SUPREME COURT COPY

SUPREME COURT
FILED

MAY 21 2008

Frederick K. Ohlrich Clerk

Deputy

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

No. S082828
San Diego No. SCE171425

v.

CORRELL THOMAS,

Defendant-Appellant./

Automatic Appeal from the Judgment of the Superior Court
County of San Diego
Hon. Allan J. Preckel, Judge

Appellant's Opening Brief

BARRY L. MORRIS
Attorney at Law
State Bar No. 48368
1260 B Street, Suite 240
Hayward, California 94541
(510) 247-1100
Fax: (510) 601-0229

Attorney for Appellant
CORRELL THOMAS

DEATH PENALTY

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

No. S082828
San Diego No. SCE171425

v.

CORRELL THOMAS,

Defendant-Appellant./

Automatic Appeal from the Judgment of the Superior Court
County of San Diego
Hon. Allan J. Preckel, Judge

Appellant's Opening Brief

BARRY L. MORRIS
Attorney at Law
State Bar No. 48368
1260 B Street, Suite 240
Hayward, California 94541
(510) 247-1100
Fax: (510) 601-0229

Attorney for Appellant
CORRELL THOMAS

Table of Contents

Table of Authorities xi

Statement of the Case 1

Statement of Appelability 4

Statement of Facts --- Guilt Phase 5

A. **McDonald Homicide** - Prosecution Witnesses 5

1. Nicole's Plea Agreement 5

2. Going to Cesar's 5

3. The Liquor Store Incident 9

4. Ricky McDonald Arrives at the Apartment Complex 12

5. The Aftermath 19

B. McDonald Homicide - Police Investigation 22

C. McDonald Homicide - Cause of Death 25

D. McDonald Homicide - Kazi's Physical Condition 39

E. McDonald Homicide -- Appellant's Witnesses 42

1. Kazi's Violent Propensities 42

2. Mr. McDonald's Missing Wallet 42

3. Nicole Admits Participation in McDonald Homicide 44

F. McDonald Homicide - Codefendant Kazi Cooksey's Witnesses 45

G. **Grote Homicide** - Prosecution Witnesses 45

H. Grote Homicide -- Police Investigation 57

I. Grote Homicide -- Autopsy 58

J. Grote Homicide -- Appellant's Witnesses 58

K. Appellant's Prior Juvenile Adjudications 62

Statement of Facts - Penalty Phase 63

L. Penalty Phase - Circumstances of the Crimes - [Penal Code §190.3(a)] 63

1. McDonald Homicide - Prosecution Evidence 63

2. McDonald Homicide - Defense Evidence 65

3. Grote Homicide - Prosecution Evidence 68

4. Grote Homicide - Defense Evidence 69

M. Uncharged Criminal Activity [Penal Code §190.3 (b)] 72

1. Stockton Robbery/Homicide/ Prosecution Evidence 72

2. Stockton Robbery/Homicide - Defense Evidence 85

3. Doss Shooting- Prosecution Evidence 86

4. Doss Shooting - Defense Evidence 88

5.. DeMarco Atkins Shooting Incident - Stipulation 89

N. Penalty Phase - Evidence in Mitigation 91

I.

The Trial Court's Erroneous Refusal to Sever the McDonald Homicide from the Grote Homicide Violated Appellant's Right to Due Process of Law Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the California Constitution 106

A. Introduction 106

B. Statement of Facts 106

C. The Trial Court Abused its Discretion When it Denied Appellant's Motion for Severance 112

1. Assuming that Initially, the McDonald and Grote Homicides Were Properly Joined, The Trial Court Has the Authority to Sever Counts if a Joint Trial Would Prejudice the Fact-Finding Process 112

2. The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Alleged Statement by Keisha Thomas Was Not Admissible in either the Grote or McDonald Cases Because it was Insolubly Ambiguous 115

3. The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Alleged Statement by Keisha Thomas Was Not Cross-Admissible in the Grote and McDonald Cases 118

4. The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Inherent Prejudice of Joining Two Unrelated Murder Cases was Not Counterbalanced by Any Saving of Time of Public Funds 119

5. Given the Fact that the Trial Court was Aware that Joinder Would Not Save Either Pubic Time or Moneys. the Trial Court Used the Wrong Standard in Ruling on Appellant's Severance Motion 122

6. The Trial Court Abused its Discretion When it Denied Appellant's Motion for a Mistrial after the Prosecution Rested Without Introducing the Purported Admission that the Trial Court Relied Upon in Denying the Severance Motion 125

C. Appellant was Prejudiced by the Trial Court's Denial of the Motion to Sever Counts Rendering His Trial Fundamentally Unfair, in Violation of the Right to Due Process of Law Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution 125

1. The Federal Guarantee of Due Process of Law is Violated When Misjoinder of Counts Results in Prejudice to the Accused 126

2. Appellant was Prejudiced By the Joinder of Two Unrelated Homicides that were Not Cross Admissible and Where the Evidence in the Grote case was Significantly Stronger than the Evidence in the McDonald Case 126

3. Appellant was Prejudiced by the Trial Court's Failure to Instruct the Jury that Evidence Pertaining to the Grote Charges Was Not Admissible as Proof of the McDonald Homicide and that Evidence Pertaining to the McDonald Charges Was Not Admissible as Proof of the Grote Homicide 130

4. Appellant's Conviction Must Be Reversed 132

II.

The Erroneous Refusal of the Trial Court to Exclude Evidence of the Milton Incident and Evidence of Mr. McDonald's Habit and Custom of Leaving Money for his Wife Violated Appellant's Due Process Right to a Fair Trial Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article One of the California Constitution 134

A. Statement of Facts 134

1. The Robbery and Robbery Special Circumstance Allegations are Dismissed at Penal Code §995 Hearing 134

2. Trial Court Rules Evidence of Milton Assault Admissible on Felony-Robbery Theory 135

B. In View of the Trial Court's Prior Ruling that Insufficient Evidence had been Presented at the Preliminary Hearing to Permit Appellant's Prosecution for Robbery and Robbery-Murder Special Circumstance, The Trial Court Erred in Permitting the Prosecution to Proceed on a Robbery-Felony-Murder Theory 138

C. Even Assuming Arguendo that it was Constitutionally Permissible to Proceed to Trial on a Robbery-Murder Allegation Where Insufficient Evidence of Robbery had been Adduced at the Preliminary Hearing, The Trial Court Erred in Permitting the Admission of Evidence of the Milton Incident under Evidence Code §1101(b) on the Issue of Intent and/or a Continuing Course of Conduct Theory 141

1. Evidence of the Milton Incident was Not Relevant to Intent in the McDonald Homicide 141

2. There Were Insufficient Similarities Between the Milton Incident and the McDonald Homicide to Warrant Admission of Evidence of the Former in the Trial of the Latter on the Issue of Intent to Rob 142

3. If There Were an Attempted Theft in the Milton Incident, It was an Afterthought to an Assault and Thus Inadmissible and Irrelevant to Prove Robbery-Felony-Murder in the McDonald Homicide 147

D. The Admission of Evidence of the Milton Liquor Store Incident Denied Appellant a Fair Trial, in Violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution 149

III.

The Trial Court's Erroneous Refusal to Instruct the Jury that Each Element of the Charged Crimes Must be Proven Beyond a Reasonable Doubt Violated Appellant's Right to Due Process of Law, to Trial by Jury, and to a Reliable Penalty Determination in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution 153

A. Statement of Facts 153

B. Appellant's Proposed Modification of CALJIC 2.90 Was and Is a Correct Statement of the Constitutionally Mandated Reasonable Doubt Standard 154

IV.

In View of The Trial Court's Failure to Ask Juror Garganera if She Could Follow the Court's Penalty Instructions Despite Her Opposition to the Death Penalty Violated Appellant's Right to an Impartial Penalty Determination in Violation of the Right To Due Process, an Impartial Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution 156

A. Introduction 156

B. Statement of Facts 157

C. The Erroneous Excusal of Ms. Garganera for Cause Violated Appellant's Right to an Impartial Jury and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution 159

D. The Judgment of Death Must be Reversed 166

V.

By Instructing the Jury that, as a Matter of Law, the Jurors "Must Consider and Accept that Death is a Greater Penalty than Life Imprisonment Without Possibility of Parole," the Trial Court Violated Appellant's Right to Due Process of Law, Trial by Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution 167

A. Introduction 167

B. Statement of Facts 169

C. By Erroneously Instructing the Jurors that they were Required to Consider Death as the "Greater" Penalty Trial Court's Unconstitutionally Prevented Jurors in Appellant's Case from Choosing LWOP as an Appropriate Sentence Based Upon a Juror's Belief that LWOP was a Greater Punishment than Death, in Violation of Appellant's Right to Trial by Jury, Due Process of Law, and the Right to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, §§7, 15, 16, and 17 170

1. The Trial Court's Instruction was an Erroneous Statement of the Law 170

2. The Trial Court's Erroneous Instruction Violated Appellant's Eighth Amendment Right to a Reliable Penalty Determination 174

3. The Court's Instruction Removed an Issue of Fact From the Jury's Consideration in Violation of Appellant's Right to Trial by Jury Guaranteed by the California Constitution and the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution 176

VI.

The Erroneous Admission of Evidence of the Firing of a Gun Nearby Jesse Russell's House and the Erroneous Instruction that Permitted the Jury to Consider the Incident as Aggravating Evidence Undermined the Reliability of the Penalty Determination in Violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution 178

A. Statement of Facts 178

B. The Stipulated Testimony Regarding the Russell Incident Did Not Establish a Violation of Penal Code §§246 (Shooting at an Inhabited Dwelling) or Penal Code §243.6 (Discharge of a Firearm in a Grossly Negligent Manner) 180

C. The Firing of a Gun Near Mr. Atkins's House Was Not Admissible as Aggravating Evidence Pursuant to Evidence Code §190.3(b) Because it was Not Directed at a Person 182

D. The Trial Court Erred by Instructing the Jury that The Shooting Near Jesse Russell's House Could Constitute the Offense of Grossly Negligent Discharge of a Firearm 183

E. The Trial Court's Error in Permitting the Jury to Consider the Shooting Near Jesse Russell's House Violated Appellant's Right to Due Process of Law and to a Reliable Penalty Determination Guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution 184

VII.

The Prosecutor's Prejudicial Argument to the Jury that Appellant Should Receive the Death Penalty Because He was Likely to be a Danger to Prison Personnel Violated Appellant's Right to Due Process of Law and to a Reliable Penalty Determination Guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution 187

A. Statement of Facts 187

B. Permitting the Prosecutor to Argue Future Dangerousness in the Absence of Evidence of Future Dangerousness, Violated Appellant's Right to Due Process of Law and to a Reliable Penalty Determination Guaranteed by the Fifth, Eighth, and Fourteenth Amendments 191

1. Introduction 191

2. There was No Evidence to Support the Prosecutor's Argument that Appellant Would Present a Danger to Other Inmates and/or Prison Personnel if Imprisoned 192

3. The California Rule Prohibiting the Introduction of Expert Evidence of Future Dangerousness and Permitting the Prosecution to Argue Future Dangerousness as a Basis for Imposition of the Death Penalty Based Solely on Out-of-Custody Conduct Unconstitutionally Undermines the Reliability of the Jury's Penalty Determination in Violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution 194

VIII.

