty case must be "particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885 [due process prohibits death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process"].) As a general matter, relevant evidence at the selection phase is limited to that which relates to the defendant's character or the circumstances of his crime. (*Zant v. Stephens*, *supra*, at p. 879.) This broad category of generally relevant evidence is not without its limits, however. (See, e.g., *Dawson v. Delaware* (1992) 503 U.S. 159, 165-167 [while membership in Aryan

Brotherhood prison gang, which entertains "morally reprehensible" white racist beliefs, is suggestive of bad character, it was "totally irrelevant" to sentencing phase of capital case where, for instance, there was no evidence connecting racist views to charged murder]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433, fn. 16 [while it is technically a circumstance of crime, fact murder accomplished with shotgun rather than rifle, which resulted in "gruesome spectacle," was "constitutionally irrelevant" to penalty decision]; *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308-1310 [character evidence of non-violent sexual conduct, which included that defendant engaged in homosexuality and "abnormal sexual relations," was constitutionally irrelevant to sentencing decision where, for instance, there was no evidence connecting sexual history to charged crime or future dangerousness].)

Aggravating evidence must be relevant to assist the jury in distinguishing "those who deserve capital punishment from those who do not." (*Arave v. Creech*, *supra*, 507 U.S. at p. 474.) Hence, an aggravating factor must reasonably justify the imposition of the most extreme sentence on a particular defendant, as compared to others who have been found guilty of murder. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 877.)

The constitutional relevance of an aggravating factor must be assessed in terms of the fundamental requirement of heightened reliability, which is the keystone in making "the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[H]eightened reliability controls the quality of the information given to the jury in the sentencing proceeding by assuring that the sentencer receives evidence that, in logic and law, bears on the selection of who, among those eligible for death, should die and who should

live. See *Gregg*, 428 U.S. at 192, 96 S.Ct. 2909; see also *United States v. Davis*, 912 F.Supp. at 943-944." (*United States v. Friend* (E.D. Va. 2000) 92 F.Supp.2d 534, 542.) Indeed, "heightened reliability is the key to a constitutionally defensible determination that death is the appropriate punishment in a specific case.' *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991." (*Ibid.*)

> Thus, as one federal court has aptly put it:
>
> > relevance and heightened reliability . . . are two sides of the same coin. Together, they assure the twin constitutional prerequisites of affording a rational basis for deciding that in a particular case death is the appropriate punishment and of providing measured guidance for making that determination. Those objectives can only be accomplished if the proposed aggravating factor raises an issue which (a) is of sufficient seriousness in the scale of societal values to be weighed in selecting who is to live or die; and (b) is imbued with a sufficient degree of logical and legal probity to permit the weighing process to produce a reliable outcome.

(*United States v. Friend*, *supra*, 92 F.Supp.2d at p. 543; accord, *United States v. Karake* (D.D.C. 2005) 370 F.Supp.2d 205, 279; *United States v. Johnson* (W.D.Va. 2001) 136 F.Supp.2d 553, 558-559; *United States v. Bin Ladin* (S.D.N.Y. 2001) 126 F.Supp.2d 290, 302.) In other words, "an aggravating factor must have a substantial degree of gravity to be the sort of factor which is appropriate for consideration in deciding who should live and who should die." (*United States v. Friend*, *supra*, 92 F.Supp.2d at p. 544.)

Pursuant to these principles, several federal courts have recognized that minor incidents of only technically violent criminal conduct – like a violation of the least adjudicated elements of section 242 – are

constitutionally irrelevant for Eighth Amendment purposes.[53] (See, e.g., *United States v. Grande* (E.D.Va. 2005) 353 F.Supp.2d 623, 634 [evidence of unadjudicated "high school fight" that occurred five years earlier and was wholly unrelated to charged murder was "unconstitutionally irrelevant to the determination of 'who should live and who should die'"]; *United States v. Gilbert* (D.Mass. 2000) 120 F.Supp.2d 147, 153 ["consideration of relatively minor misbehavior, however disturbing, would undermine the seriousness of the death penalty decision. Rather than helping the jury's decision, the previous misconduct would be a pernicious distraction in considering whether a defendant should live or die;" there, conduct amounting to crime that did not result in significant injury was "of insufficient gravity to be relevant to whether the defendant here should live or die"]; *United States v. Friend*, *supra*, 92 F.Supp.2d at p. 545 [evidence that defendant and codefendant talked about killing potential witness was "not of sufficient relevance and reliability to assume the important role of an aggravating factor which, if proven, may be weighted as a factor to determine whether death is an appropriate penalty"].)

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[53] Those cases construed the federal death penalty statute, which is similar, though not identical, to California's. It lists 16 aggravating factors that apply when a defendant has been convicted of a homicide that is eligible for capital punishment. (18 U.S.C. § 3592, subd. (c).) It also contains a "catch-all" clause that allows the jury to consider the existence of "any other aggravating factor for which notice has been given." (*Ibid.*) The intent of this non-statutory aggravating factor is to permit consideration of *constitutionally* relevant evidence regarding the defendant's character and the circumstances of the crime. (See, e.g., *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1106.) Thus, the cases address whether certain conduct is constitutionally relevant aggravation under this "non-statutory" aggravating factor.

As previously discussed, Penal Code section 190.3, factor (b), allows the jury to consider as an aggravating factor "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." This Court has held that factor (b) does not offend the Eighth Amendment on its face. (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) This is so because this Court has held that the purpose of factor (b) is that the defendant's "violent criminality" tends to demonstrate the defendant's "propensity for violence," which is a relevant and appropriate consideration in the penalty determination. (See, e.g. *People v. Ray* (1996) 13 Cal.4th 313, 349-350, and authorities cited therein.) And this Court has limited the kind of evidence admissible under factor (b) to meet its ostensible purpose. For instance, the statute excludes on its face non-violent crimes, non-criminal acts of violence, and is limited to criminal acts of force or violence against a person. In so doing, it appropriately seeks to avoid the introduction of constitutionally irrelevant "trivial incidents of misconduct and ill temper," and other conduct that should not "influence a life or death decision." (*People v. Boyd, supra*, 38 Cal.3d at pp. 774, 776.) For these reasons and for purposes of this argument only, McKinnon accepts that factor (b) is not unconstitutional *on its face*. The issue raised here involves the scope of evidence admissible under this facially constitutional factor.

b. The Scope of Relevant and Admissible Factor (b) Evidence.

The United States Supreme Court and this Court have held that "force or violence" under factor (b) is not vague because it is phrased in "conventional and understandable terms," and has a "common-sense core of meaning . . . that criminal juries should be capable of understanding."

(*Tuileapa v. California* (1994) 512 U.S. 967, 975-976; *People v. Dunkle* (2005) 36 Cal.4th 861, 922; *People v. Davis* (1995) 10 Cal.4th 463, 542.) Included within that "common sense" meaning, and consistent with the ostensible purpose of factor (b), the force or violence or threat of force of violence must be directed against a person. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) Consistent with that limitation, a common definition "of 'force' is 'such a threat or display or physical aggression toward a person as reasonably inspires fear of pain, bodily harm, or death.' (Webster's New Internat. Dict. (3d ed. 1981) at p. 887)." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210-211.) A common definition of "violent" is "involving great force or strength or intensity." (Oxford American Dict. (1980) at p. 774; see also Random House Unabridged Dictionary (1997) [defining "violent" as, inter alia, "intense in force, effect, etc.; severe; extreme" and "violence" as "rough or injurious physical force, action, or treatment"].) Consistent with these common definitions, this Court has recognized that "force or violence" under factor (b) refers to conduct causing, threatening to cause, or likely to cause pain, bodily harm, or death. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 392 [threatening arson and throwing burning sheet in trash can inside jail amounted to conduct involving threat of force or violence under factor (b) because of the "physical danger" it posed to the life and limb of other inmates and correctional officers]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [factor (b) "encompasses only those threats of violent injury that are directed against a person or persons"]; *People v. Mason* (1991) 52 Cal.3d 909, 955, and authorities cited therein [simple, attempted escape does not involve force or violence or the threat of force or violence, but when escape plan calls for use of gun to subdue guard, its danger to life or limb suffices

to qualify under factor (b)].)

Misdemeanor battery is defined as "any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242). Unlike the "common-sense" understanding of "force or violence" under factor (b), the term "force or violence" under section 242 "has *a special legal meaning* of a harmful or offensive touching." (*People v. Page* (2004) 123 Cal.App.4th 1466, 1474, fn. 1, italics added..) It means nothing more than "the least touching," which "need not be violent or severe." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn. 4.) It need not cause pain or bodily harm; it need not even be "[]likely to cause harm" or pain. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 423; accord, *People v. Rocha* (1971) 3 Cal.3d 893, 899-900, fn. 12.) Hence, as this Court has implicitly recognized, the meaning of the term "force or violence" under section 242 is not synonymous with the meaning of that term under factor (b). (*People v. Davis* (1995) 10 Cal.4th 463, 541-542 [concluding on the facts of that case that it was not reasonably likely that jurors erroneously applied the special definition of force or violence in battery context to substitute for the commonsense definition of the same term under factor (b)]); see also *People v. Collins* (1992) 10 Cal.App.4th 690, followed in *People v. Anzalone* (1999) 19 Cal.4th 1074, 1082-1083 [ordinary meaning of "force" and "violence" is different than the special legal meaning of "force or violence" in the battery context; ordinary meaning of violence "carries the connotation of more than a simple touching required for a battery"].)

Indeed, given the technical, legal meaning of "force or violence" under section 242, misdemeanor battery is *not* inherently dangerous in the abstract, though it may become dangerous under the circumstances of its commission. (*People v. Cox* (2000) 23 Cal.4th 665, 674-675.) Of course,

this Court has consistently held that whether criminal conduct involves "force or violence" under factor (b) does not turn on examining the elements of the crime in the abstract, but rather "can *only* be determined by looking to the facts of the particular case." (*People v. Mason*, *supra*, 52 Cal.3d at p. 955, italics added; accord, *People v. Livaditis*, *supra*, 2 Cal.4th at p. 777.)

It follows from the foregoing principles that all violations of section 242 do not necessarily qualify as the *dangerous* criminal activity to which factor (b) is directed merely because section 242 requires the abstract elements of "force or violence." Whether criminal activity technically violating section 242 qualifies under factor (b) "can *only* be determined by looking to the facts of the particular case." (*People v. Mason*, *supra*, 52 Cal.3d at p. 955, italics added; cf. Pen. Code, § 667.5, subd. (c)(21) [burglary of occupied residence classified as "violent" felony]; *People v. Dunkle*, *supra*, 36 Cal.4th at pp. 922, 923 [burglary only qualifies as crime involving "force or violence" under factor (b) if it, *in fact*, involved force or violence or threat of force or violence under circumstances of its commission]; *People v. Clair* (1992) 2 Cal.4th 629, 733-734 [same]; Pen Code, § 667.5, subd. (c)(9) [lewd act on child classified as "violent" felony]; *People v. Rayley*, *supra*, 2 Cal.4th at p. 908 [lewd act on child only qualifies as crime involving "force or violence" under factor (b) if it involved force or violence under circumstances of its commission].)

It further follows that only if the circumstances under which section 242 is violated causes, or poses a danger of causing, bodily harm can it be deemed constitutionally relevant to the jury's determination of whether the defendant should live or die and, hence, admissible under factor (b). If, on the other hand, conduct that violates section 242 in fact amounts to a mere

technical violation of the least adjudicated elements of the offense – i.e., the "least touching" that does not cause or involve the likelihood of physical harm – it is constitutionally irrelevant and inadmissible under factor (b). Put another way, if the conduct falls within the latter category, it amounts to nothing more than a "trivial incident[] of misconduct and ill temper," that should not "influence a life or death decision." (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 774, 776.)

This Court's prior decisions are in accord with this construction of factor (b). While this Court has held that acts amounting to a battery qualify under factor (b) when they cause, threaten to cause, or pose a danger of causing bodily harm, it has never held that a mere, technical battery satisfying the least adjudicated elements of the statute is *alone* sufficient to influence the choice between life and death under factor (b) and/or the constitution.

In *People v. Davis*, *supra*, 10 Cal.4th 463, for instance, the defendant argued that it was reasonably likely that the jurors erroneously considered mere technical batteries under factor (b) by erroneously substituting the specialized definition of "force or violence" in the battery context, with which they were instructed, for the common meaning of "force or violence" under factor (b), on which they were not instructed, the latter requiring a greater degree of force or violence than the former. (*Id.* at p. 541.) This Court implicitly acknowledged the validity of the underlying legal premise that the special meaning of "force or violent" in the battery context conflicts with the commonsense meaning of the same term under factor (b) and that, if the jurors misapplied the lesser battery standard to factor (b), it would be error. (*Id.* at pp. 541-542.) Instead, this Court rejected the defendant's argument for two reasons, the first of which turned on the language of the

particular instructions the jurors were provided in that case. (*Id.* at p. 542.) Second, and of relevance here, this Court emphasized that in any event, the incidents of battery at issue in that case went beyond mere technical violations of the least adjudicated elements of section 242 and "indisputably involved the use of 'force, and 'violence,' and 'threats' of violence under their commonsense connotations: . . . defendant kicked the victim and repeatedly lunged at him with [a] sword; . . . defendant slashed at the victim, cutting his jacket with a knife; . . . defendant struck, choked and pushed the victim." (*Ibid.*) Hence, the *Davis* opinion implicitly acknowledges that mere technical batteries without more – evidence that they caused or posed a danger of causing bodily harm – do not qualify under factor (b).

Similarly, in *People v. Pinholster* (1992) 1 Cal.4th 865, the defendant argued that a series of assaults and batteries he had committed as an adult and while in custody were not crimes involving force or violence under factor (b). Those acts included physical assaults on inmates and jail deputies that included punching one in the head and kneeing another in the groin, kicking several police officers, threatening to kill deputies, and throwing urine at deputies. (*Id.* at pp. 910, 961.) This Court held that the acts of striking and kicking – acts that certainly caused pain and posed a danger of bodily harm – amounted to assaults and batteries involving "force or violence" under factor (b) and therefore were properly admitted. (*Id.* at p. 961.) As to throwing the urine, this Court observed that it was a technical battery. (*Ibid.*) However, this Court did *not* hold that the act was admissible under factor (b) for this reason. To the contrary, this Court implicitly recognized that this act did *not* involve "force or violence" *within the meaning of factor (b)* in and of itself. Instead, this Court emphasized

the series of acts causing pain posed a danger of bodily harm, of which the urine throwing was one part. (*Ibid.*) Therefore, that act was properly admitted under the general rule that "'all crimes committed during a continuous course of criminal activity which includes the use of force or violence may be considered in aggravation *even if some portions thereof* [i.e., the technical battery] *may not be violent.*' [Citation.]" (*Ibid.*, italics added.)

This Court in *People v. Burgener* (2003) 29 Cal.4th 833, similarly held that a series of acts in which the adult defendant threw a mixture of scouring powder and chlorine bleach, as well as water and urine, at jail guards amounted to batteries *and* involved force or violence under factor (b). (*Id.* at p. 866.) Again, however, the non-dangerous, non-violent act of throwing urine and water was one part of a series of acts that were violent and did present a danger of bodily harm – i.e., throwing a mixture of scouring powder and chlorine bleach, a highly toxic substance, at people certainly poses a risk of serious injury if it comes into contact with the skin or eyes. (See also *People v. Jones* (1998) 17 Cal.4th 279, 311 [conduct underlying guilty plea to misdemeanor battery properly admitted under factor (b) when the circumstances of its commission showed acts of causing bodily harm – defendant beat victim severely, possibly with a chair, resulting in need for medical attention and possible miscarriage]; *People v. Osband* (1996) 13 Cal.4th 622, 710-711 [same - underlying conduct showed defendant hit 60-year-old woman with bicycle in effort to steal her purse]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1184-1185 [court properly admitted evidence of several acts of forcible rape after the defendant held a knife to the victim's throat and repeatedly threatened to kill her and her child, during which he inserted a hair spray can into the victim's vagina,

causing her considerable pain and resulting in a torn uterus, four unsuccessful operations and a hysterectomy; even if hair spray can activity occurred prior to enactment of Penal Code Section 289, which prohibits penetration of genital openings by a foreign object, it was admissible because "the conduct in question was unquestionably criminal activity – at least a battery (§ 242) – involving force or violence"]; *People v. Belmontes*, *supra*, 45 Cal.3d at pp. 796-797, 809 [evidence that defendant cut telephone cord when victim attempted to call police, pushed her, hit her on head, shoved her to the ground, and choked her, was properly admitted as "violent criminal offenses (aggravated assault, battery . . . and simple assault) and thus properly argued as aggravating circumstances"].)

Here, the evidence showed nothing more than that McKinnon put his hands on a teacher and moved, or even pushed, her aside as he exited the cafeteria after a disagreement with the cashier. His "crime" of battery was not inherently dangerous in the abstract. It was not dangerous under the circumstances of its commission, in that it caused no pain or bodily harm nor was there any evidence to suggest that it threatened or posed a danger of causing pain or bodily harm. Indeed, it did not even involve moral turpitude that would suggest a "readiness to do evil." (See, e.g., *People v. Mansfield* (1988) 200 Cal.App.3d 82, 88-89.)

Furthermore, McKinnon committed his "crime" when he was a 17-year-old child, more than nine years before the charged offenses. As the United States Supreme Court has recognized, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions . . . . (*Roper v. Simmons* (2005) 543 U.S. 551, 569.) Hence, criminal acts committed by

children simply do not evince the same degree of moral culpability as the same acts committed by adults. (*Id.* at pp. 553-554, 569-572 [Eighth and Fourteenth Amendments prohibit imposition of the death penalty for people who were juveniles at time of their crimes].)