California's Death Penalty Statute, As Interpreted By This Court And applied At Appellant's Trial, Violates the United States Constitution. 199

A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad 201

B. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(A) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution. 203

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution. 205

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated 206

a. In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt. 209

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt. 214

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty. 216

a. Factual Determinations 216

b. Imposition of Life or Death 217

c. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors. 219

d. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Discriminatory, or Disproportionate Impositions of the Death Penalty 222

e. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury. 223

f. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury. 225

g. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction. 225

D. THe California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants. 228

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution. 231

Table of Authorities

Adams v. Texas
(1980) 448 U.S. 38 — 160

Addington v. Texas
(1979) 441 U.S. 418 — 215

Ake v. Oklahoma
(1985) 470 U.S. 68 — 195

Apprendi v. New Jersey
(2000) 530 U.S. 466 — 176, 207

Arrieta-Colon v. Wal-Mart P.R., Inc.
(1st Cir. 2006) 434 F.3d 75 — 140

Atkins v. Virginia
(2002) 536 U.S. 304 — 195

Banks v. Dretke
(2004) 540 U.S. 668 — 195

Barefoot v. Estelle
(1983) 463 U.S. 880 — 195, 197

Bean v. Calderon
(9th Cir. 1998) 163 F.3d 1073 — 126, 127, 131

Belton v. Superior Court
(1993) 19 Cal.App.4th 1279 — 114

Blakely v. Washington
(2004) 542 U.S. 296 — 176, 207, 214

Boyde v. California
(1990) 494 U.S. 370 — 131

Brown v. Lambert
(9th Cir. 2006) 451 F.3d 946 — 164

Brown v. Sanders
(2006) 546 U.S. 212 — 185

Brown v. Texas
(1997) 522 U.S. 940 — 195

Buchanan v. Angelone
(1998) 522 U.S. 269 — 195

Caldwell v. Mississippi
(1985) 472 U.S. 320 — 184, 192

California v. Ramos
(1983) 463 U.S. 992 — 197, 219

Campbell v. Blodgett
(9th Cir. 1993) 997 F.2d 512 — 227

Clayborne v. United States
(D.C. 2000) 751 A.2d 956 — 116

Coleman v. Calderon
(9th Cir. 2000) 210 F.3d 1047 — 192

Coleman v. Superior Court
(1981) 116 Cal.App.3d 129 — 113, 128

Commonwealth v. Croft
(Mass. 1979) 186 N.E.2d 468 — 116

Conservatorship of Roulet
(1979) 23 Cal.3d 219 — 217

Cunningham v. California
(2007) 549 U.S. 270 — 176, 207, 211, 212, 213

Davis v. Georgia
(1976) 429 U.S. 122 — 166

Department of Parks & Recreation v. State Personnel Bd.
(1991) 233 Cal. App. 3d 813 — 117