The most that can be said about McKinnon's technical battery is that it amounted to a remote, childish, "trivial incident[] of misconduct and ill temper." (*People v. Boyd*, *supra* 38 Cal.3d at p. 774.) Indeed, one would be hard pressed to identify *anyone* who has not committed the "least offensive touching" of another person during his or her tumultuous teenage years. Of course, "if the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." (*Arave v. Creech* (1993) 507 U.S. 463, 474.)

At bottom, the trivial incident simply did not have the requisite degree of gravity to influence the jury's decision to put another human being to death. As a matter of statutory construction, this conduct did not satisfy the "force or violence" requirement of section 190.3, subdivision (b). As a matter of constitutional law, admission of this trivial, constitutionally irrelevant incident as an aggravating circumstance violated McKinnon's Eighth and Fourteenth Amendment rights.

E. The Trial Court Erred in Omitting the Essential Knowledge Element from its Instruction on Penal Code Section 4502, as Well as an Instruction on Circumstantial Evidence

The prosecution also presented evidence that, in a February 1997 search of his jail cell, correctional officers found a shank hidden in a small space between the ceiling and a light fixture. (13 RT 1564-1567; see, e.g., *People v. Combs* (2004) 34 Cal.4th 821, 860 [possession of shank in

custody qualifies as factor (b) evidence].) The issue of whether McKinnon knew of the shank's presence in his cell was vigorously disputed, even before admission of the evidence when counsel unsuccessfully moved to exclude it on the ground that the evidence was legally insufficient to prove knowledge. (11 RT 1339-1340.)

Neither the shank nor the "small, small space" between the ceiling and light fixture affixed to the ceiling in which it was found was visible from external examination. (13 RT 1567, 1573-1574.) Officers only found the shank when they discovered the space and probed it with the handle of a plastic spoon. (13 RT 1574.) There was no evidence that McKinnon's fingerprints were on the weapon, the light fixture, or the ceiling. (13 RT 1572-1573.)

McKinnon had been the only occupant of that cell for six months. (13 RT 1570.) While cells are usually searched once a week, the prosecution presented no direct evidence that the small, hidden space where the shank was discovered had been searched or probed at any time during or after a prior resident occupied the cell. (13 RT 1569.) Hence, McKinnon's defense to the shank possession allegation was that he did not know of its presence in his cell. (13 RT 1660-1661.)

Based upon the evidence and over counsel's objection, the trial court instructed the jurors generally on Penal Code section 4502. (12 RT 1452-1453, 1609; 14 CT 4078.) Unfortunately, however, the court omitted from its instructions the essential knowledge element of the statute.

Once again, "though there is no sua sponte duty at the penalty phase to instruct on the elements of 'other crimes' introduced in aggravation (citation), when such instructions are given, they should be accurate and complete." (*People v. Montiel* (1993) 5 Cal.4th 877, 942; accord, *People v.*

Prieto (2003) 30 Cal.4th 226, 268; *People v. Cummings* (1993) 4 Cal.4th 1233, 1337; *People v. Malone* (1988) 47 Cal.3d 1, 49.) The "right to correct instructions on crimes introduced in aggravation at the penalty phase stems from the right to have the penalty jury consider such crimes only if it finds them true beyond a reasonable doubt." (*People v. Montiel*, *supra*, at p. 942; see also *People v. Robertson* (1982) 33 Cal.3d 21, 53-55, and authorities cited therein.)

Penal Code section 4502, subdivision (a) provides in relevant part: "[e]very person who, while . . . confined in any penal institution, . . . possesses or carries upon his . . . person or has under his . . . control any . . . sharp instrument . . . is guilty of a felony . . . ." To establish a violation of section 4502, the prosecution must prove beyond a reasonable doubt that the defendant had knowledge that the object was in his or her possession. (*People v. Strunk* (1995) 31 Cal.App.4th 265, 272; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779, disapproved on another ground in *People v. Flood* (1998) 18 Cal.4th 470; *People v. Steely* (1968) 266 Cal.App.2d 591, 594; see also *People v. Lucky* (1988) 45 Cal.3d 259, 291 ["knowledge is an essential element" of section 4574, subdivision (a), prohibiting possession of deadly weapon in jail].) Therefore, complete and accurate instructions on section 4502 must inform the jury that it must find this element beyond a reasonable doubt. (See, e.g., *People v. Reynolds*, *supra*, at p. 780 [court's instructions on section 4502 were incomplete and erroneous because they "never informed the jury that it had to determine whether (the defendant) knew of the object's presence"].)

Here, the trial court provided the jury with CALJIC No. 7.38 as follows:

Every person who, while at, confined in, while

> being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his person or has under his custody or control any instrument or weapon commonly known as a shank, is guilty of a violation of Penal Code section 4502, a crime.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person was confined in or being conveyed to or from any penal institution or under the custody of officials, officers or employees of a penal institution; and
>
> 2. While so confined, being conveyed or under that custody, possessed or carried upon his person or under his custody or control known as a shank [*sic*].

(14 CT 4078; 13 RT 1609 [oral instruction referring to "a weapon known as a shank"].)

The instruction omitted the essential knowledge element and, in fact, failed to define possession at all. Furthermore, the court did not provide any other instructions to cure the omission, such as CALJIC No. 1.24 (defining actual and constructive possession, including knowledge requirement). Hence, the court erred by failing to provide complete and accurate instructions on the elements of Penal Code section 4502. (*People v. Reynolds*, *supra*, 205 Cal.App.3d at p. 780; see also *People v. Prieto*, *supra*, 30 Cal.4th at p. 268; *People v. Montiel*, *supra*, 5 Cal.4th at p. 942; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1337; *People v. Malone*, *supra*, 47 Cal.3d at p. 49.)

Furthermore, the prosecution's theory of liability under section 4502 again rested entirely on circumstantial evidence – i.e., the jurors could infer

from the existence of the very well hidden shank in McKinnon's cell that McKinnon must have knowingly possessed it. Once again, however, the court failed to instruct the jurors that if the evidence were reasonably susceptible of an interpretation that McKinnon did *not* knowingly possess the shank, they were bound to accept that interpretation. (See, e.g., *People v. Wiley*, *supra*, 18 Cal.3d at p. 174; *People v. Yrigoyen*, *supra*, 45 Cal.2d at p. 49; *People v. Bender*, *supra*, 27 Cal.2d at pp. 174-175; *People v. Fuentes*, *supra*, 183 Cal.App.3d at pp. 454-456 .) As discussed in part E, above, the court erred in omitting this instruction.

Of course, once the court undertakes to instruct on other crimes evidence, its obligation to do so accurately and completely "stems from the right to have the penalty jury consider such crimes only if it finds them true beyond a reasonable doubt" (*People v. Montiel*, *supra*, 5 Cal.4th at p. 942), and proof beyond a reasonable doubt of other crimes under factor (b) is essential to a capital defendant's rights to a fair and reliable jury determination of the appropriate penalty, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. Furthermore, long standing and well-established authority created a constitutionally protected, "substantial and legitimate expectation" that McKinnon would not be deprived of his life in the absence of proof beyond a reasonable doubt of the criminal activity alleged under factor (b). (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [although federal Constitution does not require states to employ jury sentencing in non-capital cases, once state does so, right it is protected by federal due process because a defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion"]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301, cert. denied 513 U.S.

914 (1994); *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Moreover, a critical component of McKinnon's penalty phase defense was that he did not know that the shank was in the cell, a defense that was obliterated by the instructional error. (Cf. *Conde v. Henry*, *supra*, 198 F.3d at pp. 734, 739-740 [trial court's instructional error and other rulings prevented consideration of primary defense and violated Fifth and Sixth Amendment right to effective counsel, to present a defense, and to a fair trial]; see also *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 847 ["'we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing'"].) For all of these reasons, the court's instructional error also violated McKinnon's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Finally, respondent cannot prove the errors harmless beyond a reasonable doubt. (See, e.g., *People v. Malone*, *supra*, 47 Cal.3d at pp. 49-50 [applying harmless beyond a reasonable doubt standard to instructional error omitting element of other crime offered in aggravation]; accord *People v. Prieto*, *supra*, 30 Cal.4th at p. 268; *People v. Stankewitz* (1990) 51 Cal.3d 72, 106.) In other words, respondent cannot prove that the jurors would have found that the prosecution had satisfied its burden of proving the knowledge element in the absence of instructional error.

The prosecution's proof that McKinnon had knowledge of the shank's presence was negligible at best. As previously discussed, neither the shank nor the "small, small space" where it was secreted was visible from external examination; the shank was only discovered after searching officers discovered the niche and probed it with a thin object. (13 RT 1574-1575; compare *People v. Prieto*, *supra*, 30 Cal.4th at p. 268 [failure to instruct on knowledge element harmless beyond a reasonable doubt when

shank was found under defendant's bunk and defendant admitted he had it for protection].) Furthermore, the prosecution offered no affirmative evidence that the space had been searched prior to McKinnon's occupancy of the cell. The searching officer testified generally that cells are searched on a weekly basis. (13 RT 1569.) It was only in response to a leading question that the searching officer agreed with the prosecutor that "part of the standard operating procedure" is to check the light fixtures and any gaps between them and the ceilings. (13 RT 1574-1575.) At the same time, he testified that gaps between the fixtures and ceilings are not typical and therefore they are only searched if discovered and that he did not know how long the shank had been in the cell. (13 RT 1568, 1572, 1574.) The testimony undercut the implication that the space was examined in the standard weekly search of the cell. Jurors are presumed to be intelligent people and those intelligent people no doubt appreciated the questionable credibility of words the prosecutor put in the witness' mouth that were inconsistent with the witness' own words. (See, e.g., *In re Cox* (2003) 30 Cal.4th 974, 1018 [witness' credibility "eroded" where, inter alia, she was "constantly asked leading questions" on direct]; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1481 [trial judge's statement to counsel that he would afford less weight and credibility to witness' answers to leading questions was "an honest reaction" to be "expect(ed) of any trier of fact - judge or jury"].) Finally, there was no evidence that McKinnon's fingerprints were on the shank, the light fixture, or the ceiling. (See, e.g., *United States v. Thompson* (9th Cir. 1994) 37 F.3d 450, 453-454 [absence of fingerprint evidence supports "no knowledge" defense to possession charge].) Unfortunately, due to the court's instructional error, these intelligent people were never informed that the weakness of the evidence that McKinnon

knew of the shank's presence in the cell was legally relevant. On this record, respondent cannot prove the errors harmless beyond a reasonable doubt. Hence, it must be presumed that the jurors *did* consider the shank evidence in aggravation due to the error and that they would *not* have considered it in the absence of the error.

F. The Cumulative Effect of the Errors Was Prejudicial, Violated McKinnon's Eighth and Fourteenth Amendment Rights to a Fair Penalty Trial and a Reliable Death Verdict, and Requires Reversal of the Death Judgment

Once again, where, as here, errors of federal constitutional dimension have occurred, reversal is required unless this Court determines that they were harmless beyond a reasonable doubt. *(Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404; *Chapman v. California* (1967) 386 U.S. 18, 24.) For state law violations in the penalty phase of a capital trial, reversal is required if there is any "reasonable possibility" that the verdict would have been different in the absence of the error. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961 ; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) As this Court has explained, this """reasonable possibility"" standard and *Chapman's* "'reasonable doubt'" test . . . are the same in substance and effect.'" (*People v. Gonzalez*, *supra*, at p. 96, quoting from *People v. Ashmus* (1991) 54 Cal.3d 932. 990.) Because a death verdict must be unanimous, reversal is required under this standard if there is a reasonable possibility that even a single juror *might* have reached a different decision absent the error. (*People v. Ashmus*, *supra*, 54 Cal.3d at pp. 983-984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"]; *People v. Brown*, *supra*, 46 Cal.3d at p. 472, fn. 1 (conc. & dis. opn. of Broussard, J.).)

To be sure, given the seemingly trivial nature of the factor (b) evidence to which all of the foregoing errors went, at first, superficial blush, it is tempting to dismiss that evidence, and therefore the errors, as harmless. However, a thoughtful analysis of the errors, the case as a whole, and the verdict leads to but one conclusion: given the remarkable closeness of the penalty phase case, the only rational explanation for the death verdict is that the factor (b) evidence – all of which was tainted by error – tipped the closely balanced scales in favor of death. (See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of errors in penalty phase was prejudicial and required reversal of death judgment]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878 [cumulative effect of evidentiary and evidentiary instructional errors in penalty phase was prejudicial and required reversal of death judgment].)

The case for mitigation was strong. McKinnon presented a wealth of compelling, undisputed evidence that painted a graphic, horrific portrait of a childhood and adolescence marked by nearly constant exposure to extreme violence, emotional abuse, and abject poverty. By all accounts, both his father and his step-father were heroin addicts who subjected McKinnon to a barrage of physical and psychological abuse. (12 RT 1500-1505, 1508-1509 1511, 1521, 1523-1525, 1540-1541, 1543, 1545, 1547; 13 RT 1581-1585.) The paramount concern of both his father and step-father was their need for drugs; they used the family's already very limited resources to purchase heroin, leaving the family destitute and the children often hungry. (12 RT 1503, 1512, 1515, 1524-1525, 1541-1542, 1546; 13 RT 1578-1580, 1586-1587.) McKinnon was not allowed to play outside, was locked in closets, and forced for to lie in his own waste for hours and even days. (12 RT 1502, 1505, 1508-1509, 1523, 1511, 13 RT 1582, 1584-1585.) His

estranged father – himself a convicted murderer – was an admitted sadist. He shockingly described having physical "orgasms" over whipping, beating, and terrorizing his son. (12 RT 1518, 1536, 1544; 13 RT 1584, 1588.) When McKinnon was not the victim of violence himself, he was being exposed to violent acts committed on others, including bloody assaults, rapes, and even murders on the grounds of the notorious housing project in which he was raised and savage beatings of his mother and sisters that were so severe that they left scars. (12 RT 1501, 1504-1508, 1514-1515, 1539-1540, 1542; 13 RT 1582, 1587.) Not surprisingly, McKinnon was a traumatized child who had a chronic bed wetting problem and experienced nightmares so intense that he awakened from them screaming and sobbing. (12 RT 1508, 1510, 1523, 1540, 1544; 13 RT 1585.) His manifestations of trauma only brought him more abuse. (12 RT 1508-1509, 1523; 13 RT 1582-1585.) (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 534 [difficult childhood and "alcoholic, absentee mother" part of "powerful" mitigating evidence]; *Williams v. Taylor* (2000) 529 U.S. 363, 397-398 ["graphic description of (appellant's) childhood, filled with abuse and privation" was sufficiently mitigating to require reversal due to counsel's failure to present it]; *In re Lucas* (2004) 33 Cal.4th 682, 734 ["childhood abandonment" and abuse is "forceful" mitigation]; *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1163 [evidence of defendant's childhood marked by neglect and instability was sufficiently mitigating to require reversal for counsel's failure to present it].) Despite the horror of his upbringing, McKinnon had positive relationships with his mother, sisters, and young daughter and even wrote poetry throughout his adolescence and adulthood. (12 RT 1519, 1526, 1529-1531, 1548; see, e.g. *Parker v. Dugger* (1991) 498 U.S. 308, 314 [defendant's positive

relationships with friends and family have mitigating value]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 918-919, 929-932 [same]; *Jackson v. Herring* (11th Cir. 1995) 42 F.3d 1350, 1368 [same]; *People v. Harris* (1984) 36 Cal.3d 36, 68-70 [poems defendant wrote while in jail were relevant mitigating evidence]; *Mayfield v. Woodford*, *supra*, at p. 932 ["humanizing" evidence sufficiently mitigating that counsel's failure to present it amounted to constitutionally ineffective assistance].)

Furthermore, lingering doubt was a cornerstone of the penalty phase defense and the jurors were instructed that they could consider their lingering doubts as to McKinnon's guilt in determining whether he should live or die. (13 RT 1648-1652; 14 CT 4066.) As thoroughly discussed in the preceding arguments, the evidence connecting McKinnon to both murders was weak at best. As also previously discussed, after four days of deliberations, the jurors declared that they were deadlocked as to the Martin murder and related firearm possession charges. (13 CT 3810; 15 15 CT 4108-4109; 14 CT 4093-4095, 4098.) While the jurors ultimately resolved their *reasonable* doubts against McKinnon on the fifth day of their deliberations in the guilt phase, their indication of deadlock is nevertheless a compelling, objective indication that at least some of those jurors harbored lingering doubt as to his guilt of the Martin murder charge and, hence, lingering doubt that he was even *eligible* for the death penalty at all. Although the guilt phase errors undercut the lingering doubt defense (see Argument XIII, below), the jurors' lingering doubts as to McKinnon's guilt of the Martin murder surely made a strong case for life that much stronger. (See, e.g., *Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715-716 [lingering doubt has "'powerful mitigating'" effect, as demonstrated by results of comprehensive studies]; *Lockhart v. McCree* (1986) 476 U.S.

162, 181 ["residual doubt has been recognized as an extremely effective argument" in mitigation]; see also *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1164, cert. denied (1995) 531 U.S. 1072 [emphasizing weak nature of evidence to prove elements of offense in guilt phase in concluding penalty phase error prejudicial]; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1222 [same]; *Miller v. Lockhart* (8th Cir. 1995) 65 F.3d 676, 685 [emphasizing viable innocence defense to underlying charges at guilt phase in concluding penalty phase error prejudicial].)

The case for aggravation, on the other hand, cannot be characterized as anything other than weak. As to the circumstances of the crimes, they simply were not particularly aggravating. There was no evidence that the killings were pre-planned. To the contrary, the evidence clearly demonstrated that – if McKinnon were the killer – they were spontaneous. (See, e.g., *Belmontes v. Woodford* (9th Cir. 2003) 350 F.3d 861, 906-907 [instructional error in penalty phase prejudicial in light of "substantial mitigating evidence" which included, inter alia, that murder was not pre-planned].) The killer did not inflict, or attempt to inflict, any pain or suffering above and beyond that inherent in the crimes themselves. He did not harm anyone else or attempt to harm anyone else in the commission of the crimes. He did not commit the crimes in the commission of other, morally reprehensible crimes, such as rape. (Cf. *Jackson v. Herring* (11th Cir. 1995) 42 F.3d 1350, 1369 [circumstances of crime were not aggravating as compared to "many death penalty cases (which) involve murders that are carefully planned or accompanied by torture, rape, or kidnapping"].) The crimes were not committed for some particularly nefarious motive, such as silencing witnesses or pecuniary gain. Thus, the "circumstances" of the crimes under factor (a) came down to nothing more

than the bare commission of the crimes themselves.

Nor did McKinnon have a significant history of violence. Virtually all of the aggravating factor (b) evidence was erroneously admitted or tainted by error. The only factor (b) evidence that was arguably, properly before the jury was the testimony of an arresting officer that McKinnon's sister, Robin, reported that he had assaulted her during a heated argument. (13 RT 1558; see also 14 CT 4065 [instruction limiting jurors' consideration to discrete list of factor (b) events].) Robin herself denied that her brother had hit or assaulted her, but admitted that she was furious at her brother, hysterical, and therefore likely exaggerated the incident to police. (12 RT 1486-1487, 1489-1490.) (Cf. *People v. Horton* (1995) 11 Cal.4th 1068, 1140 [reversal required where only aggravation that was offered apart from circumstances of the crimes was erroneously admitted].)[54]

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[54] The jury also heard testimony from Linda Bethune for the ostensible purpose of describing the facts underlying McKinnon's robbery conviction. (11 RT 1373-1384: 3 CT 760-761.) Bethune was an admitted drug addict with a string of prior convictions who provided a rambling, inconsistent, largely incoherent account of McKinnon having punched her once – testimony that did not suggest that a robbery ever occurred and testimony that was otherwise facially incredible, such as her claim that she sold $20,000 and consumed $1,000 of crack cocaine *every day*. (11 RT 1372-1384.) Defense counsel objected to her testimony on lack of notice grounds because the prosecutor provided no offer of proof apart from indicating that she would testify to the undescribed facts underlying McKinnon's robbery conviction and – as the prosecutor acknowledged – the police report relating to the incident had been destroyed. (11 RT 1371-1372, 1385-1388.) He later moved to strike the incident as a factor (b) event because her testimony not only failed to conform to the proffer in that it failed to even hint at a robbery, it was unreliable. (11 RT 1385.) The court agreed that Bethune was a "fairly incredible witness" (13 RT 1637),

(continued...)

In sum, the jury's conclusion that McKinnon was the man who had shot two people to death, which made him death-eligible, combined with the other, arguably properly admitted aggravating evidence that he had allegedly assaulted his sister during a heated argument, and had prior convictions for robbery and weapon possession, was anemic aggravation when compared to the powerful mitigation. (See, e.g., *People v. Hernandez*, *supra*, 30 Cal.4th at pp. 851-853, 877 [penalty phase errors going to "most important aggravating evidence" under factor (b) required reversal where aggravation was based on circumstances of underlying murder for financial gain, along with prior conviction for robbery in which defendant used and fired a weapon at one of the victims and another prior conviction for burglary and mitigation included evidence of positive childhood and drug addiction]; *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 962 [penalty phase error required reversal; despite "egregious" nature of current double murder, along with prior assaults on inmates, possession of assault weapon, and possession of shank in jail, "a death verdict was not a foregone conclusion"]; *Belmontes v. Woodford*, *supra*, 350 F.3d at pp. 906-907 [prosecution's aggravating evidence was "weak[]" where it was based on circumstances of underlying crimes and prior incidents of domestic violence, firearm possession, and juvenile incarceration for being an accessory after the fact to voluntary manslaughter]; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081 [aggravating evidence was "scant" where

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[54] (...continued)
and ultimately provided a jury instruction identifying and limiting the factor (b) evidence it could consider, from which it omitted this incident. (14 CT 4065; see also 13 RT 1593-1594.) In short, while the jury heard this unreliable evidence, it ultimately was instructed not to consider it in aggravation.

based on circumstances of underlying crimes – two first degree murders and assault with deadly weapon on third person in two separate incidents – along with prior felony burglary conviction and prior violent assault in which defendant fired gun].) Certainly, far more egregious aggravation has been found *insufficient* to render penalty phase errors harmless, even under the *Strickland* standard for prejudice, a more stringent standard than either the *Brown* or *Chapman* standards.[55] (See, e.g., *Williams v. Taylor*, *supra*, 529 U.S. at p. 418 (dis. opn. of Rehnquist, J.) [emphasizing that majority reversed for penalty phase errors under *Strickland* standard despite aggravating evidence that appellant had "savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a prisoner's jaw"]; *In re Lucas* (2004) 33 Cal.4th 682, 735 [penalty phase error required reversal under *Strickland* standard despite aggravating evidence based on crimes in which defendant "brutal[ly]" killed two elderly and "vulnerable" neighbors

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[55] Under the *Strickland* standard, trial counsel's penalty phase error that falls below an objective standard of reasonableness requires reversal if it undermines confidence in the outcome of the case. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) This standard has been equated with the *Watson* standard of prejudice. (See, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 558-559 (dis. opn. of Mosk, J.); see also *People v. Espinoza* (1992) 3 Cal.4th 806, 821; *People v. Rich* (1988) 45 Cal.3d 1036, 1096.) The *Brown* standard for prejudice for penalty phase violations of state law is "more exacting" than the *Watson* standard and, hence, "more exacting" than the *Strickland* standard. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) Therefore, decisions assessing the closeness of a penalty phase case for prejudice purposes under the *Strickland* standard are instructive in assessing the closeness of a penalty phase case for prejudice purposes under the more exacting *Brown* standard and under the even more exacting harmless beyond a reasonable doubt standard for penalty violations of the federal constitution.

in their home, and on defendant's prior violent assault]; *Mayfield v. Woodford*, *supra*, 270 F.3d at pp. 918-919, 929-932 [same – reversal required despite "strong" aggravating evidence based on current crimes in which defendant carefully planned and committed murders of three people in two separate incidents, and on defendant's prior violent assaults]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 619-622 [same – despite defendant having been convicted of thirteen counts of aggravated first-degree murder]; see also *People v. Sturm*, *supra*, 37 Cal.4th at p, 1244 [penalty phase errors required reversal despite fact defendant murdered three friends, after he bound them and even as they "cried or begged for mercy," in order to rob store in which they worked; "although the crime committed was undeniably heinous, a death sentence in this case was by no means a foregone conclusion].)[56]

Indeed, the record of deliberations indicate that the jurors viewed the case to be a close one. The jurors deliberated for approximately two days over the course of three court sessions (14 CT 4043, 4090-4091), while the *entire* penalty phase case, including hearings and other proceedings outside of the jury's presence, the presentation of evidence, presentation of argument, and provision of instructions, took the same amount of time. (11 RT 1348, 1679; 14 CT 4037, 4041-4043, 4090-4091.) (See, e.g., *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 [fact jury deliberated

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[56] The prosecution also seemed to recognize the weakness of its case for aggravation. It offered not to proceed with the penalty phase if McKinnon waived his right to appeal the guilt phase judgment, an offer McKinnon refused. (10 RT 1300; see also 1 RT 37-40 [prosecutor notifying court and counsel prior to guilt phase that he would recommend that his office accept a plea bargain offer whereby McKinnon would plead guilty in exchange for a life without parole sentence].)

over two days after one and a half day trial indicated close case]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine hours]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [almost six hours].)

Into this very close case was erroneously injected what effectively amounted to bad character evidence designed to persuade the jurors that McKinnon was not a man deserving of their mercy. Certainly, the importance of the evidence to the state's case is amply demonstrated by the prosecutor's substantial reliance on it. The prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [prosecutor's reliance in summation on erroneously admitted aggravating evidence critical factor in finding error prejudicial]; *People v. Hernandez*, *supra*, 30 Cal.4th at p. 877 [same]; *People v. Quartermain* (1997) 16 Cal.4th 600, 622 [error in admitting evidence prejudicial due in large part to prosecutor's reliance upon it in summation]; *People v. Woodard*, *supra*, 23 Cal.3d at p. 341 [same]; *People v. Powell* (1967) 67 Cal.2d 32, 56-57; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments . . ."].)

The prosecutor argued the factor (b) evidence throughout his opening statement and his closing and rebuttal arguments. In opening, he not only emphasized the factor (b) evidence, he distorted it to make it appear far more aggravating than it actually was. For instance, he relied on the cafeteria incident as a robbery in which McKinnon "threatened" the cashier, although the true facts were that McKinnon never explicitly or implicitly threatened her and, in fact, his conduct did not amount to a

robbery at all. (11 RT 1354.)[57] He similarly told the jurors that McKinnon's assault upon Robin resulted in injuries, although he never presented such evidence and Robin specifically testified that she was *not* injured in the incident. (11 RT 1354; 12 RT 1484, 1486, 1488, 1491-1492.)

The prosecutor continued the theme in his closing argument, emphasizing and exaggerating the factor (b) evidence as demonstrating a "history of violence" that weighed heavily in favor of a death sentence. (13 RT 1631.) With respect to the battery upon Robin and the related conduct, the prosecutor argued that the jury should consider not only the alleged battery, but also the "various acts of violence that took place during that." (13 RT 1628.) Indeed, the prosecutor continued, "there's . . . actually *four parts* of that particular incident that show violence, or the threat of violence on the part of the defendant. [A] is he hit her with the cast. B, choked her. C, broke property. And D, what did he do when he was taken down to the police station? He made a threat. Now *these could be considered separate aggravating factors* for you or one aggravating factor . . ." (13 RT 1629, italics added.) The prosecutor pointed to the cafeteria "incident" as "just another example of the defendant wanting his own way and using force or violence to accomplish that." (13 RT 1628.) He argued that McKinnon's possession of bullets for a handgun in 1988 should be "considered as an aggravating course of conduct. Future dangerousness. Present

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[57] The prosecutor also told the jurors that McKinnon robbed Linda Bethune at knife-point. (11 RT 1354.) Whatever else might be said about Bethune's rambling and inconsistent testimony – testimony the court ultimately determined the jury could not consider in its penalty determination (see footnote 54, above) – Bethune never suggested that McKinnon was even armed with a knife, much less that he threatened her with one, nor did any other evidence. (See 11 RT 1377-1384.)

dangerousness . . . . " which involved "a threat of violence . . . . " (13 RT 1628.)[58] Finally, significantly omitting any mention of the knowledge requirement for the possession allegation, the prosecutor argued that the jury should consider the "shank in cell" as a circumstance in aggravation. (13 RT 1629.)

Given the dearth of any other aggravating evidence and the prosecution's emphasis and exaggeration of the factor (b) evidence, it is clear that the tainted factor (b) evidence was a vital part of the prosecution's case for death. The Court has "seen how important" the erroneously admitted factor (b) evidence was "to the People's case . . ." (*People v. Powell*, *supra*, 67 Cal.2d at p. 56.) "'There is no reason why [this Court] should treat this evidence as any less "crucial" than the prosecutor – and so presumably the jury – treated it.' (*People v. Cruz* (1964) 61 Cal.2d 861, 868.)" (*Id.* at pp. 56-57.)

Given the weakness of the state's case for death as compared to the quantity and quality of the mitigating case for life, it is at least reasonably possible that the jurors did as the prosecutor entreated them to do and gave the erroneous factor (b) evidence sufficient aggravating weight to tip the closely balanced scales in favor of the jurors' unanimous decision to put McKinnon to death. Indeed, the Supreme Court has recently emphasized the devastating effect that the erroneous admission of aggravating evidence has in a penalty trial where the jury is told to weigh aggravation against mitigation. (*Brown v. Sanders* (2006) 546 U.S. ___ , 126 S.Ct. 884, 892 [due process violation where invalid aggravating factor results in admission

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[58] The court sustained an objection to the prosecution's reference to future dangerousness. (13 RT 1628; see also 13 RT 1631, 1636-1637.)

of evidence in the weighing process that the jury would not otherwise have heard]; see also, *Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1179, opn. amended on limited grant of rhg., 421 F.3d 1154 ["Because the jury in a capital case is asked to evaluate whether aggravating circumstances in a defendant's background outweigh whatever mitigating value it can find, counsel (and the court) must be especially vigilant to ensure that the jury is not presented more aggravating facts than the law allows"].) Under any standard, the death judgment must be reversed.

XIII

THE CUMULATIVE EFFECT OF ANY OR ALL OF THE GUILT AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF THE DEATH VERDICT

As discussed in the preceding argument, the cumulative effect of the errors in the admission and instructions on factor (b) evidence requires reversal of the death judgment. Even if it does not, however, the cumulative effect of those errors along with the guilt phase errors was prejudicial, violated McKinnon's rights to a fair penalty trial and a reliable penalty determination, as guaranteed by the Eighth and Fourteenth Amendments and the California Constitution's counterparts, and therefore requires reversal of the death judgment. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase]; *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at guilt phase requires reversal of penalty judgment if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *People v. Hamilton* (1963) 60 Cal.2d 105, 136; U.S. Const., Amend. 5, 8 & 14.)

Under California law, the penalty determination takes into account all evidence presented in the guilt phase of a capital trial and all of the "circumstances of the crimes" (Pen. Code, § 190.3, subd. (a)), as the jurors in this case were explicitly instructed (13 RT 1602; 14 CT 4062 [jurors in this case instructed with CALJIC No. 8.85 to consider guilt phase evidence in determining appropriate penalty]). The United States Supreme Court has recently emphasized the significance of the "circumstances of the crime"

factor in a California jury's death penalty decision. (*Brown v. Sanders* (2006) 546 U.S. ___, 126 S.Ct. 884, 892.) Furthermore, under California law, jurors can consider and give effect to their lingering doubts over the defendant's guilt in deciding whether he should live or die. (See, e.g., *People v. Earp* (1990) 20 Cal.4th 826, 903; *People v. Hawkins* (1995) 10 Cal. 4th 920, 966-967; *People v. Cox* (1991) 53 Cal.3d 618, 676; *People v. Kaurish* (1990) 52 Cal.3d 648, 706; *People v. Terry* (1964) 61 Cal.2d 137, 147.) Hence, it is clear that errors committed in the guilt phase can have a profound impact upon the jury's penalty phase deliberations. This is just such a case.

As discussed XII-F (pages 349-350) above, lingering doubt was a crucial component of the penalty phase defense (13 RT 1648-1652 [defense counsel's argument]; 13 RT 1604; 14 CT 4066 [jurors instructed that they may consider lingering doubt in mitigation].) Even assuming for the sake of argument that the jurors would not have had *reasonable* doubt regarding McKinnon's guilt of one or both murders in the absence of the guilt phase errors, it is beyond dispute that at least one would have had *lingering* doubt as to his guilt in the absence of those errors. As previously discussed, the improper consolidation of the unrelated charges (Argument I), the improper admission of evidence that Hunt had allegedly "failed" a polygraph examination when he insisted that he had no knowledge of McKinnon having committed the Coder murder (Argument V), the improper exclusion of the Buchanan memo, which would have cast doubt not only on the veracity of Kim Gamble and Harold Black's accounts regarding the Martin murder weapon, but also on all of the evidence that Buchanan's interrogations produced, including the testimony of Harold Black, Orlando Hunt, Johnetta Hawkins, and Gina Lee (Argument III), and the erroneous

omission of instructions on circumstantial evidence and oral admissions (Argument IV and VII), all served to bolster the state's case and undermine the dual defense of innocence and evidence fabrication. In other words, the cumulative effect of the guilt phase errors served unfairly to subvert what should have been a powerful penalty phase defense of lingering doubt. (See *People v. Terry*, *supra*, 61 Cal.2d 137, 147; see also, *Lockhart v. McCree* (1986) 476 U.S. 162, 181 ["residual doubt has been recognized as an extremely effective argument" in mitigation]; *Chandler v. United States* (11th Cir. 2000) 218 F.3d 1205, 1320, fn. 28 ["residual doubt is perhaps the most effective strategy to employ at sentencing"]; *Tarver v. Hopper*, *supra*, 169 F.3d at pp. 715-716 [emphasizing the "'powerful mitigating'" effect of a lingering doubt defense]; *Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972, 987 [errors affecting the credibility of key guilt phase witnesses for the prosecution may also affect jurors' assessment of appropriate penalty to impose] *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 855, fn. 25 [same].) Certainly, in the absence of the guilt phase errors, it is more than reasonably possible that at least one juror would have harbored lingering doubts as to McKinnon's guilt. And, given the closely balanced penalty phase evidence, it is reasonably possible that at least one juror would have given effect to those lingering doubts by refusing to execute McKinnon for a crime or crimes he may not have committed. For this reason alone, the death verdict should be reversed. (*People v. Brown*, *supra*, 46 Cal.3d at p. 472, fn. 1 (conc. & dis. opn. of Broussard, J.).)

The court's exclusion of the Buchanan memo was particularly devastating to McKinnon in the penalty phase for another reason. As discussed in Argument III, in his guilt phase summation, the prosecutor argued at length that there was "no way in the world" that Black could have

known about the Martin murder weapon's presence in Gamble's purse unless, as he claimed, McKinnon confessed to him, and there was no rational explanation for the consistencies in Black and Gamble's accounts other than their truth. (9 RT 1220.) As further discussed in Argument III, the memo would have soundly rebutted the prosecutor's argument. In addition, the prosecutor repeatedly emphasized Gamble's trial testimony regarding the gun in his penalty phase argument for death. The prosecutor argued:

> What happened that would aggravate this murder as far as the way the defendant acted during the course of this whole thing? What did he do?
>
> He killed the victim. He had the gun seven days later, I think, and then when stopped by police he told Kimiya to put the gun into her purse, to hide the murder weapon, to keep suspicion off himself 'cause he knew that was the murder weapon. And what happened as a result of that? She got convicted and pled guilty of something, in reality she should never have had to go through. She ended up with a conviction on her record. And she put the gun in her purse because he put it there, or told her to put it there. And that can be an aggravating factor that you can consider.