Doyle v. Ohio
(1976) 426 U.S. 610 — 116

Drake v. Kemp
(11th Cir. 1985) 762 F.2d 1449 — 192

Drew v. United States
(D.C.Cir.1964) 331 F.2d 85 — 127

Eddings v. Oklahoma
(1982) 455 U.S. 104 — 169, 176, 228

Edelbacher v. Calderon

(9th Cir. 1998) 160 F.3d 582 171

Featherstone v. Estelle
(9th Cir. 1991) 948 F.2d 1497 126

Fetterly v. Paskett
(9th Cir. 1993) 997 F.2d 1295 227

Ford v. Wainwright
(1986) 477 U.S. 399 171

Franklin v. Lynaugh
(1988) 487 U.S. 164 195

Gardner v. Florida
(1977) 430 U.S. 349 167

Godfrey v. Georgia
(1980) 446 U.S. 420 205

Graham v. Collins
(1993) 506 U.S. 461 195

Gray v. Mississippi
(1987) 481 U.S. 648 161

Gray v. Netherland
(1996) 518 U.S. 152 195

Harris v. Vasquez
(9th Cir. 1990) 949 F.2d 1497 185

Herring v. Meachum
(2d Cir. 1993) 11 F.3d 374 131

Hicks v. Oklahoma
(1980) 447 U.S. 343 227

In re Winship
(1970) 397 U.S. 358 217, 218

In re Sturm
(1974) 11 Cal.3d 258 220

Jackson v. State
(Fla. 1986) 498 So. 2d 906 140

Jammal v. Van de Kamp
(9th Cir. 1991). 926 F.2d 918 152

Jeffer, Mangels and Butler v. Glickman
(1991) 234 Cal.App.3d 1432 — 123

Johnson v. Mississippi
(1978) 486 U.S. 578 — 186, 224

Johnson v. State
(Nev. 2002) 59 P.3d 450 — 210, 215

Johnson v. Texas
(1993) 509 U.S. 350 — 195

Jones v. Superior Court
(1971) 4 Cal. 3d 660 — 139

Jurek v. Texas
(1976) 428 U.S. 262 — 195

Kansas v. Marsh
(2006) 548 U.S. 163 — 199

Kealohapauole v. Shimoda
(9th Cir. 1986). 800 F.2d 1463 — 152

Lockett v. Ohio
(1978) 438 U.S. 586 — 174

Lockhart v. McCree
(1986) 476 U.S. 162 — 157, 160, 161

McCleskey v. Kemp
(1986) 481 U.S. 279 — 171, 174, 176

Maynard v. Cartwright
(1988) 486 U.S. 356 — 205

Mills v. Maryland
(1988) 486 U.S. 367 — 221

Monge v. California
(1998) 524 U.S. 721 — 215, 219, 228

Myers v. Ylst
9th Cir. 1990) 897 F.2d 417 — 220

O'Dell v. Netherland
(1997) 521 U.S. 151 — 195

Parks v. Superior Court of Alameda County
(1952) 38 Cal. 2d 609 139, 140

Payne v. Tennessee
(1991) 501 U.S. 808 171

Pennsylvania R. Co. v. Chamberlain
(1933) 288 U.S. 333 116

Penry v. Johnson
(2001) 532 U.S. 782 195

Penry v. Lynaugh
(1989) 492 U.S. 302 195

People v. Adcox
(1988) 47 Cal.3d 207 203

People v. Allen
(1986) 42 Cal.3d 1222 210

People v. Anderson
(2001) 25 Cal.4th 543 212

People v. Anderson
(1987) 43 Cal.3d 1104 124

People v. Arias
(1996) 13 Cal.4th 92 119, 121, 129

People v. Ashmus
(1991) 54 Cal.3d 932 166

People v Bacigalupo
(1993) 6 Cal.4th 857 201

People v. Balderas
(1985) 41 Cal.3d 144 112, 114, 119

People v. Bean
(1988) 46 Cal.3d 919 112, 114, 119, 122, 132

People v. Beeman
(1984) 35 Cal.3d 547 132

People v. Bernal
(1967) 254 Cal.App.2d 283 117

People v. Berryman

(1993) 6 Cal. 4th 1048 138, 181

People v. Bittaker
(1989) 48 Cal.3d 1046 204

People v. Black
(2005) 35 Cal.4th 1238 211

People v. Boyd
(1985) 38 Cal.3d 762 182, 227

People v. Bradford
(1997) 15 Cal. 4th 1229 113, 194

People v. Brock
(1967) 66 Cal.2d 64 107

People v. Brown
(1985) 40 Cal.3d 512 169, 174

People v. Brown
(1988) 46 Cal.3d 432 209

People v. Burnick
(1975) 14 Cal.3d 306 217

People v. Carpenter
(1997) 15 Cal.4th 312 114, 145, 226

People v. Carter
(2005) 36 Cal. 4th 1114 114, 121

People v. Catlin
(2001) 26 Cal. 4th 81 113

People v. Champion
(1995) 9 Cal.4th 879 191

People v. Cudjo
(1993) 6 Cal.4th 585 171

People v. Davenport
(1985) 41 Cal.3d 247 184, 191

People v. Davis
(2005) 36 Cal. 4th 510 148

People v. De La Plane
(1979) 88 Cal. App. 3d 223 117

People v. Demetroulias
(2006) 39 Cal.4th 1 210, 221

People v. Dennis
(1998) 17 Cal. 4th 468 181

People v. Dickey
(2005) 35 Cal.4th 884 210

People v. Dillon
(1984) 34 Cal.3d 441 202

People v. Dyer
(1988) 45 Cal.3d 26 203

People v. Edelbacher
(1989) 47 Cal.3d 983 201, 225

People v. Ewoldt
(1994) 7 Cal. 4th 380

People v. Fairbank
(1997) 16 Cal.4th 1223 206, 219

People v. Farnam
(2002) 28 Cal.4th 107 209

People v. Fauber
(1992) 2 Cal.4th 792 220

People v. Feagley
(1975) 14 Cal.3d 338 217

People v. Freeman
(1994) 8 Cal.4th 450 155

People v. Fries
(1979) 24 Cal.3d 222 122

People v. Green
(1980) 27 Cal.3d 1 116, 147, 148

People v. Guerra
(2006) 37 Cal. 4th 1067 173

People v. Hamilton
(1989) 48 Cal.3d 1142 225

People v. Hardy
(1992) 2 Cal.4th 86 204

People v. Harris
(2005) 37 Cal. 4th 310 177, 191

People v. Hart
(1999) 20 Cal. 4th 546 138

People v. Hawkins
(1995) 10 Cal. 4th 920 126

People v. Hawthorne
(1992) 4 Cal.4th 43 221

People v. Hillhouse
(2002) 27 Cal.4th 469 202

People v. Holt
(1997)15 Cal.4th 619 154

People v. Johnson
(1984) 43 Cal. 3d 296 107

People v. Jones
(1998) 17 Cal.4th 279 185

People v. Kaurish
(1990) 52 Cal.3d 648 157

People v. Keenan
(1988) 46 Cal.3d 478 119

People v. Kirkpatrick
(1994) 7 Cal 4th 988 182

People v. Lucas
(1995) 12 Cal. 4th 415 174

People v. Mason
(1991) 52 Cal. 3d 909 107

People v. Marshall
(1996) 13 Cal. 4th 799 174

People v. Marshall
(1990) 50 Cal.3d 907 223

People v. Millwee

(1998) 18 Cal. 4th 96 — 194

People v. Mitcham
(1992) 1 Cal.4th 1027 — 184

People v. Mickey
(1991) 54 Cal.3d 612 — 160

People v. Montiel
(1994) 5 Cal.4th 877 — 224

People v. Montgomery
(1879) 53 Cal. 576 — 117

People v. Morris
(1988) 46 Cal.3d 1 — 117

People v. Morrison
(2004) 34 Cal.4th 698 — 224

People v. Murtishaw
(1989) 48 Cal. 3d 1001 — 169, 191, 192, 194

People v. Nicolaus
(1991) 54 Cal.3d 551 — 204

People v. Ochoa
(1998) 19 Cal. 4th 353 — 107

People v. Olivas
(1976) 17 Cal.3d 236 — 228

People v. Osband
(1996) 13 Cal.4th 622 — 121

People v. Perez
(1992) 2 Cal. 4th 1117 — 181

People v. Phillips
(1985) 41 Cal.3d 29 — 182, 184

People v. Pineda
(1973) 30 Cal.App.3d 860 — 117

People v. Poggi
(1988) 45 Cal.3d 306 — 191

People v. Posey
(2004) 32 Cal. 4th 193 — 154

People v. Prieto
(2003) 30 Cal.4th 226 — 210, 229

People v. Raley
(1992) 2 Cal.4th 870 — 117

People v. Ramos
(1984) 37 Cal.3d 136 — 197

People v. Ray
(1996) 13 Cal. 4th 313 — 194

People v. Robertson
(1982) 33 Cal.3d 21 — 184

People v. Robinson
(2005) 37 Cal.4th 592 — 204

People v. Robbins
(1988) 45 Cal.3d 867 — 142

People v. Rodriguez
(1986) 42 Cal.3d 730 — 176, 177

People v. Rogers
(2006) 39 Cal.4th 826 — 220

People v. Sandoval
(1992) 4 Cal. 4th 155 — 113

People v. Sengpadychith
(2001) 26 Cal. 4th 316 — 154

People v. Smallwood
(1986) 42 Cal.3d 415 — 120

People v. Smith
(1984) 155 Cal.App.3d 1103 — 127

People v. Snow
(2003) 30 Cal.4th 43 — 210, 229

People v. Stewart
(2004) 33 Cal.4th 425 — 157, 160, 162, 166

People v. Stewart
(1985) 165 Cal.App.3d 1050 — 119

People v. Stitely
(2005) 35 Cal.4th 514 — 114, 176

People v. Sully
(1991) 53 Cal. 3d 1195 — 119, 132

People v. Superior Court (Day)
(1985) 174 Cal.App.3d 1008 — 139

People v. Superior Court (Engert)
(1982) 31 Cal.3d 797 — 201

People v. Sutton
(1993) 19 Cal.App.4th 795 — 116

People v. Terry
(1962) 57 Cal.2d 538 — 117

People v. Thomas
(1977) 19 Ca1.3d 630 — 217

People v. Uhlemann
(1973) 9 Cal. 3d 662 — 139

People v. Vann
(1974) 12 Cal.3d 220 — 154

People v. Waidla
(2000) 22 Cal. 4th 690 — 181

People v. Walker
(1988) 47 Cal.3d 605 — 132, 204

People v. Whitehorn
(1963) 60 Cal. 2d 256 — 138

People v. Zambrano
(2007) 41 Cal. 4th 1082 — 184

People v. Zimmerman
(1980) 102 Cal.App.3d 647 — 123

Powell v. Texas
(1989) 492 U.S. 680 — 195

Presnell v. Georgia
(1978) 439 U.S. 14 — 217

Pulley v. Harris

(1984) 465 U.S. 37 199, 22

Ramdass v. Angelone
(2000) 530 U.S. 156 195

Richardson v. Newland
(E.D.Cal. 2004) 342 F. Supp. 2d 900 126

Ring v. Arizona
(2002) 536 U.S. 584 176, 177, 213, 230

Roads v. Superior Court
(1969) 275 Cal.App.2d 593 139

Romano v. Oklahoma
(1994) 512 U.S. 1 171, 176

Santosky v. Kramer
(1982) 455 U.S. 745 217, 218

Satterwhite v. Texas
(1988) 486 U.S. 249 195

Shafer v. South Carolina
(2001) 532 U.S. 36 197

Showalter v. Western Pacific R. R. Co.
(1940) 16 Cal.2d 460 116

Simmons v. South Carolina
(1994) 512 U.S. 154 197

Skinner v. Oklahoma
(1942) 316 U.S. 535 229

Skipper v. South Carolina
(1986) 476 U.S. 1 197

Smith v. Murray
(1986) 477 U.S. 527 195

Smith v. Texas
(2004) 543 U.S. 37 195

Speiser v. Randall
(1958) 357 U.S. 513 216

Sochor v. Florida
(1992) 504 U.S. 527 185

State v. Bobo
(Tenn. 1987) 727 S.W.2d 945 224

State v. Brown
(Mo. 1999) 998 S.W.2d 531 173

State v. Bright
(La. 2000) 776 So. 2d 1134 116

State v. Ring
(Az. 2003) 65 P.3d 915 215

State v. Whitfield
(Mo. 2003) 107 S.W.3d 253 215

Strickler v. Greene
(1999) 527 U.S. 263 195

Stringer v. Black
(1992) 503 U.S. 222 185, 227

Sullivan v. Louisiana
(1993) 508 U.S. 275 154

Townsend v. Sain
(1963) 372 U.S. 293 219

Tuggle v. Netherland
(1995) 516 U.S. 10 195

Tuilaepa v. California
(1994) 512 U.S. 967 204

United States v. Alferahin
(9th Cir. 2006) 433 F.3d 1148 154

United States v. Battle
(N.D. Ga. 1997) 979 F. Supp. 1442 161

United States v. Booker
(2005) 543 U.S. 220 154, 177, 208

United States v. Brashier
(9th Cir. 1976) 548 F.2d 1315 127

United States v. Daniels
(D.C. Cir. 1985) 770 F.2d 1111 127

United States v. Davis
(C.D. Cal. 2004) 330 F. Supp. 2d 1098 — 140

United States v. Foutz
(4th Cir. 1976) 540 F.2d 733 — 127, 128

United States v. Gaudin
(1995) 515 U.S. 506 — 154

United States v. Lane
(1986) 474 U.S. 438 — 126

United States v. Lewis
(9th Cir. 1986) 787 F.2d 1318 — 127

United States v. Powell
(9th Cir.1978) 587 F.2d 443 — 146

United States v. Salazar-Gonzalez
(9th Cir. 2006) 445 F.3d 1208 — 154

United States v. Vasquez-Velasco
(9th Cir. 1994) 15 F.3d 833 — 112

Verzi v. Superior Court
(1986) 183 Cal.App.3d 382 — 119

Wainwright v. Witt
(1985) 469 U.S. 412 — 157, 160, 161

Walker v. Superior Court
(1980) 107 Cal.App.3d 884 — 139

Walton v. Arizona
(1990) 497 U.S. 639 — 207

Westbrook v. Milahy
(1970) 2 Cal.3d 765 — 229

Windham v. Merkle
(9th Cir. 1998) 163 F.3d 1092 — 152

Williams v. Superior Court
(1984) 36 Cal.3d 441 — 112, 113, 114, 119, 124, 128

Williams v. Taylor
(2000) 529 U.S. 420 — 195

Williams v. Turner

(W.D.Mo. 1988) 702 F. Supp. 1439 140

Witherspoon v. Illinois
(1968) 391 U.S. 510 159

Woldt v. People
(Colo. 2003) 64 P.3d 256 215

Woodson v. North Carolina
(1976) 428 U.S. 280 167, 184, 218, 224

Zant v. Stephens
(1983) 462 U.S. 862 224

Statement of the Case

On August 29, 1996, the District Attorney of San Diego County filed an information charging appellant CORRELL THOMAS and KAZI EDWARD COOKSEY in Count One with the murder of Ricky McDonald and with the use of a dangerous weapon. (Pen.Code §§ 187, 12022(b).) Appellant and codefendant Cooksey were also charged with a robbery special circumstance. (Pen.Code §190.2(17).) Appellant alone was charged with a multiple murder special circumstance as to Count One. (Pen.Code §190.2(a)(3).)

In Count Two, appellant and codefendant Cooksey were charged with the robbery of Mr. McDonald. (Pen.Code §211)

In Count Three, codefendant NICOLE ERIN HALSTEAD was charged with being an accessory after the fact. (Pen.Code §32)

In Count Four, appellant and codefendant Halstead were charged with the murder of Creed Grote and appellant was charged with the use of a firearm. (Pen.Code §§187, 12022.5.) Codefendant Halstead was charged with an arming clause. (Pen.Code §12022(a).)

In Count Five, appellant and codefendant Halstead were charged with the attempted murder of Troy Ortiz. Appellant was charged with use of a firearm and codefendant Halstead was charged with an arming clause. (Pen.Code §§12022.5, 12022(a).) (C.T. 77)

On August 30, 1996, appellant appeared in Department 12 of the Superior Court, Hon. Alan J. Preckel presiding, and entered a plea of not guilty and denied the special allegations. (C.T. 4809)

On September 6, 1996, an amended information was filed adding a multiple murder special circumstance allegation against appellant in Count Four in addition to the already charged multiple special circumstance alleged in Count One. (C.T. 81 On September 16, 1996, appellant was

arraigned on the amended information and entered a plea of not guilty and denied the special allegations. (C.T. 4810)

On December 23, 1996, the case was assigned to Judge Preckel for all purposes. (C.T. 4812)

Hearings were begun on December 24, 1996 regarding a possible conflict in representation of appellant by the public defender's office. (C.T. 4813) On January 23, 1997, the public defender was relieved because of a conflict in interest. (C.T. 4815) On February 27, 1997, Alan Bloom was appointed to represent appellant. (C.T. 4819)

On August 29, 1997, appellant was arraigned on a Second Amended Information. This information changed language in the Count Four special circumstance allegation against codefendant Halstead from "committed" to "aided and abetted." (C.T. 307, 4831)

Appellant's Motion to Dismiss Pursuant to Penal Code §995 was heard on September 29, 1997. (R.T. 772) The trial court granted the motion with respect to the charges of robbery and robbery special circumstance and dismissed those allegations. (R.T. 792)

On December 8, 1997, codefendant Halstead entered a plea of guilty to being an accessory after the fact as charged in Count 3. (C.T. 4861, R.T. 1175-1181) On January 7, 1998, codefendant Halstead pleaded guilty to manslaughter as a lesser offense to the homicide charged in Count Four. As part of her plea agreement, Ms. Halstead agreed to testify against appellant at trial. (R.T. 1214-1226)

On January 30, 1998, the trial court ordered that two separate juries be impaneled to hear the joint trial of appellant and Mr. Cooksey. (R.T. 1272) Voir dire on the jury selected to hear the charges against appellant

began on September 10, 1998 and concluded on September 18, 1998. (C.T. 4935-4959)

A *Batson* challenge to the jury selection procedure was made on September 21, 1998. The motion was denied and the jurors were sworn. (C.T. 4962) Opening statements were given on September 22, 1998. (R.T. 3785-3883) Testimony in the guilt phase of the trial began the following day and concluded on October 26,1998. (C.T. 4968-5024)

On October 27, 1998, the trial court instructed the jury (R.T. 6378-6416) and closing arguments were given. (R.T. 6417-6530) The jury began its deliberations that same day. (C.T. 5027) On October 30, 1998, the jury sent a note indicating that it was deadlocked on the first degree murder allegation. (C.T. 5035)

On November 2, 1998, after consultation with counsel, the trial court sent the jury a note indicating that it might be helpful to consider CALJIC Nos. 2.90, 8.75, and 8.71. (C.T. 3447) Later that same day, the jury arrived at verdicts, finding appellant guilty of second degree murder in Count One (McDonald), first degree murder in Count Four (Grote), and attempted murder in Count Five (Ortiz). In addition, the jury found all of the special circumstance allegations to be true. (R.T. 6776-6784)

The penalty phase began on November 4, 1998, with the giving of opening statements and beginning of the prosecution case. (C.T. 5052) The defense began its presentation of witnesses on November 16, 1998 and concluded on November 19, 1998. The court instructed the jury and both sides presented closing arguments that same day. (C.T. 5065-5075.) On December 1, 1998, the jury sent a note to the court indicating that it was deadlocked. The trial court declared a mistrial. (C.T. 5082-5083)

On March 5 and March 12, 1999, an extended *Marsden* hearing was held. Appellant's motion to relieve counsel was denied. (C.T. 5096-5098)

On June 4, 1999, voir dire began in the retrial of the penalty phase. (C.T. 5108) Jury selection concluded on July 16, 1999 with selection of a jury. (C.T. 5152) On July 20, 1999, the trial court heard appellant's motion for a new trial of the guilt phase. Appellant's motion was denied. (C.T. 5156-5157)

Opening statements from both sides were given on July 21, 1999 and the presentation of evidence began the same day. (C.T. 5158-5156) On July 27, 1999, Juror No. 7 was excused by the trial court and an alternate was substituted. (C.T. 5172) On July 30, 1999, the prosecution rested and the defense case began. (C.T. 5182) Juror No. 1 was excused on August 26, 1999, and an alternate substituted. (C.T. 5192) The defense rested on that same day. (C.T. 5194)

On August 30, 1999, the trial court instructed the jury and closing arguments were given by both sides. (C.T. 5197-5198) The following day, the trial court gave the jury the final instructions and deliberations began. (C.T. 5199) On September 1, 1999, selected portions of the testimony were reread to the jury. (C.T. 5201) That same day, the jury returned a verdict of death. (C.T. 5202

On October 7, 1999, appellant's motion for a new trial pursuant to Penal Code §190.4 was denied and a sentence of death was imposed by the trial court. (C.T. 5203)

Statement of Appealability

This case comes before this Court on automatic appeal following a judgment of death. (Pen.Code §1239(b).

Statement of Facts - Guilt Phase

A.

McDonald Homicide - Prosecution Witnesses

1.

Nicole's Plea Agreement

At appellant's capital trial, the prosecution's primary witness against appellant was **Nicole Halstead,** appellant Correll Thomas' girlfriend. While there were other percipient witnesses for the prosecution, Nicole was the only witness who testified against appellant regarding both homicides. Nicole was not a disinterested citizen who had voluntarily reported to the police what she knew about the two homicides. Rather, she came to the attention of the police because she had told her friend, **Jody Deere**, about her involvement in the homicides shortly after the Grote homicide occurred. (R.T. 4099-4100) Ms. Deere advised Nicole to turn herself into the police but Nicole chose not to, later claiming that she did not come forward because she was afraid of what Correll and his friends and family might do. (R.T. 5210) After Nicole spurned Ms. Deere's advice to turn herself in, Ms. Deere, contacted the police and informed them of what Nicole had told her. (R.T. 5396)

The police, in turn, contacted Nicole on June 10, 1996. (R.T. 4100) On that same day, Nicole made a statement to the police accusing appellant and detailing her own involvement in the McDonald and Grote homicides. The statement was surreptitiously videotaped. (R.T. 4115)

On January 7, 1988, Nicole made entered into an agreement with the prosecution to testify against appellant in return for being allowed to plead guilty to a reduced charge. Although she was originally charged with special

circumstance homicide in the Grote homicide and as an accessory after the fact in the McDonald homicide, pursuant to the agreement, Nicole was permitted to plead guilty to manslaughter as a lesser included charge arising out of the Grote homicide[1]. (R.T. 1214-1226) Although no specific sentencing promises were made a part of the deal, a the time she entered the plea, Nicole's counsel advised her that she might get the low term,, (R.T. 4103) Although Nicole was aware that under the terms of the plea agreement, she could receive up to 12 years, at the time of her guilt phase testimony. she expected to get the low term of three years. (R.T. 5198)

On the same day that she entered into her plea agreement, Nicole had an opportunity to review the taped statements that she had made shortly after her arrest. (R.T. 1212) Previously, in late 1996, Nicole had reviewed a transcript of those videotaped statements with her attorney. After reading the transcripts, she did not inform her attorney of any errors in the transcript of that statement. (R.T. 4117) Similarly, on the day of her plea, after Nicole watched the videotapes of her statements, she told the prosecution that "it was true and accurate as to [my] observations and actions of Correll Thomas and Kazi Edward Cooksey." (R.T. 4118)

Under the terms of her agreement with the prosecutor's office, Nicole stood to forfeit the benefits of that agreement "for any intentional deviation from the truth." (C.T. 16615) At the time of her plea, the district attorney explained to the trial court that when the agreement referred to an "intentional deviation from the truth" that was a reference to "matters that would be totally inconsistent with those contained within the tapes that she

---

[1] Nicole also plead guilty to the accessory charge arising out of the McDonald homicide, but that plea was not pursuant to a plea agreement. No agreement was necessary because by the time Nicole entered her plea on the accessory charge, she had been in custody eighteen months and had effectively served all the time she could receive on that charge. (Pen. Code §32)

reviewed today." (R.T. 1215) When Nicole testified at trial, the jury was informed of that she had been told that if she intentionally deviated in her testimony from the statement she had already given, she would the lose the benefit of the plea bargain. (R.T. 4105)

2.

Going to Cesar's

On May 17, 1996, the date of the McDonald homicide, Nicole was living in El Cajon, staying with her friend, **Carolyn Lanham,** at Ms. Lanham's apartment. (R.T. 3849) Nicole had been staying at the home of another friend, **Jody Deere**, but she and Jody "had a falling out and I chose to go stay with Carolyn for a little while." (R.T. 3850) As of that date, Nicole had known Carolyn for about 2-3 years. As Carolyn put it, "[s]he was my best friend." (R.T. 4143)

Nicole first met Correll in July of 1995 and they began dating three weeks later. (R.T. 3964) She always called him Correll, but others often referred to him by the nickname of "T-Bone." (R.T. 4100) At the time they met, Nicole had two children by a man named Jesse Russell. (R.T. 3965) Although Nicole claimed to be exclusively dating Correll after they met, Correll got married to someone else during that same time period. (R.T. 3966)

Early that day, Nicole asked Carolyn if she wanted to go out that evening with her and Correll to meet one of Correll's friends, **Cesar Harris**; she agreed. Correll came by in the early evening, and she, Correll, and Ms. Lanham went out, leaving the father of Carolyn's children to watch her three kids. (R.T. 3849-3850, 4145) The first stop was at Jody Deere's apartment,

also in El Cajon. Carolyn had never met Jody before. While Nicole changed her clothes there, Carolyn put on her makeup. (R.T. 3850, 4147)

The trio got to Jody's at about 6:30-7:00 p.m.. After about 15 minutes, they left and headed towards the southeastern area of San Diego where Cesar Harris lived. On the way, they stopped to get some beer. When they got near the complex, Cesar was waiting in an alleyway. Correll got out of the car, spoke briefly to him, and got back in, telling the others that they were going to meet Cesar at another location, about a half mile away. (R.T. 3851-3853, 4148)

When they reached the apartment complex, Correll got out of the car and told Nicole to wait there in the parking lot, While they were waiting, Kazi Cooksey, a friend of Correll's who lived nearby came up to the car. Kazi walked with pronounced limp on his left side and his left arm was weak as a result of having suffered a gunshot wound to the head. Nicole had met Kazi before and he got into the driver's seat and asked where Correll was. Once he was in the car, Nicole introduced him to Carolyn. (R.T. 3657-3658, 4057)

At the time he testified, Cesar was in custody on a domestic violence charge. (R.T. 4221) Cesar had known Correll for about five or six years. He also knew Kazi for about the same period of time. Cesar had been living in the Nogal street residence for about 18 months prior to the incident that gave rise to the charges for the murder of Mr. McDonald. (R.T. 4222) While he considered the relationship with Correll to be friendly, his relationship with Kazi was more problematical. According to Cesar, Kazi was already drunk when Correll arrived. (R.T. 4307) Moreover, according to Cesar "around that particular time period [Kazi] was taking meth...he was usually kind of violent." (R.T. 4307-4308)

When Correll returned to the car, he told Kazi to get out so that he could park it. Once the car was parked, Correll, Nicole, and Carolyn walked into the apartment complex to a barbecue area where Cesar and Kazi were waiting. By then it was sometime between 9:30-10:00 p.m. (R.T. 3859-3860) The group began drinking malt liquor, but after about an hour, they ran out. Correll, Kazi. and Nicole left to go to a liquor store. (R.T. 3862-3863)

Earlier, when they first arrived, Cesar had asked Correll to get Kazi out of there, to take him home. Cesar was concerned that Kazi had been drinking and that "'[a]round that particular time period he was taking meth...[and] any time that he took that medicine, he was usually kind of violent." (R.T. 4308) Consequently, when they left for the liquor store. Cesar thought that Correll was going to take Kazi home before they came back. (*Ibid.*)

3.

The Liquor Store Incident

The liquor store, Dr. J's, was about 4-5 miles from where Cesar lived. When they arrived at the parking lot in front of the store, Nicole recalled that Correll and Kazi "were beginning to get out of the car to go into the liquor store, and I kind of wanted to stay in the car, but Correll said, 'come in.' I said, 'okay.' We walked -- all three walked in." Kazi bought some brandy and some 40 oz. bottles of St. Ives, a malt liquor. (R.T. 3864-3866)

At that same time, **Darrell Milton**, a sailor, was also at Dr. J's with his shipmate, **Kevin Collins**. Mr. Milton had been drinking that night and by that time -- 1:30 a.m. -- he was too drunk to drive. "I was going to the store to purchase some cigarettes." Milton told the jury. "One of the guys hanging out in front of store asked for a cigarette. I told him, 'okay, I'll give

you one as soon as I go in and get me some. I'll come back out and I'll give you one when I came out.'" (R.T. 4288)

When Mr. Milton came out of the store and was heading towards his Jeep, the fellow who asked about a cigarette approached him and asked Mr. Milton why he disrespected him. When Mr. Milton tried to answer him, the man took a swing at him and Mr. Milton hit him back. A fight ensued and someone hit Mr. Milton from behind, knocking him to the ground. "I balled up and I fell to the ground. And that's when they all just came on and started stomping on me, kicking at me." (R.T. 4290) Mr. Milton did not get a good look at his attackers and was unable to make an identification. A wallet and gold chain were taken. (R.T. 4290)

When Nicole left the store with Correll and Kazi, she saw Mr. Milton standing in front of the store; he appeared to be drunk and was "mouthy." As Nicole described it, "[h]e was...you know, saying stuff. You know, 'who are you?' Stuff like that. You know, I was hoping he would stop because, you know, I mean, it's a touchy situation. You know, I didn't want anything to burst out." (R.T. 3867) As they were getting into the car, one or two of the persons at the nearby phone booth ran over and started to punch Mr. Milton. According to Nicole, Correll "put the bag down in the car...just bolted over there as well. And Kazi didn't bolt over there because he's a little bit slower than Correll, but Correll went over there, too, with the men that hit him." (R.T. 3870)

By the time Correll and Kazi reached Mr. Milton, he was already on the ground. According to Nicole, Correll kicked him "real hard" about four or five times. (R.T. 3870) From a kneeling position, Kazi repeatedly punched the man. (R.T. 3873) From where she was, Nicole could see the man lying on the ground; he was bleeding from the mouth and appeared to be

unconscious. (R.T. 3874) While Mr. Milton was on the ground, the men who originally attacked him went through the his pants pockets; Nicole did not see Correll nor Kazi do the same. (R.T. 3875, 4069)

At this point, Nicole said she screamed "Stop. Get in the car. Let's go." Correll stopped, but Kazi continued to hit Mr. Milton. Correll pulled Kazi off Mr. Milton and they all got in the car and left. (R.T. 3876) On the way back to Cesar's, there was no talk about money nor about what had just happened at D.J's liquor store. As Nicole remembered it, Correll "was just driving real fast." (R.T. 4069) Nevertheless, and contradictorily, Nicole also claimed to have heard Correll say, "'I should have -- you know, I should have checked his right pocket because I didn't because I'm left-handed." (R.T. 3878, 4099)

Before they got back to Cesar's, Correll, Kazi, and Nicole stopped at a gas station because they had forgotten to buy cups. (R.T. 3880) While they were there, Kazi harassed and then punched an older man in the face for no apparent reason. (R.T. 4000) Correll told him to knock it off and they all left. (R.T. 4001)

Although Mr. Milton had put the time he was at DJ's Liquors at 1:30 a.m., Nicole remembered arriving back at Cesar's residence at 11:00 p.m.. When they got back, everyone sat down at the picnic table and drank the liquor that had just been purchased and talked; there was no mention of the incident at the liquor store. (R.T. 3381, 3882) Nicole remembered feeling "buzzed," but not drunk; Carolyn got drunk. (R.T. 4003, 4156) Although Carolyn had come along for the purpose of meeting Cesar, she was attracted to Kazi instead. (R.T. 4062)

4.

Ricky McDonald Arrives at the Apartment Complex

On that same evening, after cashing his paycheck, Ricky McDonald went with **Eduardo Valdivia**, one of his friends from White Cap Contractors where he worked, to watch the San Diego Padres play baseball. (R.T. 4816) On the way to the game, Mr. McDonald stopped at his house, which was located near Cesar's place. He told Mr. Valdivia, who waited in the truck, that "he was going to drop some money off for his wife." (R.T. 4818) Mr. McDonald had an arrangement with his fiancee, **Jennifer Jones**, where he would give her his paycheck after he got paid and she would take care of the bills; if he came home and she was not there, the arrangement was that he would leave the money under the mattress. (R.T. 4881)

Mr. McDonald came back a few minutes later and the pair headed off to Qualcomm Stadium where they met some more friends from work. (R.T. 4818) Mr. McDonald paid for the first round of beers with a $20 bill. (R.T. 4819) After about four hours -- they did not stay to the end of what must have been a very long game -- Mr. McDonald and Mr. Valdivia left at about 11:00 p.m. and went to the home of a friend, Marc Brookamp, where they continued to drink. (R.T. 4820, 4824) At about 2:00 a.m., Mr. McDonald and Mr. Valdavia went to a Mexican restaurant in National City and got some food to take out. Mr. McDonald then dropped Mr. Valdivia at his house and headed home to the Nogal Street apartments.

Although they had been drinking all night long, Mr. Valdivia denied that Mr. McDonald was feeling the effects of the alcohol. "I saw him drinking the whole time and I never saw him drunk." (R.T. 4821) At the

time of his death, Mr. McDonald had a blood alcohol level of .20. (R.T. 4637)

Some 90 minutes after Correll and the others came back from the liquor store, Ricky McDonald approached the barbecue area. Cesar first became aware that McDonald had arrived when Mr. McDonald "was trying to pull his truck into the back, park his truck up against the wall, crashing." (R.T. 4233) "Once he got out, then he walked...from the back he started saying, 'who the fuck is that out there?'" (R.T. 4233)

In Cesar's opinion, Mr. McDonald was very drunk. Cesar had seen Mr. McDonald when he had had too much to drink on prior occasions and this time he agreed that Mr. McDonald was "a lot worse off in terms of his sobriety than [he'd] seen him any time in the past." (R.T. 4380) As Mr. McDonald approached the barbecue area, he "stopped him right there because I told him -- he was cussing coming up." (R.T. 4234)

> "[H]e was saying, 'why in the hell you over here making all this fucking noise, you know, by my house?' You know, and I told him, I said, 'it's not us making the noise playing no music and stuff. It's the apartment right here.' So I told him, I said, 'you don't even know the people here. You should apologize.' So he was like, 'okay, yeah. right.' So he apologized and he was, like, 'well, let me have some of the liquor." (R.T. 4234-4235)

Kazi refused. "I bought that liquor. You ain't getting shit." Mr. McDonald walked towards where Kazi was standing and matters became more confrontational. Kazi told Mr. McDonald to get out of his face and Mr. McDonald told him he didn't have to, he lived there. (R.T. 4235) Kazi replied, "mother fucker, I told you to get out of my face. I ain't going to tell you no more." At that point, Cesar tried to separate them. "I had them step back from each other, step back from each other and I went back over to the grill because my meat had started like flaring up." After a momentary respite, things heated up again. (R.T. 4237)

> "Kazi like stepped up to him and told him and said, 'hey, man. I told you to get out of my face.' Ricky told him, said, you know, 'well, I'm not worried about you doing nothing to me,' and then Kazi was telling him, 'well, you think I can't do nothing to you?' So he was like, 'well, you ain't going to do nothing.' So Kazi was like, 'get out of my face,' you know. 'Get out of my face.' " (R.T. 4238)

According to Cesar, a few more words were exchanged and Kazi punched Mr. McDonald in the face. Mr. McDonald leaned back and told Kazi "[t]hat didn't hurt. You better not do it again." (R.T. 4239-4240) Kazi punched him again and Mr. McDonald "staggered back like a couple steps, and then like lunged forward like, you know, like -- I don't know if he was catching his balance or if he was going -- if he was going to hit Kazi or what..." (R.T. 4240-4241) As Mr. McDonald lunged forward, Correll stepped up from behind, leaned over Kazi's shoulder, and punched Mr. McDonald in the face. (R.T. 4241)