(13 RT 1627.) He later argued that the jurors should consider McKinnon's possession of the gun at that time as yet another factor (b) incident that the jury could consider *in addition* to the factor he had already urged. (13 RT 1629.)[59] The court's exclusion of the memo deprived McKinnon of an essential tool with which to rebut these arguments for death. "It is an

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[59] The prosecutor created a chart during summation in which he numbered what he contended were separate aggravating factors. (13 RT 1620-1659.) Allowing Gamble to plead guilty to the gun possession was a circumstance of the crime and item number 19 (13 RT 1626-1628) while the gun possession was another crime and item number 25 (13 RT 1629).

elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to explain or deny.' [Citation.]" (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5, fn. 1 [court's exclusion of evidence in penalty phase regarding defendant's future adjustment to prison violated due process given the prosecutor's argument regarding defendant's future dangerousness]; accord, *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163 [court's exclusion of evidence that defendant would never be granted parole violated due process where prosecution argued future dangerousness]; *Green v. Georgia* (1979) 442 U.S. 95, 97 (per curium) [court's exclusion of evidence that co-participant was only actual killer violated due process when prosecutor argued that defendant also shot and killed victim]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-623 [court's exclusion of evidence regarding third party's role in crime violated due process where prosecutor argued defendant was ringleader].)

Furthermore, the guilt phase errors resulted in the receipt of evidence that was inadmissible in the guilt phase and should not therefore have been considered as circumstances of the crime at the penalty phase – namely, that McKinnon was a member of the notorious street gang, the Crips (Argument II), that his sister had threatened and orchestrated an assault upon Orlando Hunt – an act of violence the jurors surely unfairly attributed to McKinnon, and inadmissible hearsay that McKinnon had threatened to kill Gina Lee (Argument VI). Once again, the United States Supreme Court has recently emphasized the damage wrought by "allow[ing] the sentencer to consider evidence that would not otherwise have been before it . . ." (*Brown v. Sanders* (2006) 546 U.S. ___, 126 S.Ct. 884, 892 [if invalid aggravating factor results in sentencer considering evidence that would not otherwise

have been before it, "due process would mandate reversal"].) Indeed, this evidence added aggravating weight to the state's case for death in that it portrayed McKinnon as a bad, violent, and dangerous man who likely committed violent crimes in the past and likely would commit such crimes in the future if the jurors granted him mercy and spared his life. Any question that the improperly admitted gang evidence played a pivotal role in the penalty determination is answered by the prosecutor's closing argument emphasizing the "gang aspect" of the Martin murder as aggravating evidence (13 RT 1626) and the trial court's later recitation of that evidence in support of its denial of McKinnon's motion to modify the death verdict. (15 RT 1691-1692.) Of course, further adding to the weight of aggravation were the court's various errors in admitting, and instructing the jurors on, the factor (b) evidence, evidence that figured prominently in the prosecutor's penalty phase summation, as discussed in the preceding argument.

In sum, the cumulative effect of the guilt and penalty phase errors weakened the lingering doubt defense and strengthened the prosecution's case for aggravation. Given the closeness of the penalty phase, as previously discussed and reflected by the jury's lengthy deliberations in a relatively short and uncomplicated penalty trial, it is at the very least reasonably possible that at least one juror would have voted to spare this man's life in the absence of the errors. The cumulative effect of the errors was prejudicial, violated McKinnon's state and federal constitutional rights to a fair penalty trial and reliable penalty verdicts, and requires reversal of the death sentence. (See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Hernandez*, *supra*, 30 Cal.4th

835, 870-878 [cumulative effect of penalty phase errors prejudicial under state law standard]; *Mak v. Blodgett*, *supra*, 970 F.2d at pp. 622-625 [cumulative effect of penalty phase violated federal due process].)

XIV

THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, VIOLATES THE EIGHTH AMENDMENT, AND MUST BE STRICKEN

The only special circumstance alleged and found true was under Penal Code section 190.2, subdivision (a)(3), the so-called "multiple murder" special circumstance. (1 CT 161-163.) For the reasons explained below, this special circumstance violates the Eighth Amendment. While McKinnon recognizes that this Court has rejected similar challenges to the multiple murder special circumstance (see, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 286-287; *People v. Coddington* (2000) 23 Cal.4th 529, 656), he raises the issue here in order for this Court to reconsider its previous decisions and in order to preserve the claim for federal review.

In order to satisfy the Eighth Amendment, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty'" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 877), and must do so by "provid[ing] a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.)). It must do so, furthermore, "in an objective, evenhanded, and substantially rational way . . . ." (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Under the California scheme – in which the special circumstances set forth in Penal Code section 190.2(a) are supposed to satisfy the foregoing demands (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468) – "each special circumstance" –

not just all of the special circumstances considered in the aggregate – must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." (*People v. Green* (1980) 27 Cal.3d 1, 61.)

The special circumstance at issue in this case – multiple murder, Penal Code section 190.2(a)(3) – fails to distinguish "in an objective, evenhanded, and substantially rational way" (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879), between those deserving of death and those who are not. "Narrowing is not an end in itself, and not just any narrowing will suffice." (*United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1445.) To narrow in "an evenhanded . . . and substantially rational way," the special circumstance must define a sub-class of persons of comparable culpability. "When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great." (*Ibid.*)

At issue in *Cheely* were federal statutes dealing with mail bombs. (18 U.S.C. §§ 844, subd. (d), 1716, subd. (a).) The statutes declared that anyone who, with the intent to injure property or life, causes a death by knowingly placing in the mail an explosive device, is eligible for the death penalty. The Ninth Circuit held the statutes were unconstitutional: "[T]hey create the potential for impermissibly disparate and irrational sentencing because they encompass a broad class of death-eligible defendants . . . ." (*United States v. Cheely*, *supra*, 36 F.3d at p. 1444.)

Under the statutes, the court observed, one jury could sentence to death a person who accidentally killed while intending to damage property, while a second jury could vote to spare a mail-bomber who deliberately

assassinated an NAACP official. "The narrowing" principle on which the statutes rest thus fails to "foreclose . . . the prospect of ... 'wanton or freakish' imposition of the death penalty." (*United States v. Cheely*, *supra*, 36 F.3d at p. 1445.)

This is equally true of the multiple murder special circumstance in the California statute. Thus the multiple murder special circumstance applies to the white racist who deliberately kills several black children in separate incidents. It also applies to the black man who, in the course of a robbery, accidentally kills one white woman and her 9-week old fetus, which the defendant did not know the woman was carrying. (See, e.g., *People v. Davis* (1994) 7 Cal.4th 797, 810 [person responsible for death of 8-week old fetus may be convicted of murder]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150 [intent to kill not required for multiple murder special circumstance]. Under the statutory scheme, one jury could sentence the black defendant to death while another could spare the life of the white killer. "The prospect of such 'wanton and freakish' death sentencing is intolerable under *Furman* and the cases following it." (*United States v. Cheely*, *supra*, 36 F.3d at p. 1444.)[60] In short, the multiple-murder special circumstance establishes unconstitutionally overbroad criteria for death-eligibility.

As noted above, McKinnon recognizes that this Court has rejected this challenge to the multiple murder special circumstance. (See, e.g.,

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[60] A defendant may challenge the constitutionality of the statutory scheme even if the particular unfairness described may not have occurred in his case. (*United States v. Cheely*, *supra*, 36 F.3d at p. 1444, fn. 11.) A scheme that allows for the sort of arbitrary sentencing described in the text also allows for it in individual cases, albeit in more subtle forms that are not readily visible to those not participating in the deliberations.

People v. Sapp, *supra*, 31 Cal.4th at pp. 286-287; *People v. Coddington*, *supra*, 23 Cal.4th at p. 656.) In *Sapp*, this Court distinguished *Cheely* on the ground that the mail-bomb statute permitted individuals to be sentenced to death even if no "serious bodily harm or death were intended" and the defendants did not have the "mens rea of murderers." (*People v. Sapp*, *supra*, 31 Cal.4th at p.287.) The flaw in this Court's analysis is that it overlooks the example given above, the man who accidentally kills during the course of a robbery did not harbor malice – the mens rea of a murderer – and did not intend either "serious bodily harm or death." He is guilty of first-degree murder only because of the felony-murder rule. The mail-bomb statute at issue in *Cheely* likewise created a category of felony murder and allowed anyone who fell within it to be sentenced to death. Both it and Penal Code section 190.2, subdivision (a)(3) create "a broad class, composed of persons of many different levels of culpability." Allowing juries "to decide who among them deserves death" is what creates "the possibility of aberrational decisions as to life or death" and violates the Eighth Amendment. (*United States v. Cheely*, *supra*, 36 F.3d at p. 1445.)

In *Coddington*, this Court noted that the United States Supreme Court held that multiple murder is a constitutionally proper narrowing category in *Lowenfield v. Phelps* (1988) 484 U.S. 231. (*People v. Coddington*, *supra*, 23 Cal.4th at p. 656.) Not so. In *Lowenfield*, the question presented was whether, in a non-weighing state, an aggravating circumstance at the selection stage may duplicate an element of a capital crime or – put another way – a special circumstance creating death eligibility (there, intentional murder with intent to kill more than one person). The Supreme Court held that such duplication was constitutionally permissible because, while the capital murder element, or special

circumstance finding, accomplished the narrowing required by the Eighth Amendment, the question in the penalty phase was whether mitigation outweighed aggravation. (*Id.* at pp. 241-246.) The Court was simply not presented with the question whether the multiple-murder special circumstance adequately narrowed the class of persons eligible for the death penalty. That issue was neither raised by the defendant nor discussed by the Supreme Court.

For all of these reasons, McKinnon respectfully requests that this Court revisit the merits of this argument. If it does, the special circumstance finding must be stricken, which shall render the judgment of death void. (See *Godfrey v. Georgia*, *supra*, 446 U.S. at pp. 422-33 [death sentence vacated where Supreme Court finds sole eligibility factor unconstitutionally broad]; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1322 [invalidation of sole special circumstance requires per se reversal].)

XV

THE TRIAL COURT'S REFUSAL TO CONDUCT INDIVIDUAL SEQUESTERED DEATH QUALIFICATION VOIR DIRE, AND ITS UNREASONABLE AND UNEQUAL APPLICATION OF CALIFORNIA LAW GOVERNING JUROR VOIR DIRE, VIOLATED MCKINNON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND HIS STATUTORY RIGHT UNDER CODE OF CIVIL PROCEDURE SECTION 223 TO INDIVIDUAL VOIR DIRE WHERE GROUP VOIR DIRE IS NOT PRACTICABLE

> Given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death.

(*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 81.)

McKinnon requested sequestered individual voir dire of the prospective jurors, citing, inter alia, his federal constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution; he further argued that "good cause" within the meaning of Code of Civil Procedure section 223 (as enacted by section 7 of Proposition 115) existed for such examination. (1 CT 251-261; 1 RT 5.) The trial court summarily denied the request and conducted non-sequestered voir dire. (1 RT 5; 2 RT 125 - 3 RT 473.)

As discussed below, the trial court's failure to conduct individual sequestered death qualification voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated McKinnon's federal constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict, and his right under California law to individual juror voir dire where group

voir dire is not practicable.

A. A Voir Dire Procedure That Does Not Allow Individual Sequestered Voir Dire on Death-qualifying Issues Violates a Capital Defendant's Constitutional Rights to Due Process, Trial by an Impartial Jury, Effective Assistance of Counsel, and a Reliable Sentencing Determination

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. (U.S. Const., Amends. 6 & 14; Cal. Const, art. I, §§ 7, 15 & 16; *Morgan v. Illinois* (1992) 504 U.S. 719, 726.) Whether prospective capital jurors are impartial within the meaning of these rights is determined in part by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or substantially impair their ability to judge in accordance with the court's instructions are not impartial and cannot constitutionally remain on a capital jury. (See *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522; see also *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-734; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) To that extent, the right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at pp. 735-736, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37.) A trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death

qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, 74-75.) When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at p. 74.) By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey*, *supra*, at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.)

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered voir dire on death-qualifying issues – including that imposed by Code of Civil Procedure section 223, which allows death qualification in the presence of other prospective jurors and abrogates this Court's mandate that such voir dire be done individually and in sequestration (*People v. Waidla* (2000) 22 Cal.4th 690, 713; *Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80;) – cannot withstand constitutional principles of jury impartiality. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 736, citing *Turner v. Murray*, *supra*, 476 U.S. at p. 36 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital

sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"].) Nor can such restriction withstand Eighth Amendment principles mandating a need for the heightened reliability of death sentences. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to make peremptory challenges (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of McKinnon's death sentence. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at p.739; *Turner v. Murray*, *supra*, 476 U.S. at p. 37.)

B. The Superior Court Erred in Denying McKinnon's Request for Individual Sequestered Voir Dire

Even assuming individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case the trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors still violated McKinnon's constitutional rights to an impartial jury and due process of law. The court's conduct also violated McKinnon's constitutional right to

equal protection of the law, and his federal due process protected statutory right to individual voir dire where group voir dire is impracticable. (See *Hicks v. Oklahoma* (1980) 447 U.S. at p. 346.)

Code of Civil Procedure section 223 vests trial courts with discretion to determine the feasibility of conducting voir dire in the presence of other jurors. (*People v. Box* (2000) 23 Cal.4th 1153, 1180; *People v. Waidla*, *supra*, 22 Cal.4th at p. 713; *Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1184.) Under that code section, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223.) However, as this Court recognizes, individual sequestered voir dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80, 81.) The proper exercise of a trial court's discretion under section 223 therefore must balance competing practicalities. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977["[E]xercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue."].)

The trial court's summary denial of McKinnon's request simply does not reflect a sound exercise of discretion about whether, in the particular circumstances of this case, group voir dire was practicable. (1 RT 5.) The record fails to show that the court in making its decision "engaged in a careful consideration of the practicability of . . . group voir dire as applied to [McKinnon's] case." (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1183.) The court's bald denial of McKinnon's request does not equate with the kind of "reasoned judgment" this Court ascribes to

judicial discretion. (See *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 977.) Nor does it equate with "a careful consideration" (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1183) of the practicability of small group voir over individualized sequestered voir dire, "[t]he most practical and effective procedure available to minimize the untoward effects of death-qualification[.]" (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80.)

Certainly, the concerns identified in *Hovey* applied in this case. For instance, Prospective Juror Riley stated in front of the other prospective jurors that she did not think that she could ever vote to impose the death penalty and she was dismissed for her views. (3 RT 314-315, 321-322.) What this signaled to the pro-death jurors who wished to serve but whose views would disqualify them was that they could avoid dismissal by downplaying their support for the death penalty and express a willingness to consider both penalties if they wished to serve. Under the circumstances, the trial court clearly committed error of federal constitutional magnitude in denying McKinnon's request for individual sequestered voir dire. (U.S. Const., Amends. 5, 6, 8 & 14.)

C. The Trial Court's Unreasonable and Unequal Application of the Law Governing Juror Voir Dire Requires Reversal of McKinnon's Death Sentence

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in a "a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." However, section 223 must be viewed as providing McKinnon an important procedural protection and liberty interest (namely, the right to individual juror voir dire on death penalty issues where group voir dire is impracticable) that is

protected under the federal due process clause. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Accordingly, the trial court's unreasonable application of section 223 in McKinnon's case must be assessed under the *Chapman* standard of federal constitutional error. In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that contributed to McKinnon's death verdict (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the trial court's failure to conduct individual, sequestered juror voir dire on death penalty issues requires reversal of McKinnon's death sentence.

The group voir dire procedure employed by the trial court created a substantial risk that McKinnon was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80, fn. 134), and who had become "desensitized to the intimidating duty" of determining whether McKinnon would live or die (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1173) because of their "repeated exposure to the idea of taking a life." (*Hovey*, *supra*, at p. 75.) Accordingly, the trial court's failure to carefully consider the practicability of group voir dire as applied to McKinnon's case led to a voir dire procedure that denied McKinnon the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that McKinnon was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process. (See *Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 74-75.) These hazards infringed upon McKinnon's rights to due process and an impartial jury (see *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729), and cast doubt on whether the Eighth Amendment principles mandating a need for

the heightened reliability of death sentences is satisfied in this case. By their very nature, these are rights that are so important as to constitute an "essential part of justice" (*People v. O'Bryan* (1913) 165 Cal. 55, 65) for which the risks of deprivation must be regarded as a miscarriage of justice. Indeed, errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial)[.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 501; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 699 ["The denial of the right of trial by a fair and impartial jury is, in itself, a miscarriage of justice."].)

Moreover, because the voir dire procedure employed by the trial court was inadequate to identify those jurors whose views on the death penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or impaired their ability to judge McKinnon in accordance with the court's instructions. The trial court's use of this procedure cannot, therefore, be dismissed as harmless. (*People v. Cash* (2002) 28 Cal.4th 703, 723.) Stated simply, the jurors' exposure to death qualification of other jurors leads to doubt that McKinnon was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles, and that doubt requires reversal of McKinnon's death sentence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

XVI

THE COURT'S REFUSAL TO LIMIT THE VICTIM IMPACT EVIDENCE, AND ITS REFUSAL TO PROVIDE A SPECIAL INSTRUCTION REGARDING THE APPROPRIATE CONSIDERATION OF THAT EVIDENCE, VIOLATED MCKINNON'S RIGHTS TO A FAIR AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS

In its notice of aggravation, the prosecutor declared his intention to introduce evidence of the impact of the Coder and Martin murders on their families. (3 CT 760-761.) Relying upon his state and federal constitutional rights to a fair trial, equal protection, and heightened reliability in the penalty determination, McKinnon moved to limit admission of the victim impact evidence to evidence about the victims of which McKinnon was aware or to evidence that was admitted during the guilt phase. (13 CT 3698-3723; 10 RT 1301.)