Mr. McDonald fell back into the bushes; he did not appear to be conscious, but he was breathing. According to Cesar, Kazi stood there while Correll kicked Mr. McDonald a few times. Cesar was standing back and although he could not tell just how forceful the kicks were, "it didn't seem like, you know, it was much effort. He didn't really put much effort in." (R.T. 4242, 4399) Cesar estimated that Correll kicked him six times in the chest area; in statements given shortly after the incident, Cesar said Correll kicked him three times. (R.T. 4242-4244; 4316) At the preliminary hearing, Cesar described the kicks as "short, little kicks." (R.T. 4317) In any event, as soon as Cesar saw Correll kicking Mr. McDonald, he went over put his hand on Correll's chest and told him that he had enough; Correll stopped. (R.T. 4245)

About 15-20 minutes later, Cesar saw Kazi walk over to where Mr. McDonald lay on his back, apparently unconscious, get down on his knees,

and start punching Mr. McDonald with his right hand.[2] "I didn't actually count them, but it was a lot of punches." Cesar pulled Kazi off Mr. McDonald and told him that he needed to "cool out. You just need to let Ricky get up and go in the house." (R.T. 4246-4247)

They all went back to the table and continued to drink. Shortly thereafter, Kazi grabbed the liquor bottle and walked away. Cesar thought he was going home, but instead, Kazi went over to where Mr. McDonald was lying on the ground, got on his knees, and started hitting Mr. McDonald on the head with the bottle. (R.T. 4248-4249) Both Cesar and Correll were surprised at this turn of events. Kazi hit Mr. McDonald with the bottle 12-15 times and, while pummeling him, said "I'm going to kill you, mother fucker." (R.T. 4352)

After a while, Cesar went over to were Kazi was, "grabbed his arm and lifted him up by his waist and like turned him around and walked him toward the sidewalk." (R.T. 4250-4251)

Contrary to all of his previous statements and testimony, on direct examination while testifying for the prosecution, Cesar claimed that after he pulled Kazi off, he saw Correll walk over to where Mr. McDonald lay and stomp him few times in the head/jaw area. (R.T. 4251-4252) On cross-examination, Cesar admitted that in all of his previous statements, including one made as recently as a few days before his testimony, he took the position that Correll did not hit Mr. McDonald after Kazi hit him with the bottle, that the last act of violence he saw inflicted on Mr. McDonald was when Kazi hit him with the bottle. (R.T. 4297-4302)[3] Most

---

[2] By way of contrast, Nicole estimated that the time between when Correll first hit Mr. McDonald and the time Kazi started hitting him with a bottle to be 45 seconds to a minute. (R.T. 3900)
[3] See e.g., Px. 411

significantly, contrary to his testimony on direct, on cross-examination, Cesar agreed that it was his present recollection "that the last violence inflicted on Ricky McDonald was Kazi Cooksey striking him with the bottle." (R.T. 4399)

Similarly, although Cesar testified at trial that Correll "stomped" on Mr. McDonald in the head area, in all of his previous statements and testimony, Cesar had stated that they were kicks, not stomps and that they were to the shoulder area, not to the head. (R.T. 4317-4322) At trial Cesar attempted to explain the discrepancy by noting that Mr. McDonald "was behind a bush, like, up to his knees..."

> "Q. So you couldn't see what part of the body Mr. Thomas's foot made contact with?
>
> A. That's why I said the shoulder area.
>
> Q. Even right now, as you're thinking about it, you don't know what part of the body it touched, do you?
>
> A. That's why I said the shoulder area.
>
> Q. Am I correct, sir, you don't know what part of the body it touched? Is that true? ...
>
> A. I only knew after the fact." (R.T. 4330)

After Kazi beat Mr. McDonald with the bottle, Cesar saw Correll pull Mr. McDonald's pants down; when he asked Correll why he was doing that, Correll responded "just to show his ass." Although Cesar seemed to recall that Correll and Kazi were pulling Mr. McDonald's shoes off, "as far as I knew, he had his shoes on when I left....I think he [Correll] took his shoes

---

> "Q. [A]fter Mr. Cooksey started...striking Mr. McDonald with the bottle, did you see Mr. Thomas go over and do any more violence to Mr. McDonald?
>
> A. No."

off and put it back on." (R.T. 4254-4255) At trial, Cesar claimed that when Correll pulled down Mr. McDonald' sock, he found his billfold. (R.T. 4259) At the preliminary hearing, however, Cesar testified that Correll did not look into Mr. McDonald's socks. (R.T. 4356)

Nicole also saw a portion of the incident. She first became aware of Mr. McDonald when, from about 20-25 feet away, "[h]e said something loudly....All I remember was hearing--and he sounded drunk --'What are you guys doing over here? It's late in front of my apartment. What the hell is going on?'" (R.T. 3883, 4006) When he spoke those words, Mr. McDonald was not actually inside the barbecue area, but about 9-12 feet away from Nicole; at that time, Correll and Kazi were seated at the picnic table. (R.T. 3884)

Kazi then jumped up and approached Mr. McDonald. At trial, Nicole testified that she wasn't sure who hit McDonald first; she said she did see Kazi push Mr. McDonald several times. (R.T. 3890) In her statement to the police, however, Nicole recalled that the first blows were struck when Kazi punched Mr. McDonald several times in the head. (R.T. 4014-4015) At trial, Nicole said that McDonald stumbled backwards when Kazi hit him; she told the police that McDonald "hit the ground" when Kazi hit him, which she admitted was different from her trial testimony. (R.T. 4015)

When Correll hit Mr. McDonald, Nicole turned away. "When that happened, he fell, Carolyn started getting upset. I was sitting. She had come over to sit next to me after Correll got up from the table and did that." (R.T. 3895) Carolyn started crying. (R.T. 4156) "Cesar came over to me. He was trying to pull me away because he saw I was upset." (R.T. 4157) Carolyn never got out of her seat to see what was going on. (R.T. 4162)

Nicole recalled seeing Correll kick Mr. McDonald four or five times on his right side, but from where she was seated with Carolyn, she did not have a clear view of Mr. McDonald after he was knocked to the ground. "I could see, like, his feet from where I was seated. You know, but bits and parts of him." (R.T. 3898) Nicole also saw Kazi holding the bottle of brandy by the neck and striking Mr. McDonald. At trial, she said Kazi struck him at least eight to ten times; when she spoke to the police not long after the incident, she said it was at least twenty times. (R.T. 3900, 4020) Although she thought that the blows that she saw were to the area of Mr. McDonald's head, she conceded that they could have also hit his throat or neck. (R.T. 4021-4022)

Nicole got up from where she was sitting and walked towards where Kazi, Correll and Mr. McDonald were; as she walked over, Kazi was continuing to strike Mr. McDonald with the bottle while he lay face down; she never saw Mr. McDonald lying face up. (R.T. 9303) Nicole denied telling Miriam Rodriguez, her cellmate at the county jail, that she too had kicked Mr. McDonald while he lay on the ground. (R.T. 4033)

Nicole claimed to have seen Correll stomping[4] on Mr. McDonald's back. "I didn't see him kick him directly in the head, though, or anything like that." (R.T. 3904) According to Nicole, the whole incident, from the first punch to the last, took about five to ten minutes. (R.T. 3907) Nicole also saw Correll strip Mr. McDonald, but did not see if Mr. McDonald was wearing socks. Correll did not appear to be searching through Mr. McDonald's clothing. (R.T. 3909-3910) Correll did slap Mr. McDonald on his bare buttocks. "He was smiling, you know, like I could tell he was doing

---

4 "May the record reflect that the witness has stepped out of the witness box, lifted her left foot, bend at the knee, and then would slam her foot to the floor after each bend of the knee? THE COURT: Yes." (R.T. 3904)

that to him to -- you know, just for disrespect," (R.T. 3913-3914) Nicole saw Correll take Mr. McDonald's shoes and hat and bring them to the car. (R.T. 3915) "I helped Kazi to the car because he acted weird, like he couldn't walk, you know....[Kazi was acting] confused, like he almost didn't know where he was." (R.T. 3916)

Before leaving the area, Nicole walked over to where Mr. McDonald was. He was lying face down, making snoring noises. (R.T. 3920) According to Nicole, Correll took about ten minutes to get back to the car. "He got in the car and...I go, you know, 'what were you doing taking so long?' and he said, '[H]e was waking up. He was acting like he was going to wake up...' [and] that he took care of that." (R.T. 3919)

According to Cesar, Correll and the others left the area about ten minutes after the last blow was inflicted on Mr. McDonald. Before they left, Cesar gathered up all the bags in the area, including those that Mr. McDonald had brought with him, and brought them to Nicole's car. (R.T. 4256-4257) After he left Nicole and Carolyn in the car, Correll went back and attempted to help Cesar take his grill back; when it fell, Cesar told him to leave and just go. (R.T. 4258) When Cesar last saw Mr. McDonald, he was lying face down. (R.T. 4259)

Cesar admitted that he had *13* prior felony convictions: theft, assault, 9 counts of aggravated assault, possession of cocaine for sale, and evading a police officer[5]. (R.T. 4364-4366) He also admitted that he was inebriated at the time of the incident. (R.T. 4372)

5.

The Aftermath

---

[5] Penal Code §2800.2.

After they left the housing complex where Cesar lived -- Nicole estimated the time that they left the complex as being 12:30-1:00 a.m.,-- Correll, Nicole, Kazi, and Carolyn headed towards the beach -- Nicole thought it was South Mission Beach -- with Correll driving Nicole's car. According to Nicole, on the way there, Correll and Kazi were "laughing and saying, you know, 'did you see that what we did'" you know, 'we got him,' all the stuff like that." (R.T. 3923) When asked about any slang terms that were used by Kazi and Correll, Nicole recalled that

> "Kazi was telling Correll that -- you know, in a joking manner, like "M 1," you know, like "you got your stripes" or whatever. Something like that.
>
> Q. M 1?
>
> A. Yeah....
>
> Q. Okay. And what was your understanding of what that meant?
>
> A. Murder
>
> Q. Murder one?
>
> A. Uh-huh, yes." (R.T. 3924)

When she spoke to the police a few weeks after the incident, however, Nicole only remembered Correll telling Kazi "just like we beat that nigger. Did you see that, all this shit. we beat that nigger down. We beat his ass." Nicole did not tell the police anything about a conversation about "M1" even though the police asked her the same question that the prosecutor had asked her at trial, namely whether there was any slang being used to describe what had happened (R.T. 4044-4045)

When questioned about what sentence she hoped to get as a result of testifying for the prosecution, Nicole stated that she was hoping that she

would get credit for time served, Nicole admitted that she would do "anything it takes" to get her children back. (R.T. 5211)

After she was arrested, but before she made a deal with the prosecution, Nicole sent Carolyn a letter telling her that they needed to "make sure to get our stories straight." (R.T. 4131)

Although at trial, Carolyn seemed to recall mention of "M1" in the car on the way to the beach, at the preliminary hearing, Carolyn testified that she first heard that phrase at another time, some time *after* the evening she went to the beach. (R.T. 4161, 4201-4202)

When they arrived at the beach, about an hour after they left the apartment complex, Correll, Kazi, Nicole, and Carolyn sat in the car for a while and talked. Kazi and Carolyn then left the car and went off to have sex somewhere on the beach; Correll and Nicole had sex in the car. (R.T. 3927-3928)

The four left the beach in the early morning hours, shortly after the sun came up, and they went back to the apartment complex. They pulled into the same parking lot where they had parked before and saw that there was yellow police tape around the barbecue area and there were police cars everywhere. Correll and Kazi got out and Nicole drove away and went back to Carolyn's house in El Cajon. (R.T. 3931-3933)

Jennifer Jones had been Mr. McDonald's fiancee since 1989. They lived together along with Ms. Jones' two children. (R.T. 4880) Early in the morning of May 18th, Ms. Jones got up and realized that Mr. McDonald had not come home. She knew that he had gone to the Padres game the night before. (R.T. 4879, 4885) When she left the apartment to go to work, the first thing she saw as she came down the staircase was Mr. McDonald's

sock. She turned around and she saw Mr. McDonald lying on the ground, with no clothes other than his shirt pulled up under his arm. (R.T. 4886)

Mr. McDonald did not usually carry his wallet with him; it was his habit to leave it in the truck. (R.T. 4888) She never recovered his wallet. (R.T. 4893)

Bradley Brooks, a neighbor of Mr. McDonald and Ms. Jones, heard her screaming "my baby" that morning. "After the third time she said it, I went outside to see if maybe her child had fell from the top of the steps. As I came out a little more, I seen her husband -- boyfriend laying out in the side of the flower bed." (R.T. 4450) He went downstairs and, when he saw Mr. McDonald lying there, he put an article of clothing, some gray shorts, on top of Mr. McDonald to cover the lower half of his body. (R.T. 4451-4452) Mr. Brooks told the police that when he first saw Mr. McDonald, he was totally naked, except for the socks he was wearing. (R.T. 4456) On redirect examination, upon viewing a picture of Mr. McDonald's body, Mr. Brooks then remembered that Mr. McDonald did not have on any socks. (R.T. 4457)

B.