At the hearing on the motion to limit the evidence and by way of an offer of proof, the prosecutor indicated that he would call Coder's mother and/or sister to testify to the impact of his death on their lives. (10 RT 1301.) In addition, he indicated that he might call Coder's girlfriend, with whom Coder had a child. (10 RT 1301.) Finally, the prosecutor indicated that he would not be presenting the testimony of anyone from Martin's family. (10 RT 1301.) Based upon that offer of proof, the court denied the motion. (10 RT 1301-1302.)

Thereafter, defense counsel moved for a special instruction regarding appropriate consideration of victim impact evidence, which provided:

> Evidence has been introduced for the purpose of showing the specific harm caused by Crandell McKinnon's crimes. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper

> role of deciding whether he should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument.

(13 CT 3739-3740; 12 RT 1461-1462.) The court summarily denied the request. (12 RT 1462.)

Consequently, as discussed in detail in part B, below, the jurors heard a substantial amount of emotionally-charged evidence regarding matters about which McKinnon was unaware at the time of the crimes, which had not been admitted during the guilt phase, and which raised substantial questions of causation. As explained fully below, the court's refusal to limit the admission and the jury's consideration of the victim impact evidence violated McKinnon's rights to a fair penalty trial and a reliable penalty verdict, as guaranteed by the Eighth and Fourteenth Amendments. The death judgment must be reversed.

A. The Victim Impact Evidence Was Admitted Without Necessary Safeguards to Confine it Within Constitutional Bounds

In *Booth v. Maryland* (1987) 482 U.S. 496, the United States Supreme Court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. At issue in that case were two types of victim impact evidence: 1) the personal characteristics of the victims and the impact of the crimes on their families; and 2) the family members' opinions and characterizations of the defendant and his crimes, and their view of the appropriate sentence. (*Id.* at pp. 507-510.)

In *Payne v. Tennessee* (1991) 501 U.S. 808, the Court partially overruled *Booth*. The Court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that

subject, the Eighth Amendment erects no per se bar." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.) However, the Court took care to note that its holding encompassed only the first category of victim impact evidence addressed in *Booth*, not the second category of evidence relating to the family members' views on the appropriate punishment or characterizations of the defendant and his crimes. (*Id.* at p. 830, fn. 2.) Following *Payne*, in *People v. Edwards* (1991) 54 Cal.3d 787, this Court held that although victim impact is not expressly enumerated as a statutory aggravating factor, such evidence is generally admissible as a circumstance of the crime under section 190.3, factor (a). (*Id.* at p. 833.)

"This holding was not without limits, however, and 'only encompasses evidence that logically shows the harm *caused by* the defendant.' [Citation.]" (*People v. Brown* (2004) 33 Cal.4th 382, 396, italics added; accord *Payne v. Tennessee*, *supra*, 501 U.S. at p. 819 [victim impact limited to "harm caused by" defendant]; *People v. Harris* (2005) 37 Cal.4th 310, 352; *People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) Furthermore, the use of victim impact evidence is limited by the fundamental principle that penalty determinations must be based on reason rather than emotion or vengeance. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358 ["it is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"]; *People v. Haskett* (1982) 30 Cal.3d 841, 864 [in every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason"]; *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713 [punishment is "not to exact revenge on behalf of an individual victim"].) Moreover, as this Court and several others have recognized, that part of the *Booth* decision prohibiting

consideration of the family members' views on the appropriate sentence survived *Payne*. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; *People v. Smith* (2003) 30 Cal.4th 581, 622; *Hain v. Gibson* (10th Cir. 2002) 287 F.3d 1224, 1239, and authorities cited therein.)

Otherwise, as this Court in *Edwards* noted: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*." (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.) Since *Edwards*, this Court has said little about the boundaries of appropriate victim impact evidence.[61]

However, "'[i]t is the general rule that the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.' [Citations.]" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-

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[61] In his dissent in *People v. Bacigalupo*, (1993) 6 Cal.4th 457, 492, fn. 2, Justice Mosk noted that this Court's expansive extension of the "circumstances of the crime" lacked specificity:

> It is manifest that this aggravating factor as construed in *Edwards* is vague under the Eighth Amendment. Could a jury-or anyone, for that matter- divine therefrom just what it was required to find in order to impose the death penalty? True, it might believe it must ascertain whether something "surrounded" the crime "materially, morally, or logically." But whether something "surrounds" a crime "materially, morally, or logically" is theoretically indeterminate and practically meaningless. Indeed, it might reach matters such as whether the capital defendant [or victim] - like defendant here - had been born in the Southern Hemisphere under the astrological sign of Libra.

(*Ibid.*)

735.) Therefore, to determine the scope of the victim impact evidence permitted by *Payne v. Tennessee*, *supra*, 501 U.S. 808, the facts before the Court in that case are critical.

Payne involved a single victim impact witness who testified about the effects of the murder of a mother and her two-year-old daughter on the woman's three-year-old son who was present at the scene of the crime, and suffered serious injuries in the attack himself. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 811-812.) The boy's grandmother testified that he cried for his mother and sister, that he worried about his sister, and that he could not seem to understand why his mother did not come home. (*Id.* at pp. 814-815.)

To be consistent with the facts and holding of *Payne*, the admission of victim impact evidence must be attended by appropriate safeguards to minimize its prejudicial effect, and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. Three such safeguards apply to the nature of the evidence itself. None of them was employed in the instant case.

First, victim impact evidence should be limited to testimony from a single witness, like the grandmother's testimony in *Payne*. This limitation is imposed by judicial decision in New Jersey. (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180) In *Muhammad*, the Supreme Court of New Jersey explained the reason for the limitation thusly:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors

> make an informed assessment of the defendant's moral culpability and blameworthiness.

(*State v. Muhammad*, *supra*, 678 A.2d at p. 180.) This limitation on victim impact evidence is also imposed in Illinois by statute. (725 ILCS 120/3(a)(3); see *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107.)

Second, victim impact evidence should be limited to testimony describing the effect of the murder on a family member present at the scene during or immediately after the crime. Third, victim impact evidence should be restricted to testimony concerning those effects of the murder which were either known or reasonably apparent to the defendant at the time he committed the crime, or properly introduced to prove the charges at the guilt phase of the trial. These limitations are consistent with *Payne*, where the victim impact evidence described the effect of the crime on the victims' son and brother who was present at the scene of the crime. Given the boy's presence at the scene, and the fact that he was critically injured during the attack, the defendant presumably was well-aware of his likely grief and suffering.

In addition to comporting with *Payne*, these limitations are necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes, and to avoid expanding the scope of the aggravating circumstances set out in those statutes so much that they become unconstitutionally vague. In California, aggravating evidence is admissible only when relevant to one of the statutory factors. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Victim impact evidence is admitted on the theory that it is relevant to factor (a) of section 190.3, which permits the sentencer to consider the "circumstances of the offense."

(*People v. Edwards*, *supra*, 54 Cal.3d at p. 835.)

However, to be relevant to the circumstances of the offense, the evidence must show circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) The only victim impact evidence meeting that standard is evidence about 1) "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935); 2) the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes; and 3) facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.)).

The evidence presented here exceeded the limitations of *Payne*. First, while the prosecutor did present only a single victim impact witness for the Martin murder, he presented three witnesses for the Coder murder – Coder's mother, his sister, and his fiancee. That unnecessarily extensive presentation violated the first of the *Payne* safeguards.

Second, the victim impact evidence in this case included information McKinnon could not possibly have known regarding the personal histories, and characteristics of the victims and their family, and/or the idiosyncratic responses of the victims' family members to their deaths. The prosecution called Coder's girlfriend, Darlene Shelton, who testified that she was pregnant with their child when he was killed. (11 RT 1403.) Indeed, she even brought the child into the courtroom and the prosecutor pointed him out to the jurors both during her testimony (11 RT 1403) and in summation (13 RT 1621). Furthermore, she testified that when she went into labor, she "almost lost [the baby]. Because they were losing his heartbeat because [Coder's] death was affecting me so bad." (11 RT 1404.) As she

explained, her inability to stop thinking about Coder actually caused her child's heart to stop beating and she had to "pop out of the grief again" in order to save her child. (11 RT 1405.) Furthermore, she had another child, six years old at the time of her January 1999 testimony (and therefore around one year old at the time of Coder's February 1994 death), who considered Coder to be his father and who missed him very much. (11 RT 1406.)

Similarly, Coder's sister, Dawn Coder testified that she had "a real bad thyroid at the time when it happened and my brain just went totally berserk." (11 RT 1408.) Coder's mother testified that he was partially deaf and had a twin. (11 RT 1412.) Martin's sister also testified that she had another brother who was killed within five months of Martin's death. (11 RT 1422.) As the prosecutor acknowledged, McKinnon had never had any prior contact with Coder (4 RT 504) and therefore could not have known that he was partially deaf or had a twin. Nor was there any way he could have known that Coder had a fiancee, that his fiancee already had one child who had a relationship with Coder, or that she was pregnant with his child when he died. (11 RT 1403.) Certainly, there was no way that he could know that Shelton's thoughts about Coder during childbirth caused her child's heart to stop beating, as she claimed. (11 RT 1404-1405.) Similarly, McKinnon could not have known that Coder had a sister at the time of the crime, much less that she had "a real bad thyroid" that could be exacerbated or triggered by her grief. (11 RT 1408.) Similarly, there was no evidence that McKinnon knew that Martin had a sister, much less that their brother had been murdered around the same time that Martin was killed.

Certainly, the admission of victim impact testimony that Coder's

child's heart stopped beating during childbirth and that his sister's "real bad thyroid" that made her "brain go berserk" far exceeded the confines of acceptable victim impact evidence. (See *People v. Harris* (2005) 37 Cal.4th 310, 352 [victim impact testimony that the victim's coffin was inadvertently opened in the presence of mourners, and about the "screaming and fainting of funeral attendees" that ensued, should have been excluded because it was "too remote from any act by the defendant to be relevant to his culpability"; *People v. Brown*, *supra*, 33 Cal.4th at p. 396 [admissible victim impact evidence 'only encompasses evidence that logically shows the harm *caused by* the defendant.'"]; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 819 [victim impact limited to "harm caused by" defendant].) An interpretation of "circumstances of the crime" so broad as to allow for the admission of the victim impact evidence in this case would render that factor unconstitutionally overbroad and vague. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15 & 17.)

When deciding between life and death, the jury should be given clear and objective standards providing specific and detailed guidance. (See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776.) Sentencing factors must have a common-sense core of meaning juries are capable of understanding. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.) Things that happen after the crime – like Shelton's difficult childbirth or Coder's thyroid problem – do not fall within any reasonable common sense definition of the phrase "circumstances of the crime." Accordingly, if that evidence was properly introduced under state law, factor (a) of section 190.3 is unconstitutionally vague. (But see *People v. Boyette* (2002) 29 Cal.4th 381, 445.)

The trial court's admission of this improper victim impact evidence violated McKinnon's right to a fair and reliable penalty determination, and

denied him due process by rendering the penalty trial fundamentally unfair. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, §§ 7, 15 & 17; *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-825.)

B. Particularly Given the Admission of Victim Impact Evidence Beyond the Scope of *Payne*, the Court Committed Prejudicial Error in Refusing to Instruct the Jurors on the Limited, Appropriate Use of That Evidence

As noted above, counsel requested in the alternative that the jury be instructed that victim impact evidence must relate to "the specific harm caused by Crandell McKinnon's crimes," and cautioned that the evidence could not be "used to impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument." (13 CT 3739-3740; 12 RT 1461-1462.) Having already admitted evidence that exceeded the appropriate scope of victim impact evidence, the court's refusal to so instruct was error.

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842 [discussing the need for instructions on victim

impact evidence].) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the integrity of the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim-impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that in every case in which victim impact evidence is introduced, the trial court must instruct the jurors on the appropriate use of that evidence, and admonish them against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) The Supreme Court of Pennsylvania has also recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 158-159.)

Although the language of the required instruction varies in each state depending on the role victim impact evidence plays in that state's statutory scheme, common features of such instructions are an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors.

The limiting instruction proposed by McKinnon appropriately conveyed this explanation to the jury. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195 [stating that a jury must never be influenced by passion or prejudice].) Although in *Pollock* this Court held that the trial court properly refused to give an instruction intended to limit the jury's consideration of victim impact evidence, it did so because the instruction incorrectly suggested that the jury could not be influenced by sympathy for the victims.

(*Ibid.*) The requested instruction in this case was neither inaccurate nor misleading, and would have been consistent with the rule that a capital "jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Furthermore, as previously discussed, victim impact evidence can only be considered in the sentencing calculus if it was *logically caused* by the defendant's acts. (*People v. Brown*, *supra*, 33 Cal.4th at p. 396; *People v. Edwards*, *supra*, 54 Cal.3d at p. 835; see also *Payne v. Tennessee*, *supra*, 501 U.S. at p. 819.) Certainly, none of the other instructions addressed the foregoing principles.

Assuming, arguendo, that the proposed instruction was somehow deficient, the trial court nevertheless should have given a properly-revised version of that instruction. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924.) An appropriate instruction for California would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence.
>
> You may only consider harm that was logically caused by the defendant.
>
> You must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the appropriate punishment to be imposed.

The first paragraph of this instruction duplicates the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v.*

Means (2001) 773 A.2d 143, 158-159. The second paragraph is is taken verbatim from this Court's decisions, cited above. (*People v. Brown*, *supra*, 33 Cal.4th at p. 396; *People v. Edwards*, *supra*, 54 Cal.3d at p. 835; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 819.) The third paragaraph is based on *State v. Koskovich*, *supra*, 776 A.2d at p. 177 and also a correct statement of the law. (See, e.g., *People v. Pollock*, *supra*, 32 Cal.4th at p. 1180; *People v. Smith*, *supra*, 30 Cal.4th at p. 622; *Hain v. Gibson*, *supra*, 287 F.3d at p. 1239.)

In the absence of such an instruction, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision. CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings." However, the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victim's relatives, or by any direct appeal for vengeance on behalf of the victim's family or society as a whole.

Certainly, the victim impact evidence presented here was emotionally charged. Indeed, the court reporter noted that Martin's sister was "sobbing" during her testimony. (11 RT 1420.) And the jury heard a substantial amount of evidence about which there were serious questions of causation, such as Darlene Shelton's testimony that her grief caused her baby's heart to stop beating during delivery, her testimony regarding the

impact of Coder's death on her other child (not Coder's), who could not have been more than a year old at the time of his death and thus highly unlikely even to have remembered him, and his sister's testimony that her grief somehow exacerbated a "real bad thyroid," causing her brain to go "berserk." In view of this evidence and the reliance the prosecutor placed on it during his closing argument (13 RT 1621-1623), the trial court's refusal to give the requested instruction violated McKinnon's rights to a fair, non-arbitrary, and reliable sentencing determination, and to have the jury consider all mitigating circumstances (see, e.g., *Skipper v. South Carolina* (1986) 476 U.S.1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604) and make an individualized determination whether he should be executed (see *Zant v. Stephens* (1983) 462 U.S. 862, 879). (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17.) The death judgment must be reversed.

XVII

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATED MCKINNON'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. The failure to conduct intercase proportionality review in capital cases violates McKinnon's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

The Eighth Amendment to the United States Constitution forbids cruel and unusual punishments. The jurisprudence applying that ban to capital cases requires death judgments to be both proportionate and reliable, which are closely related concepts. Part of the requirement of reliability 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 (plur. opn., alterations in original), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opn. of Stewart, Powell, and Stevens, JJ.).)

The United States Supreme Court has lauded comparative proportionality review as a means to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as ensuring that the death penalty will not be imposed on a capriciously-selected group of convicted defendants. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review is an important tool in ensuring the constitutionality of a state's death penalty scheme.

Despite its recognition of the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily required for a state death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court ruled that California's capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme, i.e., that the application of the relevant factors provides jury guidance and lessens the chance that the death penalty will be arbitrarily applied. (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) This case illustrates that California's statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) It is because comparative case review is the most rational and effective means by which to ascertain whether a scheme produces arbitrary results that the vast majority of the states that sanction capital punishment require such review.

The capital sentencing scheme in effect at McKinnon's trial was "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Section 190.2 immunizes few if any first degree murderers from death eligibility, and section 190.3 provides little guidance to juries in making the death-sentencing decision. California's scheme fails

to provide any method for ensuring consistency in capital sentencing verdicts, and consequently defendants with widely-varying degrees of relative culpability are sentenced to death.

The lack of intercase proportionality review violated McKinnon's Eighth and Fourteenth Amendment right against the arbitrary and capricious imposition of a death sentence, and requires the reversal of that sentence.

XVIII

PENAL CODE SECTION 190.3, FACTOR (b), BOTH AS WRITTEN AND AS APPLIED TO THIS CASE, VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

In addition to the specific objections McKinnon made to the evidence offered under section 190.3, factor (b), discussed in Argument XII, above, he objected that the admission of any prior unadjudicated criminal activity violates the Eighth Amendment and therefore moved to exclude it. (13 CT 3638-3692.) Moreover, he objected to the instruction on factor (b) as unconstitutional and, in the alternative, requested instructions defining the terms "force" and "violence" (13 CT 3745-3747) and requiring the jurors unanimous determination that the other activity be proven beyond a reasonable doubt before it could be considered in aggravation (13 CT 3733-3734). The court overruled the objections, admitted evidence of unadjudicated criminal activity, and denied the instructional requests. (10 RT 1305-1306, 1317-1318; 11 RT 1323-1337, 1338-1347, 1425, 1430-1432, 1434; 12 RT 1439-1440, 1448, 1451-1453, 1461-1462.)