McDonald Homicide - Police Investigation

Officer **Robert Hawkins** of the San Diego Police Department was on routine patrol in the southeast area of San Diego in the early morning hours of May 18, 1996, when he got a call to go to the Nogal Street housing complex. "As I approached the building area, I saw a male laying in the bushes." (R.T. 4431) There was an article of clothing covering his groin area. (R.T. 4437)

> "When I first got there, paramedics had arrived just before me. And we approached them at the same time, you know, as they

> were around the body. And they immediately told us that the person was deceased." (R.T. 4432)

When he found out that Mr. McDonald was dead, since there was nothing they could do for Mr. McDonald, Officer Hawkins asked the half dozen or so paramedics to leave the area. He put up the crime scene tape. (R.T. 4432-4434) During the two hours that he was at the scene, there were approximately eight to ten officers present. (R.T. 4436)

Alicia Lampert, a lieutenant in the San Diego Police Department, was a sergeant in the homicide squad in May of 1996. She went to the scene in the early morning hours of May 18th and supervised the on-site investigation. (R.T. 4461-4463) During a canvas of the area, she spoke to someone who identified himself as Bill Johnson. "When I saw him he was just wandering down on the sidewalk area in the complex area." After appellant was arrested, she realized that he was the person who identified himself as Bill Johnson. (R.T. 4464-4465)

Later in the investigation, on June 11, 1996, Sgt. Lampert did a tape recorded interview with Carolyn Lanham. In that interview, Carolyn stated that after the homicide, on the way to the beach, Correll and Kazi were laughing and bragging about what had happened, repeating the phrase "M-1." (R.T. 4473, C.T. 16713-16714) Carolyn did not tell her, as between Kazi and Correll, who said what; she just used the word "they." (R.T. 4483)

Det. **Sandra B. Angotti** was also at the scene on May 18th and she was assigned to "working the crime scene...working with a forensic specialist to identify, photograph, collect, measure items of evidence found at the scene." (R.T. 4487)

> "As soon as our patrol officers arrive, they protect and cordon off the area so it cannot be disturbed. Once my forensic specialist and I arrive, our first job is to document with

photographs overall how the crime scene looked before we go into and disturb anything or collect anything." (R.T. 4490)

Mr. McDonald's body was lying on his back, face up when Det. Angotti first arrived. (R.T. 4544) A piece of tree bark found near the body appeared to have a patterned blood stain on it. (R.T. 4499) A comparison was made between the pattern on the bark and the pattern of the shoes that Correll was wearing on the day of his arrest. (R.T. 4583) Although there were certain similarities between the patterns, it could not be stated with any certainty that Correll's shoes made the pattern on the bark. (R.T. 4574)

DNA testing of the shoes Correll was wearing on the day he was arrested revealed that four blood stains on the shoes were consistent with the blood having come from Mr. McDonald; two of those stains had a mixture of DNA coming from more than one individual and Correll could not be excluded as a donor. (R.T. 4851-4854)

Mr. McDonald's underwear was found near his left hand as were his keys. (R.T. 4500) Four socks were found; "a single sock...was east of his left foot....two socks [were also] east of his left foot and...a little bit southeast of the single sock. and then on the other side of the body near the right foot was a fourth sock, a single sock." (R.T. 4501) Some of the socks had blood stains on them. (R.T. 4503)

Det. Angotti did not find any shoes that Mr. McDonald might have been wearing; she later found out what type of shoes Mr. McDonald was wearing when, a few months after the homicide, Ms. Jones showed her an empty shoe box indicating that Mr. McDonald's shoes were Nike Air Screech. (R.T. 4515-4518)

The bottle of brandy used to strike Mr. McDonald was found in some thorn bushes to the west of the body. (R.T. 4505) Although two latent

prints were removed from the bottle of brandy, they were unusable. (R.T. 4567)

Personnel from the medical examiner's office came to the scene at 11:40 a.m. and started bagging the body 10 minutes later; at 12:15 p.m., the body was removed from the scene. (R.T. 4536) No attempt was made to quantify the amount of blood that was visible underneath Mr. McDonald's head or determine how much blood had seeped into the mulchy soil underneath his head. (R.T. 4540)

C.

McDonald Homicide - Cause of Death[6]

Unlike most capital cases, cause of death was a major issue in this case, with each side presenting expert testimony to support their view of the cause of Mr. McDonald's death. Appellant took the position that the blows to the head inflicted by Kazi with the brandy bottle was the cause of death. The bottle of brandy that Kazi used to hit Mr. McDonald weighed 2.1 pounds. (R.T. 5438) DNA testing established that the blood of Mr. McDonald had the same genetic markers as the blood on the bottle, "meaning that he could be the source of the blood." (R.T. 5426)

Kazi took the position that the fracture to the larynx, allegedly caused when appellant kicked Mr. McDonald, was the cause of death. The

[6] Unlike most capital cases, cause of death was a major issue in this case, with each side presenting expert testimony to support their view of the cause of Mr. McDonald's death. Appellant took the position that the blows to the head inflicted by Kazi with the brandy bottle was the cause of death. Kazi took the position that the fracture to the larynx, allegedly caused by appellant's kick, was the cause of death. The prosecution took the position that it was one or the other or both. In an effort to make this testimony more comprehensible, appellant will present all of the testimony regarding the cause of death under one heading, specify what side called what expert.

prosecution took the position that it was one or the other or both. In an effort to make this testimony more comprehensible, appellant will present all of the testimony regarding the cause of death under one heading, specifying which side called what expert.

Dr. Brian Blackbourne, a forensic pathologist and the county medical examiner for the San Diego County, testified for the prosecution concerning the autopsy and the cause of death. Although he was not the pathologist who actually conducted the autopsy -- the doctor who did the autopsy, Dr. Terry Haddix, had since left the office and the area -- Dr. Blackbourne was present as the witnessing pathologist and presented Dr. Haddix's findings to the jury. Blackbourne testified that he "signed the report, but Dr. Haddix is the one who dictated it." (R.T. 4601-4606, 4610, 4654)

> "I did not stand over her shoulder the whole two hours or two and a half hours, but rather came back and forth for whatever else I was doing that day, and saw the external injuries and saw the internal injuries." (R.T. 4640)

The only independent recollection Dr. Blackbourne had of the autopsy was of the injuries to Mr. McDonald's face. (R.T. 4639) Dr. Blackbourne reviewed Dr. Haddix's report but never examined any of the tissues that were preserved from the autopsy. (R.T. 4640)

Blackbourne testified that Mr. McDonald was six feet tall and weighed 172 pounds. (R.T. 4621) At the time of his death, Mr. McDonald had a blood alcohol level of .20. (R.T. 4637) For a man of Mr. McDonald's size, that would translate to 11 one ounce drinks in his system at the time of death. (R.T. 4735)

External examination of the body revealed that there was a one and one half inch laceration on the top right side of the head. There was a large area of hemorrhage beneath the skin under the laceration; the injury is

consistent with having been caused by being hit with the brandy bottle. (R.T. 4611-4612) The force that caused this injury could have been fatal. (R.T. 4704)

On the right lower forehead, there was a five inch by three inch area of contusions and abrasions. (R.T. 4614) "Over the mid forehead there was an area of small abrasions, superficial abrasions. And then over the left side of the nose, the left cheek, going down over the left side of the jaw there was another large area [of abrasions]." (R.T. 4615)

There was a one by one eighth inch abrasion on the neck, contusions on both shoulders, and a series of abrasions on the left and front side of the chest. (R.T. 4615) In addition, there were various abrasions and contusions on Mr. McDonald's abdomen, thighs, and back. (R.T. 4618)

Internal examination revealed that there were no fractures to the skull. There was a thin layer of subdural hemorrhage -- between one and two millimeters thick -- over both the right and left sides of the brain and subarachnoid hemorrhage over both spheres of the brain. (R.T. 4625)

Examination of the neck area revealed hemorrhage in the sternomastoid muscles on the side of the neck, and in the strap muscles located in front of the larynx. There was a vertical 2.5 centimeter fracture to the thyroid cartilage, just to the right of the Adam's apple. (R.T. 4630-4631, 4634) Dr. Blackbourne explained that the function of the thyroid cartilage was to support the airway passage through the neck. (R.T. 4634)

> "The air goes through the thyroid cartilage to get down to the lungs. And when we swallow this whole area moves, as we know, when we swallow. The thyroid cartilage goes up and down, and that allows the airway to be protected and the food to go down, slide down behind it into the esophagus on the way down to the stomach." (*Ibid.*)

Dr. Haddix opined, and Dr. Blackbourne concurred, that the cause of death was "blunt force injuries of the head and neck." (R.T. 4636) Dr. Blackbourne could not determine whether death was caused by the injury to the head alone, to the neck alone, or by a combination of both injuries. (R.T. 4722)

> "The cause of death, when we put it on the death certificate we don't usually pick one injury and say that's what caused the death or another injury and that's what caused the death. If there are two potentially lethal injuries, we put them both on the death certificate, as we did in this case, blunt trauma of head and neck." (R.T. 4723)

The autopsy did not mention the presence or absence of brain swelling resulting from the hemorrhages. (R.T. 4645) No photograph was taken of the brain. (R.T. 4672) Brain swelling can cause death because "the brain controls the heart rate and controls the breathing." (R.T. 4673) When the brain swells, it puts pressure on the medulla -- the brain stem -- the part of the brain that controls heart rate and breathing. (R.T. 4675) Swelling of the brain would create pressure that would cause the heart rate and breathing to slow down. (R.T. 4673)

> "The lungs would begin to get congested, probably get some edema fluid in the lungs. The breathing would slow down and they would die...if the brain is swollen, it's no longer functioning...those stimulus (sic) it sends down to breathe, for the heart to beat, is removed and the body dies." (*Ibid.*)

The best way of determining whether or not there is brain swelling is to look for flattening of the outer surface of the brain. (R.T. 4659) Although there are other indications of brain swelling, such as cerebella or tonsilar herniation, where the lower portion of the brain is pushed through the hole at the bottom of the skull where the spinal cord meets the brain, it is possible to have swelling of the brain without such herniation. (R.T. 4660)

The surface of the brain is made up of "gyri" which are little mountains and "sulci" which are valleys. (R.T. 4659)

> "If the brain swells up inside the skull, those mountains are flattened out and it becomes more flat with the -- a little tiny thing, flat, like this. And one can see that with the naked eye when one takes the skull cap off. And to me, that's a very important time to make that determination of brain swelling." (*Ibid.*)

According to Dr. Blackbourne, evidence of brain swelling can also be detected by examining sections of the brain under a microscope in some cases. (R.T. 4666-4667) Dr. Blackbourne examined the slides of brain tissue taken from Mr. McDonald's brain and could find no evidence of swelling. This does not necessarily mean that there was no brain swelling because, in Dr. Blackbourne's estimation, such microscopic evidence would be lacking in about half of the instances were there had been fatal brain swelling. (R.T. 4667) Since Dr. Blackbourne did not know which areas of the brain the two slides he examined were taken from, he conceded that it was possible that other areas of the brain could have been swollen, even though the tissues on the slides he examined revealed no evidence of brain swelling. (R.T. 4671) Dr. Blackbourne noted that Mr. McDonald's brain weight was slightly less than normal. but that brain weight is not necessarily an indicator of whether or not there was brain swelling. (R.T. 4783)

Based on the fact that there were visible contusions to the body, Dr. Blackbourne estimated that Mr. McDonald must have lived at least ten to fifteen minutes after the blows were inflicted because it takes that long for the contusions on the body and brain to become visible. Because the lungs were filled with fluid and weighed twice as much as normal, Dr. Blackbourne estimated that Mr. McDonald most probably lived for an hour or slightly more "due to the fact that the lungs...[were] congested...and that would

occur as the respirations began to slow down, the fluid began to accumulate in the lungs." (R.T. 4704-4705, 4704)

The laceration to the top of the head could have caused considerable bleeding initially. Ordinarily, that bleeding would last for 15-20 minutes. However, if the clotting ability of the body has been compromised, such an injury can bleed for a longer period of time. (R.T. 4737) Dr. Blackbourne was unable to quantify the loss of blood. (R.T. 4803)

Mr. McDonald had some liver damage. "[H]e had the first stage of alcoholic liver disease, which is fatty metamorphosis of the liver... Cirrhosis is the second or terminal phase." (R.T. 4731-4732) Given that the liver controls the clotting functions of the blood, liver damage can impair the clotting function of the blood. (R.T. 4731) Dr. Blackbourne agreed that Mr. McDonald's liver condition could have impaired the clotting ability of his blood. (R.T. 4804)

Dr. Blackbourne initially agreed that Mr. McDonald could have died from loss of blood. (R.T. 4731) Later in his testimony, however, Dr. Blackbourne stated that there was "no indication of sufficient bleeding to cause his death..." (R.T. 4782) However, Dr. Blackbourne also stated that he couldn't "totally rule it out, no." (R.T. 4804)