The prosecution's reliance on such unadjudicated criminal activity during the penalty phase deprived McKinnon of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, the protection of the collateral estoppel rule, the guarantee against double jeopardy, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. McKinnon's death judgment must therefore be reversed.

A. The Use of Factor (b) Violated McKinnon's Constitutional Rights, Including His Sixth, Eighth and Fourteenth Amendment Rights to Due Process and a Reliable Penalty Determination[62]

Section 190.3, factor (b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (14 CT 4062, 4065; 13 RT 1602-1604.) Pursuant to that factor, the prosecution presented evidence of prior incidents of alleged criminal activity, as detailed in Argument XII, above. The jury was expressly told to weigh the presence or absence of that alleged criminal activity. (14 CT 4062-4065; 13 RT 1602.)

As McKinnon argued at trial, the admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated his rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 279-281.) Admission of the unadjudicated prior criminal activity also denied McKinnon the rights to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offenses") by an impartial and unanimous jury, to effective assistance of counsel, and to effective confrontation of witnesses, under the Sixth and Fourteenth

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[62] Although the United States Supreme Court, in *Tuilaepa v. California* (1994) 512 U.S. 967, 977, determined that factor (b) was not unconstitutionally vague, that opinion did not address the issues raised herein.

Amendments, and to equal protection of the law under the Fourteenth Amendment. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

Factor (b), as written and as interpreted by this Court, is an open-ended aggravating factor that fosters arbitrary and capricious application of the death penalty, and thus violates the Eighth Amendment requirement that the procedures used to impose the death penalty must make a rational distinction "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted factor (b) in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be *more* rigorous than those provided non-capital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606), this Court has turned this mandate on its head, singling out capital defendants for *less* procedural protection than is afforded other criminal defendants. For example, this Court has ruled that in order to consider evidence under factor (b), it is not necessary for the 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057); the jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192); and the trial court is not required to enumerate the other crimes the jury should consider, or to

instruct on the elements of those crimes (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207). This Court has also ruled that 1) unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under factor (b), while felony convictions, even for violent crimes, rendered after the capital homicide are not (*People v. Morales* (1989) 48 Cal.3d 527, 567), and 2) a threat of violence is admissible if, by happenstance, the words are uttered in a state where such threats are a criminal offense (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261). This Court has also held that juvenile conduct is admissible under factor (b) (*People v. Burton* (1989) 48 Cal.3d 843, 862), as are offenses dismissed pursuant to a plea bargain (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659). In sum, this Court has indeed treated death differently, by *lowering* rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same jury for the penalty-phase adjudication of other-crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such an offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585), and the jurors must give the determination whether such an offense has been proved the exact same level of deliberation and impartiality as would have been required of them in a separate criminal trial; when a state provides for capital sentencing by a

jury, the due process clause of the Fourteenth Amendment requires that jury to be impartial.[63] (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 (1971) (where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand); *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In McKinnon's case, the jurors charged with making an impartial, and therefore reliable, assessment of McKinnon's guilt of the previously unadjudicated offenses were the same jurors who had just convicted him of capital murder. It would seem self-evident that a jury which already has unanimously found a defendant guilty of capital murder cannot be impartial in considering whether similar but unrelated violent crimes have been proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).)[64]

A finding of guilt by such a biased factfinder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3d Cir. 1977) 551

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[63] The United States Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.) Similarly, due process protections apply to a capital sentencing proceeding. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358.)

[64] Even in the unlikely event that only a single juror was impermissibly prejudiced against him, McKinnon's rights would still be violated. (See *People v. Pierce* (1979) 24 Cal.3d 199, 208 ("[A] conviction cannot stand if even a single juror has been improperly influenced."].)

F.2d 553, 554, relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of the trial forced McKinnon to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. (*Pointer v. United States* (1894) 151 U.S. 396, 408-409; *Lewis v. United States* (1892) 146 U.S. 370, 376.) The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. (*Dyer v. Calderon* (9th Cir. en banc 1998) 151 F.3d 970, 973, and cases cited therein.) In this case, defense counsel understandably did not question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and questioning the potential jurors about other violent crimes unquestionably would have tainted the impartiality of the jury that was impaneled. Requiring McKinnon to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

Further, because California does not allow the use of unadjudicated offenses in non-capital sentencing, the use of this evidence in a capital proceeding violated McKinnon's equal protection rights under the Fourteenth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) It also violated McKinnon's Fourteenth Amendment right to due process because the State applies its law in an irrational and unfair manner.

(*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) Finally, the failure to require jury unanimity with respect to such unadjudicated conduct not only exacerbated this defect, but itself violated McKinnon's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty.

A series of recent decisions by the United States Supreme Court clearly indicate that the existence of any aggravating factors relied upon to impose a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See *Ring v. Arizona* (2002) 536 U.S. 584, 609; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in McKinnon's case was instructed that the prosecutor had the burden of proving the other crimes evidence beyond a reasonable doubt (14 CT 4064-4066), the jury was *not* instructed on the need for a unanimous finding; nor is such an instruction required under California's sentencing scheme. The jurors' consideration of this evidence thus violated McKinnon's rights to due process of law, to trial by jury, and to a reliable capital sentencing determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See Argument XIV, Section A, *infra.*)

B. Some of the Unadjudicated Criminal Activity Alleged Against McKinnon Was Outside Applicable Statutes of Limitations and Therefore Was Improperly Introduced as Evidence in Aggravation

At the time the information was filed in this case, October 21, 1996, substantive criminal charges could not have been brought against McKinnon based on some of the criminal conduct alleged against him

under factor (b) in aggravation. Thus, the statute of limitations had expired on the alleged 1988 cocaine possession and violation of Penal Code section 12025 and the alleged 1984 violations of sections 211 and 242.[65] (3 CT 760-761.) The admission of such stale evidence of criminal conduct at the penalty phase violated McKinnon's due process rights to a fair trial and to effectively confront and rebut the aggravating evidence presented against him, and the constitutional requirement of heightened reliability in capital trials. (U.S. Const., Amends. 5, 6, 8 & 14; see *Gardner v. Florida*, *supra*, 430 U.S. 349, 362.)

Statutes of limitations are not mere technicalities. They exist to ensure the level of reliability required in any criminal case, and to an enhanced degree in capital cases. As this Court has observed, such statutes recognize the "difficulty faced by both the government and a criminal defendant in obtaining *reliable* evidence (or any evidence at all) as time passes following the commission of a crime." (*People v. Zamora* (1976) 18 Cal.3d 538, 546, italics added.) Limitation periods "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*United States v. Marion* (1971) 404 U.S. 307, 322; see *Stogner v. California* (2003) 539 U.S. 607, 615.)

McKinnon is aware that this Court has held that because there is no statute of limitations for murder, the expiration of the statute of limitations for any other substantive crime does not constrain the prosecution from introducing evidence of such crime at the penalty phase of a capital trial.

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[65] Section 242 had a maximum statute of limitations of one year. (§§ 243, subd. (a), 802, subd. (a).) Sections 12025 and 211 had a maximum state of limitations of three years. (§§ 213, 12025; 801.)

(*People v. Heishman*, *supra*, 45 Cal.3d at p. 192; accord, *People v. Medina* (1995) 11 Cal.4th 694, 772.) *Heishman*, however, relied on *People v. Terry* (1969) 70 Cal.2d 410, a capital case decided prior to *Furman v. Georgia* (1972) 408 U.S. 238, the case that inaugurated modern capital punishment jurisprudence. Since that time, the United States Supreme Court has explicitly held that the Eighth Amendment's guarantee of a reliable penalty determination requires that the procedures governing a capital sentencer's consideration of "other crimes" evidence must conform to the constitutional standards governing proof of the substantive offense. (See *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 585-586 [invalidating a death judgment because one of the aggravating circumstances was based on a prior conviction that had been found constitutionally defective by a state appellate court].)

In light of *Johnson*, this Court's focus on capital murder as the predicate offense rendering the statute of limitations inapplicable to any other crimes alleged at the penalty phase is misdirected. The jury's consideration of evidence of other violent crimes committed by the defendant is likely to have "an ascertainable and 'dramatic' impact" (*Zant v Stephens* (1983) 462 U.S. 862, 903 (conc. opn. of Rehnquist, J.), and even to prove "decisive" in the choice of penalty (*Gardner v. Florida*, *supra*, 430 U.S. at p. 359), especially when compounded by the lack of an impartial jury. Therefore, allowing the prosecution to litigate time-barred offenses necessarily creates an unacceptable risk of unfairness and introduces unreliable evidence into the penalty determination. Because allowing the jury to consider such a charge denies the defendant a fair penalty trial, a death sentence based even in part on such evidence is fatally defective. (See *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 586, 590; *Gardner v.*

Florida, supra, 430 U.S. at pp. 359, 362.)

C. McKinnon's Alleged Juvenile Misconduct Was Improperly Introduced as Evidence in Aggravation

As previously discussed, the 1984 incident in the school cafeteria occurred when McKinnon was only 17 years old. (11 RT 1363-1364, 1476, 1480.) Evidence of such juvenile misconduct is insufficiently relevant or reliable to be considered by a penalty phase jury, because such misconduct cannot serve as a sufficient basis for concluding that the death penalty would be appropriate to serve society's legitimate interest in retribution.

The "social purposes" served by the imposition of capital punishment are "'retribution and deterrence of capital crimes by prospective offenders . . . .'" (*Atkins v. Virgina* (2002) 536 U.S. 304, 319, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 183.) Unless the imposition of the death penalty serves one or both of those purposes it constitutes cruel and unusual punishment. (*Coker v. Georgia* (1977) 433 U.S. 584, 592.) Because minors lack maturity and self-control, it violates the Eighth Amendment to allow the jury to use evidence of the defendant's juvenile misconduct as a basis for imposing the death penalty.

In *Roper v. Simmons* (2005) 543 U.S. 551, 574-574, the United States Supreme Court held that because of the great differences in maturity and judgment between adults and minors the death penalty is a disproportionate penalty for offenders under the age of 18. Even prior to *Simmons*, the high court had recognized that "youth is more than a chronological fact. It is a time and condition of life when a person may be susceptible to influence and to psychological damage." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 115.) In *Johnson v. Texas* (1993) 509 U.S. 350, the high court observed that "[a] lack of maturity and an

underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." (*Id.* at p. 367 [recognizing that a sentencer in a capital case must be allowed to consider the *mitigating* qualities of youth in the course of its deliberations over the appropriate penalty]; see *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834-835 [because juveniles are "more vulnerable, more impulsive, and less self-disciplined than adults . . . less culpability should attached to a crime committed by a juvenile than to a similar crime committed by an adult"].) In light of those well-understood differences between minors and adults it is inappropriate to use evidence of juvenile misconduct as aggravating evidence in the penalty phase of a capital trial.

Moreover, evidence of juvenile misconduct is insufficiently reliable to be considered in the penalty phase of a capital trial, because jurors cannot readily differentiate which acts of juvenile criminality actually demonstrate the degree of heightened culpability required to support the imposition of a death sentence. (See *Roper v. Simmons*, *supra*, 543 U.S. at p. 573.) "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (*Ibid.*)

The consideration as aggravation in the penalty phase of this capital trial of McKinnon's "impetuous and ill-considered actions"as a minor, acts that occurred when he was particularly "susceptible to influence and psychological damage" (*Johnson v. Texas*, *supra*, 509 U.S. at p. 367), was in direct conflict with federal constitutional guarantees of due process and the constitutionally-based heightened need for reliability of capital trials and sentencing procedures (U.S. Const., Amends. 5, 6, 8 & 14). The use of

such evidence was also in direct conflict with the rehabilitative goal and "fresh start" promise of the juvenile court system.

McKinnon recognizes that this Court has declared that "nothing in the 1977 or 1978 [death penalty statutes] indicates an intent to exclude violent criminal misconduct while a juvenile as an aggravating factor." (*People v Lucky* (1988) 45 Cal.3d 259, 295.) McKinnon respectfully submits that the *Lucky* analysis is flawed, and should be reconsidered in light of *Roper v. Simmons*, *supra*.

D. The Alleged Criminal Activity Was Improperly Considered in Aggravation Because It Was Not Required To Be Found True Beyond a Reasonable Doubt by a Unanimous Jury

The application of the *Apprendi v. New Jersey* (2000) 530 U.S. 466 line of cases to California's capital-sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See *Blakely v. Washington* (2004) 542 U.S. 296, 313; *Ring v. Arizona* (2002) 536 U.S. 584, 609; *Apprendi v. New Jersey*, *supra*.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in McKinnon's case was instructed that the prosecutor had the burden of proving the other-crimes evidence beyond a reasonable doubt (14 CT 4064-4066), the jury was not instructed on the need for a unanimous finding; nor is such an instruction required under California's sentencing scheme. The jurors' consideration of this evidence thus violated McKinnon's rights to due process of law, to trial by jury, and to a reliable capital-sentencing determination, in violation of the Sixth, Eighth and Fourteenth

Amendments.

For all the foregoing reasons, the prosecution's use of evidence of unadjudicated criminal activity against McKinnon requires reversal of the judgment of death. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 590; *Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

XIX

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

California's death penalty statute fails to provide any of the safeguards against the arbitrary imposition of death common to other death penalty sentencing schemes. Juries do not make written findings or achieve unanimity as to aggravating circumstances, and need not find beyond a reasonable doubt that: 1) any aggravating circumstances have been proved; 2) the aggravating factors outweigh the mitigating circumstances; or 3) death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, penalty phase juries are not instructed on any burden of proof. Under the rationale that the decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making applicable to all other parts of the law have been banished from the process of deciding whether to impose death. Those omissions run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Recognizing this, McKinnon requested that the jurors be instructed that they had to find the existence of aggravating factors unanimously and beyond a reasonable doubt before they could consider them. (13 CT 3733-3734.) The court denied the request. (12 RT 1461-1462.)

A. The Statute and Instructions Unconstitutionally Fail to Assign the State the Burden of Proving Beyond a Reasonable Doubt That Aggravating Factors Exist and Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty

Before a defendant can be sentenced to death in California the jury

must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3), and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538). However, under the California scheme neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty needs to be proved pursuant to any delineated burden of proof. The failure to assign a burden of proof renders California's death penalty scheme unconstitutional, and renders McKinnon's death sentence unconstitutional and unreliable.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . . ." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842.) However, that reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296.

Those three decisions by the high court effectively dispose of any argument that the federal Constitution allows a defendant to be sentenced to death by a jury which has not found beyond a reasonable doubt that specific aggravating circumstances exist, that those factors outweigh the mitigating evidence presented, and that death is the appropriate penalty. As Justice Scalia said in distilling the holding in *Ring*: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary

Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for a conviction of first degree murder with a special circumstance is death, *Apprendi* did not apply to California capital sentencing. After *Ring*, this Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263.) In light of the United States Supreme Court's decisions, those holdings are simply untenable because, read together, the *Apprendi* line of cases renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.)

As *Apprendi* states, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." Under California's sentencing scheme, the death penalty may not be imposed based solely upon a verdict of first degree murder with special circumstances. While it is true that such a verdict carries a maximum sentence of death (Pen. Code, § 190.2), the statute "'authorizes a maximum punishment of death only in a formal sense.'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) To impose death, the jury must also find at least one aggravating factor, and find that the aggravating factor or factors outweigh any mitigating factors, and death is appropriate. Those additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v.*

Arizona, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives" (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.)). Thus, *Blakely-Ring-Apprendi* require that the jury be instructed to find those factors, and determine their weight, beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the sentencer's functions, and that facts must be found before the death penalty may be considered. (See, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 478 [penalty jury's role includes "find[ing] facts"]; *People v. Johnson* (1993) 6 Cal.4th 1, 48 [finding it appropriate to give CALJIC No. 2.21 to penalty jury in light of "the admissibility of penalty phase testimony on a variety of factual matters . . . ."].) Nonetheless, this Court has held that *Ring* does not apply to capital sentencing in California because the facts found at the penalty phase "bear upon, but do not necessarily determine," which penalty is appropriate. (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn. 14.) This Court has also sought to distinguish *Ring* by comparing California's capital sentencing process to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.)

However, before a California jury can weigh the aggravating and mitigating circumstances it must first decide whether any statutory aggravating circumstances exist. Thus, while the determination whether the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, that determination is no less subject

to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. Thus, under *Apprendi*, *Ring*, and *Blakely*, a California jury's determination that the aggravating factors substantially outweigh those in mitigation must be made beyond a reasonable doubt.

This Court has also relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) However, in *Ring* the state also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances based on that "difference," and the high court rebuffed that reasoning. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi v. New Jersey*, *supra*, 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

It is certainly true that the decision whether to impose death or life is moral and normative. However, this Court errs in using that fact to eliminate procedural protections which render the decision more rational and reliable, and in allowing the findings that are prerequisites to that decision to be uncertain, undefined, and subject to dispute not only as to their significance, but also their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State and Federal Constitutions Require the Jury to Be Instructed That it May Impose a Sentence of Death Only If Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Ones, and That Death Is the Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an

appraisal of the facts. (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.) The primary procedural safeguard in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof, which in criminal cases is rooted in the due process clauses of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Under the Fourteenth and Eighth Amendments, the burden of proof for factual determinations during the penalty phase must be beyond a reasonable doubt.

2. Imposition of Life Imprisonment Without Parole or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake, and on the social goal of reducing erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

The "private interests affected by the proceeding" in this context are obviously of the highest order. Yet even far less important interests are protected by the requirement of proof beyond a reasonable doubt. (See *In re Winship*, *supra*, 397 U.S. at p. 364 [adjudication of juvenile

delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender].) 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," the United States Supreme Court reasoned:

> 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.]

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423-424, 427.)

Moreover, there is substantial room for error in deciding whether to impose the death penalty, because that decision involves "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 763.) A burden of proof beyond a reasonable doubt can effectively reduce that risk of error, since that standard is "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

Finally, "the countervailing governmental interest supporting use of the challenged procedure" also calls for imposition of a reasonable doubt standard. The use of that standard would not deprive the State of the power to impose capital punishment, it would 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.) Thus, under the Eighth and Fourteenth Amendments, a death sentence may not be imposed unless the sentencer is convinced beyond a reasonable doubt that death is the appropriate sentence.

C. The Constitution Requires the State to Bear Some Burden of Persuasion at the Penalty Phase

The failure of the penalty phase instructions here to assign any burden of persuasion regarding the jury's ultimate penalty phase determinations is unacceptable under the Sixth, Eighth and Fourteenth Amendments.

Allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, it is reasonably likely that different juries will impose different standards of proof in deciding whether to impose death, and that who bears the burden of persuasion as to the sentencing determination will vary from case to case. Such arbitrariness undermines the requirement of a meaningful basis for distinguishing the few cases in which the death penalty is appropriate, and is unacceptable under the Eighth and Fourteenth Amendments. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374.)

Further, while California's scheme allocates no burden to the prosecution, the prosecution must obviously have *some* burden to show that the aggravating factors outweigh the mitigating ones, because the jury must impose a sentence of life without possibility of parole if it does not make

that finding (Pen. Code, § 190.3), and may reject death even if no mitigation is presented (see *People v. Duncan* (1991) 53 Cal.3d 955, 979).

Section 190.4, subdivision (e), clearly suggests that some sort of finding must be "proved" by the prosecution and reviewed by the trial court, since it requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to determine "whether the jury's findings and verdicts . . . are contrary to law or the evidence presented." Clearly, a jury could not make a finding without imposing some sort of burden on the party offering the evidence on which that finding is based. The failure to inform capital jurors how to make the factual findings they are legally required to make is inexplicable.

Moreover, California imposes on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible in noncapital cases. (See Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520.) In a capital case, *any* aggravating factor relates to wrongdoing – even factors that are not themselves wrongdoing, such as the defendant's age, are deemed to aggravate other wrongdoing by the defendant – and the prosecution must thus bear the burden of proof to establish any such factors. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments. In addition, providing greater protections to noncapital than to capital defendants

violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

The burden of proof is among the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

D. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Require Juror Unanimity on Aggravating Factors

The court refused to instruct the jury that it had to make unanimous findings on aggravating circumstances, or even that a simple majority of them had to agree that any particular aggravating factor or combination of aggravating factors warranted a death sentence. (13 CT 3733-3734; 12 RT 1461-1462.) Thus, the jurors were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe the jury imposed the death sentence in this case based on any agreement other than the general one that, based on a comparison of the aggravating and mitigating factors, death was warranted. Thus, in deciding to impose death, each juror may have relied on evidence that only he or she believed existed. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

While this Court has held that "there is no constitutional requirement for [a penalty phase] jury to reach unanimous agreement on the circumstances in aggravation that support its verdict" (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749), McKinnon asserts that failing to require unanimity as to aggravating circumstances encourages jurors to act in an arbitrary, capricious and

unreviewable manner, and thus slants the sentencing process in favor of execution. The lack of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – in particular its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) However, that is not the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* undermines the reasoning in *Hildwin*, and thus the constitutional validity of this Court's ruling in *Bacigalupo*.[66]

Under *Ring*, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California* (1998) 524 U.S. 721, 732),

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[66] McKinnon acknowledges that this Court has held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor (*People v. Prieto*, *supra*, 30 Cal.4th at p. 265), but, as shown previously, that holding is mistaken. (See Subsection A, *supra*.)

the Sixth and Eighth Amendments are not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the California Constitution assumes that there will be jury unanimity in criminal trials. The first sentence of article I, section 16 of the Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

The failure to require the jury to unanimously find the aggravating factors true also stands in stark contrast to the rules applied in California to noncapital cases. Thus, where a defendant faces special allegations that may increase the severity of his sentence the jury must render a separate, unanimous verdict on each such allegation. (See, e.g., Penal Code, § 1158(a).) Since capital defendants are entitled to more rigorous protections than noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to noncapital than to capital defendants would violate the Fourteenth Amendment's equal protection requirement (see e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), unanimity with regard to aggravating circumstances must be constitutionally required. To apply the requirement to an enhancement finding carrying only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), violates the equal protection, due process and cruel and unusual punishment clauses, and the Sixth Amendment guarantee of a fair jury trial.

Where a death penalty statute permits a wide range of possible aggravators, as California's does, and the prosecutor offers up multiple

theories or instances of alleged aggravation, unless the jury is required to agree unanimously on the existence of each aggravator to be considered there is a grave risk the verdict will cover up wide disagreement among the jurors about just what the defendant did, and that the jurors will fail to focus upon specific factual details, and will simply impose death based on all the evidence. Such an inherently unreliable decision-making process is unacceptable in a capital context.

E. The Penalty Jury Should Also Have Been Instructed on the Presumption of Life

McKinnon further requested that the jurors be instructed that the weighing process depends on the force and not on the number of applicable factors and that any reasonable doubt as to the appropriate penalty had to be resolved in favor of life. (13 CT 3757.) Again, the court denied the request. (12 RT 1461-1462.)

In noncapital cases, and at the guilt phase of a capital trial, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Accordingly, jurors must be instructed that if they have any doubt as to the correct punishment, they were required to vote for life over death.

McKinnon submits that the trial court's failure to instruct the jury that the law favors life, and presumes life imprisonment without parole to be the appropriate sentence, violated his rights to due process of law (U.S. Const., Amend. 14; Cal. Const. art. I, §§ 7 & 15), to be free from cruel and unusual punishment and to have his sentence determined in a reliable

manner (U.S. Const., Amends. 8 & 14; Cal. Const. art. I, § 17), and to the equal protection of the laws (U.S. Const., Amend. 14; Cal. Const., art. I, § 7).

This Court has held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" provided the state properly limits death eligibility. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) However, as the other subsections of this argument demonstrate, California's death penalty law is remarkably deficient in the protections required for the consistent and reliable imposition of capital punishment, and a presumption of life instruction is thus constitutionally required.

F. Conclusion

As set forth above, the trial court violated McKinnon's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

XX

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED MCKINNON'S CONSTITUTIONAL RIGHTS

Prior to commencement of the penalty phase, McKinnon objected to the provision of CALJIC No. 8.88 and moved for modification on various grounds, discussed in detail below. (13 CT 3760-3761.) The court denied the motion and provided the instruction in its standard form. (12 RT 1461-1462; 13 RT 1610-1611; 14 CT 4081-4082.)[67]

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[67] It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and

(continued...)

As will be demonstrated, that instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed because it did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Giving that flawed instruction violated McKinnon's fundamental rights to due process (U.S. Const., Amend. 14), a fair trial by jury (U.S. Const., Amends. 6 & 14), and a reliable penalty determination (U.S. Const., Amends. 6, 8 & 14) and requires reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instruction Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard Which Did Not Provide Adequate Guidance and Direction

Pursuant to CALJIC No. 8.88, the question of whether to impose a death sentence hinged on whether the jurors were "persuaded that the aggravating circumstances [we]re so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole." (14 CT 4081-4082; 13 RT 1610-1611.) However, as McKinnon argued below (13 CT 3760), the words "so substantial" provided the jurors with no guidance as to "what they ha[d] to find in order to impose the death

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[67] (...continued)
all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(14 CT 4081-4082.)

penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) Using that phrase violated the federal constitution because it created a vague, directionless and unquantifiable standard, inviting the sentencer to impose death through the exercise of "the kind of open-ended discretion held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)[68]

McKinnon acknowledges that this Court has opined that, in this context, "the differences between [*Arnold* and California capital cases] are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. McKinnon submits that the differences between those cases do not undercut the Georgia Supreme Court's reasoning.

This case has at least one quality in common with *Arnold* and *Breaux*: it featured penalty-phase instructions which did not "provide the

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[68] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Arnold*, *supra*, 224 S.E.2d at p. at p. 391.) The instant instruction, like the one in *Breaux*, uses the term "substantial" to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty.

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those identified in *Arnold*, because No. 8.88 governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance. Nothing about CALJIC No. 8.88 "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Because the instruction rendered the penalty determination unreliable, the death judgment must be reversed.

B. The Instructions Failed to Inform the Jurors That the Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, Not Simply an Authorized One

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538.) However, CALJIC No. 8.88 does not make that standard of appropriateness clear. Telling the jurors they may return a judgment of death if the aggravating evidence "warrants" death does not inform them that the central inquiry is whether death is the appropriate penalty.

A rational juror could find in a particular case that death was warranted but not appropriate, because "warranted" has a considerably

broader meaning than "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found that such a sentence was permitted, not that it was "especially suitable," fit, and proper, i.e., appropriate. The Supreme Court has demanded that death sentences be based on the conclusion that death is the appropriate punishment, not merely one that is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate.

Whether death is "warranted" is decided when the jury finds the existence of a special circumstance authorizing the death penalty. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, even if the jury makes the preliminary determination that death is warranted or authorized it may still decide that penalty is not appropriate.

Further, the instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (14 RT 4081.) That reference did not tell the jurors they could only return a death verdict if it was appropriate.

This crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. 8 & 14), and denies due process (U.S. Const., Amend. 14; *Hicks v. Oklahoma* (1980)

447 U.S. 343, 346). That judgment must therefore be reversed.

C. The Instruction Did Not Tell the Jury That a Life Sentence Is Mandatory If the Aggravating Factors Do Not Outweigh the Mitigating Ones

A capital-sentencing jury which finds that death is not an appropriate punishment is required to return a sentence of life without the possibility of parole. (§ 190.3; see *People v. Brown*, *supra*, 40 Cal.3d at pp. 540-542, & fn. 13.) The jury is also required to return a life verdict if it finds that the factors in aggravation do not outweigh those in mitigation. (See § 190.3; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) The sentencing instruction given in this case was additionally flawed because it did not include a clear statement of those principles.

Although this Court has previously held that CALJIC No. 8.88 is valid even though it fails to advise the jury concerning these principles (see *People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan*, *supra*, 53 Cal.3d at p. 978), those holdings should be reconsidered. *Duncan* reasoned that, because the instruction directs the jurors to impose the death penalty only if they find that the aggravating circumstances outweigh the mitigating circumstances, it is unnecessary "to additionally advise [them] of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (53 Cal.3d at p. 978; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1243.)

However, *Duncan* cited no authority for that position, and McKinnon submits that it conflicts with numerous opinions disapproving instructions which emphasize the prosecution's theory of the case while minimizing or ignoring the theory of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18,

21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [trial court should instruct on every aspect of the case and avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[69]

People v. Moore, supra, 43 Cal.2d 517, is particularly instructive on this point. In that case, this Court explained as follows why a set of one-sided self-defense instructions was erroneous:

> It is true that the four instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication . . . *There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.*

(*Id.* at pp. 526-527; italics added, internal quotation marks omitted.)

In other words, contrary to *Duncan*'s apparent assumption, the law does not rely on jurors to infer a rule from the statement of its opposite.

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[69] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (*Id.* at p. 473, fn. 6; see also *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary," there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal-discovery rights, as a matter of due process the same principle should apply to jury instructions.

The instruction at issue here stated only the conditions under which a death verdict could be returned, and not those under which a life verdict was required.

Because it failed to inform the jurors of the specific mandate of section 190.3, CALJIC No. 8.88 arbitrarily deprived McKinnon of a right created by state law and thus violated his Fourteenth Amendment right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281; original emphasis.)

The defective instruction also violated McKinnon's Sixth Amendment rights. Slighting a defense theory in instructions not only violates due process, but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the case. (*Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, affd. and adopted in *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; see *Cool v. United States* (1972) 409 U.S. 100 [disapproving an instruction placing an unauthorized burden on the defense].)

For all of these reasons, reversal of McKinnon's death sentence is required.

D. The Instruction Did Not Tell the Jury That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life without the Possibility of Parole

Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in

state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[70] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88.[71] CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Additionally, it suffers from all of the constitutional defects described in Section D, *ante*.

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[70] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown*, *supra*, 40 Cal.3d at p. 544, fn. 17.)

[71] McKinnon requested an instruction on McKinnon requested instruction on this principle, but the court refused to provide it. (13 CT 3760-3761; 12 RT 1461-1462.)

E. The Instruction Did Not Tell the Jury It Could Impose a Life Sentence Even If Aggravation Outweighed Mitigation

CALJIC No. 8.88 was also defective because it implied that death was the only appropriate sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances. . . ." However, it is clear under California law that a penalty jury may always return a verdict of life without the possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown*, *supra*, 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed that in mitigation. (Cf. *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

The failure to instruct on this crucial point was prejudicial because it deprived appellant of his right to have the jury given proper information concerning its sentencing discretion. (*People v. Easley* (1983) 34 Cal.3d 858, 884.) Moreover, since the defect in the instruction deprived appellant of an important procedural protection that California law affords capital defendants, delivery of the instruction deprived appellant of due process (U.S. Const., Amend. 14; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 343, 346; see *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and made the resulting verdict unreliable (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17; *Furman v. Georgia* (1972) 408 U.S. 238). The death judgment must therefore be reversed.

F. The Instruction Did Not Tell the Jury That McKinnon Did Not Have to Persuade Them That the Death Penalty Was Inappropriate

CALJIC No. 8.88 was also defective because it failed to inform the

jurors that neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.)[72] That failure was error, because no matter the nature of the burden, and even where no burden exists, a capital-sentencing jury must be clearly informed of the applicable standards, so it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D.Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

(*Id.* at pp. 727-728.) Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, the district court in *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instant instruction, taken from CALJIC No. 8.88, suffers from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

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[72] This argument alleges that the instruction was deficient under the rules of law currently applied by this Court. In Argument XIX, McKinnon argues that there must be a burden of proof at the penalty phase of a capital case and that the instructions should inform the jury that it is the prosecution which bears that burden.

G. Conclusion

The state and federal Constitutions require capital sentencing juries to be carefully advised in order to avoid arbitrary and capricious application of the death penalty. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17.) Because CALJIC No. 8.88, the main sentencing instruction given to the penalty jury, failed to comply with that requirement, McKinnon's death judgment must be reversed.

XXI

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THOSE SENTENCING FACTORS, RENDER MCKINNON'S DEATH SENTENCE UNCONSTITUTIONAL

Prior to commencement of the penalty phase, McKinnon objected to the provision of CALJIC No. 8.85 as incorrect, inadequate, or misleading under state law and the federal Constitution. Consequently, he requested a number of modifications, amendments, and supplements to the standard instruction in order to conform to the law. (13 CT 3731-3759.) The court summarily denied the motion and provided CALJIC No. 8.85 in its standard form.[73] (12 RT 1461-1462; 13 RT 1602-1604 ;14 CT 4062-4063.)

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[73] In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any criminal activity (sic), other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(continued...)

Provision of that instruction rendered McKinnon's death sentence unconstitutional in several ways. First, the application of section 190.3, subdivision (a), resulted in the arbitrary and capricious imposition of the death penalty. Second, the failure to delete inapplicable sentencing factors violated McKinnon's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Third, the failure to instruct that statutory

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[73] (...continued)

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fourth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instructions to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Sixth, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. McKinnon's death judgment must be reversed.

A. The Instruction on Section 190.3, Subdivision (a), and Application of That Sentencing Factor, Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, subsection (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within its meaning, even ones squarely at odds with others deemed aggravating in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975-976), it has been used in ways so arbitrary and contradictory as to violate both due process of law and the Eighth Amendment. Consequently, McKinnon requested that the instruction on factor (a) be deleted as unconstitutionally vague. (13 CT 3734-3735.) The court denied his request. (12 RT 1461-1462.)

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that

using the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding it to be a relevant "circumstance of the crime" that, e.g., the defendant hated religion,[74] sought to conceal evidence after the crime,[75] threatened witnesses,[76] disposed of the victim's body so it could not be recovered,[77] or had a mental condition which compelled him to commit the crime.[78]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even ones starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California, supra,* 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "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.*

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[74] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.

[75] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[76] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

[77] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

[78] *People v. Smith* (2005) 35 Cal.4th 334, 352.

Cartwright (1988) 486 U.S. 356, 363.) That factor is therefore unconstitutional as applied. (*Ibid.*)

B. The Failure to Delete Inapplicable Sentencing Factors Violated McKinnon's Constitutional Rights

McKinnon further requested that the court delete inapplicable factors (e), (f), (g) and (j) or, alternatively, to instruct that the absence of a mitigating factor could not be considered in aggravation. (13 CT 3732-3733, 3751-3754.) The court denied his request. As McKinnon argued in the trial court, including those irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, and violated McKinnon's rights under the Sixth, Eighth and Fourteenth Amendments. McKinnon recognizes that this Court has rejected similar contentions (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but requests reconsideration for the reasons given below, and to preserve the issue for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b) and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) But the "whether or not" formulation used in CALJIC No. 8.85 suggests that the jury can consider the inapplicable factors as well. (14 CT 4062-4063.) Instructing jurors on irrelevant matters dilutes their focus, distracts their attention, and introduces confusion into their deliberations. In this context, irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, the failure to delete mitigating factors unsupported by the evidence inevitably denigrates the defendant's mitigation evidence. McKinnon's jury was effectively invited to sentence

him to death because there was evidence in mitigation for "only" one or two factors, while there was either evidence in aggravation or no evidence with respect to the rest. The failure to screen out inapplicable factors here undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived McKinnon of his right to individualized sentencing based on permissible factors relating to him and the crimes. That error also artificially inflated the weight of the aggravating factors, and violated the constitutional requirement of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 447 U.S. 625, 637.) Reversal of McKinnon's death judgment is required.