As previously mentioned, the thyroid cartilage of the larynx was fractured; the fracture spanned the full length of the front of the cartilage. (R.T. 4743) This kind of fracture can be fatal if it blocks the airway for a minimum of three to five minutes. A fracture of this type does not necessarily block the airway and the autopsy report indicated that the airway was open when it was examined. (R.T. 4745-4748) If the airway had been closed by the fracture, one would expect to find more than minimal

swelling in the airway; there was no bleeding in Mr. McDonald's airway. (R.T. 4749)

Nevertheless, Dr. Blackbourne would not rule out the possibility that obstruction of the airway could have caused death. "There's elasticity in those tissues and the larynx [could] be flattened out and come back to its more normal state without causing hemorrhage in the mucosa or the lining of the rest of the larynx." (R.T. 4753) Dr. Blackbourne was of the opinion that either a blow from the brandy bottle or a kick could have caused the fracture of the larynx. (R.T. 4763-4764)

When, in an attempt to minimize the significance of the injuries caused to Mr. McDonald's head by Kazi's repeated blows with the brand bottle, counsel for Kazi tried to establish that the head injuries were not the cause of death, Dr. Blackbourne noted that "[t]he man is dead. His injuries are to his head and to his neck. That's what we attributed the death to." (R.T. 4789) When counsel persisted with that line of inquiry, Dr. Blackbourne responded,

> "Let me explain it another way. The brain is our computer, so to speak. It does a lot of complicated things. If you take a computer and drop it off your second-floor bedroom window onto your cement driveway, you don't expect it to work and it probably won't. [¶] This brain has been traumatized. They've got 45 areas of the scalp that have hemorrhaged under them. We have got subdural, subarachnoid contusions of the brain. This brain has been traumatized at least as much as dropping it off the second-floor window." (R.T. 4789-4790)

Dr. John Eisele,[7] a forensic pathologist, was called by appellant to testify regarding the cause of Mr. McDonald's death. Although at the time of trial Dr. Eisele was in private practice, he had previously, worked as a deputy medical examiner for the County of San Diego for 12 years. Within

[7] (R.T. 5506-5633)

the past year, he had gone back to work for the county on a part time basis "to help them out with their autopsy load." (R.T. 5506-5507) In preparation for his testimony, Dr. Eisele reviewed the autopsy reports and the crime scene photos and reports, he examined the microscopic slides that were prepared in this case, viewed the autopsy photographs, and examined tissue that was preserved from the autopsy, including Mr. McDonald's larynx. (R.T. 5515-5516)

After looking at the aforementioned material, Dr. Eisele concluded that the injuries to Mr. McDonald's neck did not cause his death. (R.T. 5517) Considering the various ways that injuries to the neck could cause death, Dr. Eisele ruled out strangulation. He noted there was no indication in the autopsy report that there were petechiae near Mr. McDonald's eyes. Petechiae are little red spots, or pinpoint hemorrhages, caused by bursting capillaries when a person's neck is squeezed, as in when they are choked. (R.T. 5518)

> "Often when the neck is squeezed, the veins draining the head...[w]ill be blocked, so there's a buildup of pressure in the vessels in the face. Particularly the lose tissue of the eyelids, a lining of the lips, the capillaries will break, and most of the time when a person's neck is squeezed, there will be petechiae or pinpoint hemorrhages in those areas." (R.T. 5518-5519)

Second, Dr. Eisele concluded that the injuries to the neck did not cause death because even though the thyroid bone of Mr. McDonald's larynx had been fractured, that fracture would not, in and of itself, cause death. "[U]nless the larynx was flatten[ed]...out, the airway would not be occluded..." (R.T. 5523) Dr. Eisele observed that the autopsy report reported that the airway was not occluded at the time of the autopsy. Although in theory, the airway could have been blocked at the time of death and opened up when the pressure was released after death, if that had happened, there

would have been a great deal of bleeding in the airway. Given that it would require 3 to five minutes of constant blockage of the airway to cause death, if that had happened, at the autopsy, one would expect to see evidence of "a significant amount of hemorrhage in the lining of the airway" because of the distortion caused by that pressure. (R.T. 5524)

Dr. Eisele ruled out the thyroid fracture as a cause of death because there was no significant hemorrhage associated with it. Dr. Eisele examined Mr. McDonald's larynx, which had been preserved at the autopsy, and found only one pinpoint hemorrhage in the lining of the airway. "[I]f the larynx were distorted enough to occlude the airway, there would be much more hemorrhage than that." (R.T. 5520-5522) Dr. Eisele concluded that "the fracture itself [was] not fatal." (R.T. 5538)

> "If it were displaced, if it were crushed so the airway were occluded it could be fatal. If there was enough hemorrhage and swelling to occlude the airway, it could be fatal. The fracture itself and hemorrhage was not there, [it] was not fatal." (R.T. 5538)

Dr. Eisele confessed that the cause of death was somewhat perplexing because there was "critical information that's lacking." (R.T. 5584) "I think he, basically, died from his head injuries, but trying to put all of the information together is a little bit difficult." (R.T. 5224) Specifically, Dr. Eisele noted that "[1] there's no description of the amount of blood on the ground under his head,...[2] there's no description of brain swelling or of the effects of brain swelling or the lack of it...[3] [and Dr. Haddix] fail[ed] to describe the presence or absence of petechiae in the eye." (R.T. 5584-5585)

If Dr. Eisele had written the autopsy report, he would have ascribed "blunt injuries of the head" as the cause of death. (R.T. 5525) One head injury that contributed to the cause of death was the laceration on the top of Mr. McDonald' skull. "[T]he laceration was a fairly deep laceration, and I

believe it could have bled profusely." (R.T. 5526) Dr. Eisele opined that the propensity of scalp wounds to bleed heavily was potentiated by Mr. McDonald's liver condition which could have interfered with his blood's ability to clot:

> "The scalp was very vascular, and typically scalp wounds do bleed in a healthy person. They'll clot after a certain time and bleeding will stop. In Mr. McDonald's case he had some changes in his liver, probably alcoholic liver disease fatty change. While you can't document it postmortem, quite often this kind of liver disease will cause deficiencies in the proteins that cause the blood to clot. So they will not clot properly and they will bleed." (R.T. 5526-5527)

Dr. Eisel noted that the photographs taken at the scene indicated that there was a pool of blood underneath Mr. McDonald's head which would be consistent with extensive bleeding from the scalp laceration. (R.T. 5527-5528) He concluded that the nature of the scalp wound was consistent with having been caused by blows with the brandy bottle and inconsistent with having been caused by the running shoes Correll was wearing that evening. (R.T. 5532-5533) "It's going to take a fairly hard edge to cause that laceration, and the shoes just don't have that edge." (R.T. 5533)

Another aspect of the head injuries that contributed to the cause of Mr. McDonald's death were the contusions to the brain. When a person whose brain is not injured suffers an injury that causes major blood loss, the brain takes defensive measures. The brain "will constrict the [blood] vessels to keep the blood pressure up, or it will typically cause the vessels...in the extremities to constrict so that the blood gets to the essential part of the body, the important part of the body." (R.T. 5530)

> "[Mr. McDonald] had bruises on the brain. We know he lost consciousness. We know he had subdural hemorrhage which is over the surface of the brain. And I think those might well [have] interfere[d] with these mechanism (sic) the body uses to compensate for blood loss." (R.T. 5531)

Addressing the issue of whether brain swelling could have contributed to Mr. McDonald's death, Dr. Eisele noted that "brain swelling [is] commonly the cause of death in people with brain injuries." (R.T. 5543) The fact that there was no tonsilar herniation does not mean that there was no brain swelling. "There are other areas that can herniate." (R.T. 5540)

> "Specifically, on this diagram there's a membrane called the pentorium which separates the cerebral hemispheres from the cerebellum, which is the lower part of the brain. And there's an edge of the pentorium here, and if the top part of the brain swells, there can be pentorial herniation or uncus herniation. Uncus is this part of the brain. And that likewise can cause distortion of the brain stem. And it's also possible to get significant amounts of brain swelling without actually having herniation." (*Ibid.*)

Uncal herniation caused by swelling of the brain could cause death; repeated blows with the two pound brandy bottle "would be a very good cause for brain swelling." (R.T. 5541) Dr. Eisele agreed that the absence of evidence of brain swelling on the microscope slides is not conclusive because "you can get a significant amount of brain swelling and not have it show up microscopically." (R.T. 5542)

> "Given the injuries that I know of and the circumstances that I know of, I think there may well have been brain swelling in this case." (R.T. 5591)

In Dr. Eisele's opinion, the concurrent combination of both brain swelling and the loss of blood had more potential for causing death than did each factor did individually. "The blood loss would complicate the brain swelling and the brain swelling would complicate the response of the blood loss." (R.T. 5544)

> "I'm saying it's possible to bleed to death in a scalp laceration of this sort....[G]iven the lack of information, I can't be sure whether it's a scalp laceration or brain swelling or some combination of the two." (R.T. 5593)

Dr. Paul Wolf, a pathologist and the director of autopsy at the Veteran's Administration Medical Center in San Diego was called by codefendant Cooksey to testify regarding the cause of death. (R.T. 5669-5670) He testified that he was not a board certified forensic pathologist and had never performed an autopsy. (R.T. 5688-5689) Nevertheless, Dr. Wolf opined that Mr. McDonald died of "low oxygen flow [due] to the airway obstruction...He died of blunt force injury to the neck." (R.T. 5671-5672)

> "[The blunt force] obstructed the airway due to fracture of the thyroid cartilage and there was an abundance -- according to Dr. Haddix, abundant hemorrhage in the muscles and the soft tissues of the neck." (*Ibid.*)

Dr. Wolf conceded that the hemorrhage described was not inside the airway but "around the thyroid cartilage external to the airway." (R.T. 5711) Moreover, although he admitted that Dr. Haddix's description of the airway was deficient and that in order to make a definitive analysis, it would be best to look at the airway itself, Dr. Wolf did not examine the preserved larynx specimen kept at the medical examiner's office. (R.T. 5715-5716)

In Dr. Wolf's opinion, the fact that Dr. Haddix did not mention brain swelling meant that there was none. "As a pathologist...if there's a positive finding, you're committed to mentioning it. And if there had been brain swelling, certainly Dr. Haddix would have mentioned it in the autopsy report." (R.T. 5676)

Dr. Wolf also discounted the possibility that blood loss from the laceration on the top of the skull contributed to the cause of death. "[T]here was only about 50 mill[iliters] of blood beneath the scalp...that's a very minor amount of blood. I think there was some blood, of course, at the death scene...but the suggestion was that it wasn't very much. So I don't

think this individual, Ricky McDonald, died of hemorrhage." (R.T. 5676-5677)

Dr. Wolf conceded that he did not really know just how much blood Mr. McDonald lost. (R.T. 5700) Apparently Dr. Wolf based his opinion in part upon the incorrect assumption that Mr. McDonald's head rested on a hard, non-porous surface, an error that was probably engendered by his failure to look at any photos of the scene. (R.T. 5701) Undeterred, when asked to assume that the surface on which Mr. McDonald's head lay was a "soft, absorbent, porous-type surface," Dr. Wolf inexplicably stood by his assertion that the blood loss was minimal. (*Ibid.*)

Having written extensively on the subject, Dr. Wolf considered himself an expert on liver disease. Based upon his review of the microscopic slides, he did not think that the fatty changes to the liver were significant enough to have interfered with the coagulation process. (R.T. 5677-5678)

Dr. James Grisolia, a neurologist and Chief of Neurology at Mercy Hospital in San Diego, was also called by codefendant Cooksey on the question of the cause of death. (R.T. 5772-5773) Dr. Grisolia discounted the possibility that the laceration of the scalp contributed to the cause of death. "Those areas by themselves are not dangerous...[T]hey're the kind of thing you would go to the emergency room for to get them sewed up or something, but those did not cause any death." (R.T. 5784)

Although Dr. Grisolia admitted that lacerations to the scalp bleed easily, he took the position that there was "a small amount of blood [loss]" from the fact that the autopsy report stated that there was "a blood-covered portion of vegetation adherent to the back" when Mr. McDonald's body was rolled over. "There was no discussion of excessive bleeding, of a large pool of

coagulated blood on the surface of the ground. There was nothing like that mentioned." (R.T. 5860, 5866)

According to Dr. Grisolia, the injuries to the brain itself did not cause death. "They were significant in that they were too small to cause death." (R.T. 5787) Dr. Grisolia took the position that since the autopsy report did not mention whether or not there was swelling of the brain, that meant that there was none. (R.T. 5847-5850)

> "My opinion is that the head injuries did not cause his death. They would have gotten him a couple of days in the intensive care unit. He would have been sent out to the floor. The injury that killed him was the throat injury." (R.T. 5788)