C. Failing to Instruct That Statutory Mitigating Factors Are Relevant Solely as Mitigators Precluded a Fair, Reliable and Evenhanded Application of the Death Penalty

McKinnon further requested that the court identify which factors are aggravating and which factors are mitigating, to delete the "whether or not" phrase, and to specify that aggravation is limited to the enumerated factors. (13 CT 3739, 3762.) Again, the court denied his request. (12 RT 1461-1462.)

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – i.e., factors (c), (d), (e), (f), (g), and (i) – is relevant solely as mitigation. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) Without guidance on which factors could be considered solely as mitigating, the jury was free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and to aggravate McKinnon's sentence based on nonexistent or irrational aggravating factors. That precluded the reliable, individualized capital sentencing

determination required by the federal constitution (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879), and was reversible error.

D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

McKinnon further requested that the court delete the word "extreme" from the instruction on factor (d) as misleading. (13 CT 3748-3750.) Again, the court denied the request. (12 RT 1461-1462.) As McKinnon argued in the trial court, the inclusion in the list of potential mitigating factors read to McKinnon's jury of such adjectives as "extreme" (see factors (d) and (g)) acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

E. Failing to Require the Jury to Make Written Findings Regarding the Aggravating Factors Violated McKinnon's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

CALJIC Nos. 8.85 and 8.88 as given in this case did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing sentence. Failing to require such express findings deprived McKinnon of his Fourteenth Amendment and Eighth Amendment rights to meaningful appellate review, and his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Because California juries have total, unguided discretion on how to weigh the statutory sentencing factors (*Tuilaepa v. California, supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible

to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. This Court held that parole boards must state their reasons for denying parole because "[i]t 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." (*In re Sturm* (1974) 11 Cal.3d 258, 267.) The same reasoning must apply to the far graver decision to put someone to death. Further, in noncapital cases California requires the sentencer to state on the record the reasons for its sentence choice. (Pen. Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Accordingly, the sentencer in a capital case must identify for the record the aggravating circumstances upon which its sentence is based.

The fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral," does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. (See, e.g., Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); State v. White (Del. 1978) 395

A.2d 1082, 1090.) California's failure to require such findings renders its procedures unconstitutional.

F. Even If the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Those Safeguards to Capital Defendants Violates Equal Protection

As noted previously, the United States Supreme Court has repeatedly said that heightened reliability is required in capital cases, and that courts must be vigilant in ensuring procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732.) However, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to ones charged with noncapital crimes, in violation of the constitutional guarantee of equal protection.

"[P]ersonal 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.) In the case of interests identified as "fundamental," courts "subject[] the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing both that it is justified by a compelling purpose, and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.) The state cannot meet that burden here, because in capital cases the state and federal equal protection guarantees apply with greater force, and the scrutiny of the challenged classification is stricter, because the interest at stake is life itself.

In Argument XVII, above, McKinnon explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on violent criminal acts under section 190.3, subdivision (b), and other aggravating factors, and the disparate treatment of capital defendants as set forth in this argument. The procedural protections outlined in these arguments, but denied capital defendants, are especially important in insuring reliable and accurate fact-finding in capital trials. (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

For all of these reasons, McKinnon's death sentence must be reversed.

XXII

THE COURT'S REFUSAL TO PROVIDE LEGALLY ACCURATE INSTRUCTIONS REGARDING THE SCOPE OF AGGRAVATING AND MITIGATING EVIDENCE THE JURORS COULD CONSIDER, AS WELL AS THE SCOPE OF THEIR SENTENCING DISCRETION VIOLATED STATE LAW AS WELL AS MCKINNON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR PENALTY TRIAL AND RELIABLE PENALTY DETERMINATION AND REQUIRES THAT THE DEATH JUDGMENT BE REVERSED

In addition to McKinnon's objections to the standard penalty phase instructions, he requested a series of legally accurate instructions clarifying the nature and scope of the aggravation and mitigation and the jury's discretion in selecting the appropriate penalty. Specifically, McKinnon requested that the court: 1) supplement the instruction on factor (a) with an explanation that a special circumstance simply renders the defendant death-eligible and the very different question of the appropriate penalty was entirely up to the jurors (13 CT 3741); 2) prohibit the jurors from "double counting" the same facts as both a circumstance of the crime and a special circumstance finding under factor (a) (13 CT 3745); 3) prohibit the jurors from considering deterrence or the costs of life imprisonment as factors affecting their decision (13 CT 3729-3730); 4) modify the instruction on factor (k) to specify that the mitigating circumstances listed are only examples and the jurors could consider any other circumstances as a reason for not imposing death, that a single mitigating factor alone may be sufficient to reject death as the appropriate penalty, that the jurors need not be unanimous in finding mitigating factors, mitigating factors do not need to be proved beyond a reasonable doubt and may be supported by any evidence, no matter how weak (13 CT 3754-3757, 3762); 5) inform the jurors that they could return a life verdict even in the absence of mitigating

factors and in the face of aggravating factors (13 CT 3758); and 6) inform the jurors that they could spare McKinnon's life based on mercy or sympathy alone (13 CT 3756-3758, 3761-3762). The court denied these requests. (12 RT 1461-1462.) The court erred.

A criminal defendant is entitled upon request to instructions which pinpoint his theory of defense. (See, e.g., *People v. Kraft*, *supra*, 23 Cal.4th at p. 1068; *People v. Adrian* (1982) 135 Cal.App.3d 335, 338; *People v. Rincon-Pineda*, *supra*, 14 Cal.3d at p. 865; *People v. Sears* (1970) 2 Cal.3d 180, 190; see also Pen. Code, § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue if requested by either party . . . ."].) The right to such instructions applies at both the guilt and penalty phases of a capital trial. (See, e.g., *People v. Benson* (1990) 52 Cal.3d 754, 806; *People v. Davenport*, *supra*, 41 Cal.3d at pp. 281-283.) "[I]n considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of . . . CALJIC . . . ." (Cal. Stds. Of Jud. Admin., § 5.)

To be sure, a trial court is not required to give instructions that are argumentative or contain incorrect statements of law. (See *People v. Sanders*, *supra*, 11 Cal.4th at p. 560.) However, McKinnon's requested instructions were neither.

Selection of the appropriate penalty is an issue distinct from the question of death eligibility and a discretionary decision entirely up to the juror, just as McKinnon's requested instruction would have explained. (13 CT 3741; see, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 40-41, and authorities cited therein.) And, just as another of McKinnon's requested instructions would have informed the jurors, it is improper to double count

the same facts as both circumstances of the crime and as a special circumstance under factor (a). (13 CT 3745; *People v. Melton* (1988) 44 Cal.3d 713, 768-769; accord, *People v. Monterroso* (2004) 34 Cal.4th 743, 789-790.) Indeed, this Court has held that such an instruction should be provided on request. (*Ibid.*)

Similarly, it is well settled that the costs of life imprisonment and the deterrent effect of the death penalty must not enter into the jurors' penalty decision. (*People v. Thompson* (1988) 45 Cal.3d 86, 132, and authorities cited therein; accord, *People v. Bacigalupo* (1991) 1 Cal.4th 103, 146.) Hence, this Court has recognized that an instruction prohibiting jurors from allowing these considerations to enter into their penalty determination is an accurate statement of the law and appropriately given upon request. (*Ibid.*) Certainly, the need for such an instruction was acute in this case, given the number of jurors who had indicated the importance of deterrence and the costs of life imprisonment to their feelings about the appropriateness of the death penalty. (4 CT 878 [Juror No. 1], 904 [Juror No. 2], 927-928 [Juror No. 3], 1028 [Juror No. 7], 1102-1103 [Juror No. 12]; 5 CT 1177-1178 [originally Alternate Juror No. 4; replaced seated Juror No. 10]).

Furthermore, the United States Supreme Court has made clear that all non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. (*Tennard v. Dretke*, *supra*, 124 S. Ct. at p. 2571.) Mitigation is not limited to enumerated factors in section 190.3, but includes any mitigating information that may convince the jury to vote for a sentence less than death. (See, e.g., *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308.) Furthermore, "[t]he jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty."

(*People v. Brown*, *supra*, 40 Cal.3d at p. 540.) Indeed, just as McKinnon's requested instructions would have informed the jurors, a jury may reject the death penalty even in the complete absence of mitigating evidence. (13 CT 3754-3758, 3762; see, e.g., *People v. Duncan* (1991) 53 Cal.3d 955, 978-979; *People v. Nicolaus* (1991) 54 Cal.3d 551, 590-591.)

Moreover, this Court has held that mitigating circumstances need not be proven beyond a reasonable doubt or by a preponderance of the evidence, as another of the requested instructions would have clarified. (13 CT 3754-3757, 3762; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 416-417.) To the contrary, a jury may find a mitigating circumstance to exist if there is any evidence – as opposed to substantial evidence – to support it. (*People v. Bonillas*, *supra*, 48 Cal.3d at pp. 789-790.) At bottom, and just as McKinnon requested that his jury be instructed, the federal Constitution requires the jury be allowed to consider a mitigating circumstance "no matter how strong or weak the evidence is." (13 CT 3754-3757; *People v. Wharton*, *supra*, 53 Cal.3d at pp. 600-601.)

Further, it is well settled that mercy, sympathy, and sentiment are relevant mitigating factors. (See, e.g., *People v. Easley*, *supra*, 34 Cal.3d at pp. 874-880.) Indeed, as McKinnon requested his jurors be informed, a capital jury has the right to reject the death penalty based solely on sympathy for the accused. (13 CT 3756-3758, 3761-3762; see, e.g., *People v. Lamphear*, *supra*, 36 Cal.3d at p. 157; *People v. Robertson*, *supra*, 33 Cal.3d at pp. 57-58 [*Lockett* and *Eddings* "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it"]; *People v. Brown*, *supra*, 40 Cal.3d at p. 536 ["The jury must be free to reject death . . . on the basis of any constitutionally relevant evidence . . ."]; *People v.*

Haskett, *supra*, 30 Cal.3d at p. 863.) Moreover, the jurors may consider sympathy in determining what weight to give other factors. (See, e.g., *People v. Easley*, *supra*, at pp. 874-880.)

Thus, McKinnon's requested instructions were entirely accurate statements of the law. The proposed instructions would have clarified for the jury the nature of the process of moral weighing in which they were to engage by demonstrating that any single factor in mitigation might provide a sufficient reason for imposing a sentence other than death. (Cf. *People v. Sanders*, *supra*, 11 Cal.4th at p. 557 [noting with approval instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that a single factor could outweigh all other factors"].) This Court has indicated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process . . . ." (*Id.* at p. 557; see also *People v. Anderson* (2001) 25 Cal.4th 543, 599-600 [approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death].)

Of course, this Court has also held that it is not error to refuse to give instructions embodying these correct principles of law if the instructions the jury receives on mitigation are otherwise correct. (See, e.g., *People v. Smith*, *supra*, 30 Cal.4th at p. 638; *People v. Bonillas*, *supra*, 48 Cal.3d at pp. 789-790.) However, this rationale ignores the critical distinction between the failure to give an accurate requested instruction and the giving of an erroneous one. In fact, the rationale runs afoul of California law, which entitles a defendant to have a requested instruction given if it

correctly states applicable law. That right is not contingent on the court giving other erroneous instructions on the issue. Of course, if the trial court gives an erroneous instruction, the defendant can argue that error. But no general principle of California law mandates that establishing such error is a prerequisite to showing error in failing to give a requested instruction. Indeed, the law is just the opposite. (*People v. Kane* (1946) 27 Cal.2d 693, 698, 700 [although jury given correct instructions defining robbery and reasonable doubt, trial court committed prejudicial error by refusing pinpoint instruction directing jury to acquit if victim gave defendant permission to take property: "'It is true that the instruction given stated the law correctly, but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis.'"]; *People v. Mayo* (1961) 194 Cal.App.2d 527, 536-537 [although court's instructions regarding elements of offense were generally correct and adequate, it prejudicially erred in refusing specific instructions pinpointing theory of defense]; *People v. Sears*, *supra*, 2 Cal.3d 180, 190 [citing *Kane* and *Mayo* with approval in recognizing that defendant is entitled to pinpoint instructions upon request; refusal to give reasonable doubt instruction pinpointing theory of defense erroneous despite generally adequate reasonable doubt instruction]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 256-257 [error to refuse "instructions [because] they were allegedly incomplete and duplicated standard CALJIC instructions . . . if the defendant offers 'pinpoint' instructions intended to supplement or amplify more general instructions"].)

Certainly, there is no sound reason *not* to instruct the jury on legally correct principles that bear on vital issues in a capital case. The requested

instructions here simply and correctly explained the law applicable to the consideration of mitigating circumstances, aggravating circumstances, and the scope of their jury's sentencing discretion. Ordinarily, the integrity of the judicial process is impaired when the jury is not told about rules of law that govern the ultimate decision it must make. The guiding principle should be to explain, not to conceal, the applicable rules.

The court's refusal to provide the defense request denied McKinnon his Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable sentencing determination, to have the jury consider all mitigating circumstances (see, e.g., *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 4; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604), and to make an individualized determination whether he should be executed, under all the circumstances (see, e.g., *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) At the very least, the court's refusal to provide the instruction violated state law for all of the reasons set forth above.

Given the closeness of the case, there is a reasonable possibility (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448) that the verdict would have been more favorable to McKinnon if the court had given the requested instructions. At the very least, it is clear that the cumulative effect of this and the other errors that occurred throughout McKinnon's trial violated his state and federal constitutional rights to a fair trial and a reliable penalty judgment. (See, e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284; *People v. Hill* (1998) 17 Cal.4th 800, 844-847; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883, 893; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-625; see also Argument XII, above.) The penalty judgment must be reversed.

XXIII

MCKINNON'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States is one of the few nations which regularly uses the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) As the Canadian Supreme Court recently explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because the international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth

Amendment's determination of evolving standards of decency, McKinnon raises this claim under that amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const. art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR as "the supreme law of the land. . . ." (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

McKinnon's death sentence violates the ICCPR. Because of the improprieties in the capital sentencing process challenged in this appeal, the imposition of the death penalty on McKinnon would constitute "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. While this Court has previously rejected international law claims directed at the death penalty in California (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511), there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should apply to the United States (see *United States v. Duarte-Acero, supra,* 208 F.3d at p.1284; *McKenzie v. Day*

(9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.). McKinnon asks this Court to reconsider its prior rejection of international law claims concerning the death penalty, and to find that his death sentence violates international law.

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to use as a punishment for exceptional crimes such as treason, is uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky*, *supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn).) Indeed, *all* the nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of April 2006 at <*http://www.amnesty.org*> or <*http://www.deathpenaltyinfo.org*>.)

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment, because our Founding Fathers looked to the nations of Western Europe as models on the laws of civilized nations, and as sources for the meaning of terms in the Constitution. (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J., quoting 1 Kent's Commentaries 1); *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.)

"Cruel and unusual punishment" as defined in the Constitution is not limited to acts which violate the standards of decency existing in the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) Thus, if the standards of decency as perceived by the civilized nations of

Europe have evolved, what the Eighth Amendment requires has evolved with them. The Eighth Amendment thus prohibits forms of punishment that are not recognized by several of our states and the civilized nations of Europe, or that are used by only a handful of countries around the world – including totalitarian regimes with "standards of decency" antithetical to ours. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violates Eighth Amendment in part on the views of "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31.)

No other nation in the Western world still uses or accepts the death penalty, and the Eighth Amendment does not permit our nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment violates the Eighth and Fourteenth Amendments, and McKinnon's death sentence should therefore be set aside.

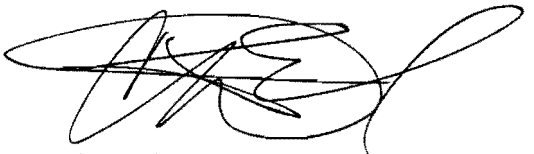
CONCLUSION

For all of the foregoing reasons, the judgment must be reversed.

DATED: October 2, 2006

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

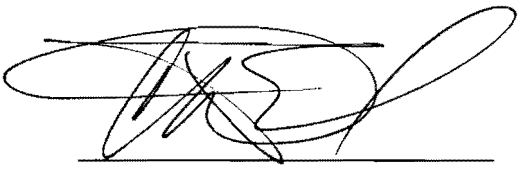


C. DELAINE RENARD
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(b)(2))

I, C. Delaine Renard, am the Deputy State Public Defender assigned to represent appellant Crandell McKinnon in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 133,080 words in length.



C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. McKinnon* No. S077166

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
P. O. Box 85266
110 W. "A" Street, Rm. 1100
San Diego, CA 92186-5266

Riverside Co. District Attorney
Attn: John Davis, D.D.A.
4075 Main Street
Riverside, CA 92501-3707

Steve Harmon, Esq.
3685 Main Street, Ste. 250
Riverside, CA 92501

David Macher, Esq.
PMB 298
40485-D Murrieta Hot Springs
Murrieta, CA 92563

Hon. Patrick F. Magers
Riverside Co. Superior Court
4100 Main Street, Rm. 110
Riverside, CA 92501-3626

Mr. Crandell McKinnon
(Appellant)

Each said envelope was then, on October 2, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 2006, at San Francisco, California.

_____

DECLARANT