When asked to comment on the fact that the airway was unobstructed at the time of the autopsy, Dr. Grisolia opined that "the tissue swelling may have gone down by this -- I would have to defer to a pathologist as to why it would be closed and then opened up again." (R.T. 5790-5791) Dr. Grisolia did not examine the larynx specimen and relied entirely on the autopsy report for his conclusions. (R.T. 5848, 5856)

Dr. Sheldon Warren, a neurologist who was hired by appellant to examine Kazi's physical condition, (see *infra*) was asked if a person with Dr. Grisolia's education and professional background, was qualified to render an opinion on the issue of cause of death. He replied in the negative. (R.T. 6345)

> "That's not what you're trained to do in neurology. I couldn't do it, and unless a neurologist training were vastly different than mine. I don't think you could consider yourself an expert in that area." (*Ibid.*)

Dr. Eisele testified a second time for the purpose of rebutting the testimony of Dr. Wolf and Dr. Grisolia. Contrary to Dr. Grisolia's testimony that tonsilar herniaton was the *sine qua non* of brain swelling as a cause of death, Dr. Eisele noted that he had seen more than one case in the 7,500

forensic autopsies that he had conducted where there was brain swelling that caused death without tonsilar herniation. (R.T. 6138) "Cerebellar tonsillar herniation is just one of the manifestations of fatal brain swelling. It's not necessarily present in all cases of fatal brain swelling." (R.T. 6138)

The fact that brain swelling was not mentioned in the autopsy report does not, as Dr. Grisolia and Dr. Wolf testified, mean that there was none. A doctor writing an autopsy report is not limited to reporting positive findings, but has a duty to chronicle "pertinent negatives," to wit, findings of normalcy as well as findings indicating the absence of abnormality. (R.T. 6146) "I think it's a -- particularly in this setting it's a significant error. It's a significant omission." (R.T. 6147)

Refuting Dr. Wolf's assertion that bleeding in the neck muscles was an indication that the larynx had been crushed. (R.T. 6163) "It indicates there was some force applied to those areas of the neck, but that hemorrhage in the muscles, the bruising of the skin in no way indicates that the airway was occluded.." (*Ibid.*) Dr. Eisele explained that "[i]t was actually looking at the airway and having it in my hands [that] convinced me that it had not been crushed." (R.T. 6164)

D.

McDonald Homicide - Kazi's Physical Condition[8]

Because of his primary role in the confrontation with Mr. McDonald, counsel for Kazi sought to portray his client as a cripple, incapable of inflicting the fatal blows that lead to Mr. McDonald's death. Appellant countered that while the left side of Kazi's body was impaired, he had at

[8] As with the previous section, appellant has grouped all of the testimony relating to this issue presented by both appellant and codefendant Cooksey.

least normal, and perhaps above normal, strength on his right side, strength that was more than sufficient to wield the brandy bottle with deadly results.

Appellant called **Richard Scott**, a 17 year veteran of the Navy who was a friend of both Cesar and Correll, to testify about Kazi's physical strength in order to establish that he was capable of inflicting the fatal blows. Mr. Scott met Kazi in late 1995, early 1996 through Cesar. (R.T. 5440-5441) Mr. Scott lived near Cesar; from time to time, Kazi would wander by and ask "what's happening, you know. If there was nothing happening or going on, he would just go on about his business." (R.T. 5442) Mr. Scott had a weight bench and some weights and he would work out with Correll and Cesar about three or four times a week. "[S]ometimes Kazi [would] come through there and he w[ould] try and work out with us. Even though he's paralyzed on his side, he would use his good arm to lift up some weights with us... [¶] [M]ainly the only thing he could do was curls, curl with his good arm. That was about it." (R.T. 5443-5444, 5446) Kazi was able to do single arm curls with a 45 pound weight. "He normally got up to about roughly around five or six curls...in a single set." (R.T. 5445-5446)

Dr. Grisolia, who had been called to testify by Kazi on the cause of Mr. McDonald's death, also examined Kazi with regard to his disability and its effect on his ability to function. (R.T. 5791) In 1996, Dr. Grisolia reviewed medical records relating to a gunshot wound to Kazi's head, including a CAT scan, and examined Kazi. "On the left side of the head, he was shot in the cheek and it went up through his forehead. So he had shots that affected both sides of his head, although the clearest brain injury was on the right." (R.T. 5792)

Dr. Grisola testified that as a result those injuries, Kazi had "some problems with memory and what we call frontal lobe function, so that his

thinking [i]sn't normal." (R.T. 5796) The damage to the right side of the brain resulted in a partial paralysis on the left side of his body. (R.T. 5797) "He really can do very little with his left arm. He can just lift it slightly. He doesn't really have a strong grip in his left hand. He also is has difficulty walking and is unsteady." (R.T. 5798)

Not surprisingly, Dr. Grisolia concluded that Kazi would be unable to kick someone.

> "When he picks up his good foot and he just tries to hold himself up by his bad foot, he would go down immediately. He wouldn't be able to do it. If he tries to pick up his bad foot and kick with that, first of all, his balance isn't really good enough to be just on his good foot by himself, so he would probably go down from that." (R.T. 5799-5800)

On the other hand, Dr. Grisolia noted that Kazi would have no trouble dropping to his knees and hitting someone with a brandy bottle with his right hand. (R.T. 5800)

Dr. Grisolia speculated that Kazi's impaired mental faculties prevented him from controlling his impulses during the McDonald incident. Noting that the damage to his brain made Kazi "misperceive things or get angrier at something that somebody says," Dr. Grisolia opined that "what happened was that because his frontal lobe was so damaged, that he literally flew into a rage that he couldn't stop or control...[O]nce he is angry,...he can't control it like an ordinary person." (R.T. 5807-5808)

> "[S]peaking medically...he went into an altered state of awareness where he wasn't reasonable in control of his behavior, he was wasn't aware of what was going on around him. That was because of defective frontal lobe control of his behavior." (R.T. 5812)

Dr. Sheldon Warren, a neurologist called by appellant, examined Kazi to assess his strength on his right side. After a complete examination, Dr. Warren concluded that "his right-sided strength was normal." (R.T. 6339)

E.

McDonald Homicide -- Appellant's Witnesses

1.

Kazi's Violent Propensities

In addition to the experts that appellant called to establish that Mr. McDonald's death was caused by the blows Kazi inflicted with the brandy bottle, appellant also presented four additional percipient witnesses who knew of Kazi's violent propensities. **Halima Tinson**, a sixteen year old high school student, had met Kazi in early 1997 and had seen him on a dozen or more occasions. In her opinion, not only Kazi was a violent person, when he used his right hand, he was very strong. (R.T. 5458-5462, 5464-5465) **Linda Robertson** met Kazi when he was brought to her house by her foster daughter. She saw him once after that and had had two telephone conversations with him. "[H]e's violent enough to frighten me" (R.T. 5470-5472)

Christine Reardon met Kazi twice. Based upon what she had observed during those encounters, even knowing that Kazi was disabled, she felt that he was "[s]cary...threatening." (R.T. 5650-5654) **Amber Schuetzle**, a friend of Christine's, had met Kazi perhaps ten times at Don Juan's house. Based upon what she had observed, she concluded that Kazi was "very violent." (R.T. 5655-5657)

2.

Mr. McDonald's Missing Wallet

One of the prosecution's theories of the case was that Mr. McDonald was killed during the course of a robbery. Evidence was introduced that when his body was found, Mr. McDonald had neither money nor a wallet on his person. To rebut the inference of robbery that the prosecution sought to draw from absence of those two items, appellant presented evidence tending to establish that Mr. McDonald had left his wallet at the home of **Mark Brookamp**, one of his co-workers before returning to the housing complex where he lived.

Mr. Brookamp had gone to the same baseball game that Mr. McDonald went to on the evening of May 17, 1996. Later that evening, after leaving the game in the eighth inning, Mr. McDonald came to his house along with Eduardo Valdivia. They stayed for a few beers and left some time around 1:00-1:30 in the morning. (R.T. 5476-5477) After Mr. McDonald left, Mr. Brookamp noticed that he had left a little attaché bag in his garage. When he opened it up, he found a photo album with pictures of his trip to Las Vegas. (R.T. 5478-5479) "As soon as I opened it up, I saw that, I knew it was Ricky's. I zipped it back up and I stuck it back on my shelf." (R.T. 4579-5480) He took it to work that Monday to give it back to Mr. McDonald, only to find out that he was dead; he gave it to Ms. Jones. (R.T. 5480)

Mr. Brookamp denied that there was a wallet inside the pouch. After being shown a copy of a statement that he made to Det. Zavala shortly after Mr. McDonald's death wherein he told the detective that there was a wallet inside, Mr. Brookamp said the statement was inaccurate. (R.T. 5480-5481) Similarly, Mr. Brookamp disavowed a statement that he had made to Rob Martino, a defense investigator, wherein he told Mr. Martino that there was a wallet in the bag. (R.T. 5481)

Det. Felix Zavala of the San Diego Police Department confirmed that he had interviewed Mr. Brookamp on the morning of May 18, 1996 and that during that interview, Mr. Brookamp told him that Mr. McDonald "left a bag and a wallet." (R.T. 5490) At a second interview, on July 2, 1996, Mr. Brookamp again told Det. Zavala that Mr. McDonald had left a wallet at his house. (R.T. 5493)

> "Q. Is there any doubt in your mind that Mr. Brookamp spoke with you about a wallet?
>
> A. No doubt.
>
> Q. Did he speak with you about a photo album?
>
> A. Never mentioned a photo album." (R.T. 5491)

Similarly, **Robert Martino**, a private investigator, confirmed that Mr. Brookamp had told him that Mr. McDonald had left a wallet at his house. (R.T. 5502)

> " Q. Are you certain that he specifically used the word "wallet"?
>
> A. Specifically because I asked him if there was any money in
>
> Q. You recall asking him if there was any money in the wallet?
>
> A. Yes, I did.
>
> Q. What did Mr. Brookamp tell you?
>
> A. He said there was no money in it. He said there was no money in the wallet." (*Ibid.*)

3.

Nicole Admits Participation in McDonald Homicide

When she testified for the prosecution, Nicole had disclaimed any active participation in the McDonald homicide. **Miriam Rodriguez** was called to rebut that assertion and impeach Nicole's credibility. Ms. Rodriguez had been Nicole's cellmate at the county jail for about seven

months while she was awaiting trial in this case. During that time, Nicole and she discussed Nicole's case. Nicole told her that she was involved with the beating of a man. "She told me she kicked him...She was she was wearing some black boots that belonged to her friend Jody." (R.T. 5645)

F.

McDonald Homicide - Codefendant Kazi Cooksey's Witnesses

Patricia Segrest, Kazi's mother, testified that Kazi lived with and was raised by his maternal grandparents. (R.T. 5731) When he was eighteen, he was hospitalized for an injury he received.[9] As a result of his injury, he started receiving Social Security disability payments. (R.T. 5736)

Cleveland Edwards, Kazi's grandfather, recalled that Kazi was in the hospital for about 5-6 weeks after he was shot. From the hospital, he went to a rehabilitation center for 4-5 months. As a result of the rehabilitation efforts, Kazi regained his ability to walk. (R.T. 5744) Kazi has had several seizures and takes Dilantin control them. Kazi really needs to use a cane to get around, but he doesn't like to use it and can "limp along" for a few blocks without it. (R.T. 5745-5746) As far as Mr. Edwards knew, Kazi did not have problems doing things with his right hand. (R.T. 5750)

G.

Grote Homicide - Prosecution Witnesses

The Grote homicide arose from a separate incident in which Nicole was also involved. Indeed, her actions precipitated a series of events that culminated with the death of Mr. Grote. As previously stated, Nicole agreed

---

[9] The gunshot wound referred to, *supra*.

to testify for the prosecution in return for reducing her pending charges of capital murder stemming from her involvement in the homicide of Mr. Grote to voluntary manslaughter. After she testified, she was sentenced to seven years.

On June 5, 1996, Nicole Halstead's two daughters were living with their father, Jesse Russell and his sister, Ruby. (R.T. 4951) Nicole, who generally stayed with Jody Deere at the time, had spend the night before at Jesse's house. That morning, Nicole and Ruby got into an argument about who would watch Nicole's children. Jesse worked and Ruby usually stayed home and watched Nicole's children, aged 10 months and 2 years old, while Jesse was at work. That morning, Ruby complained that "she had to go somewhere. She wanted me to stay there. But I had some other things to do." (R.T. 5068-5069)

> "She just came at me loud and stupid about it, you know. And I'm like, 'What is your problem?" You know, she's like, you know, this and that and I have things to do and, you know, you can't -- I go, "if would you have asked me, I would have said yes." I didn't know it got like that. More -- and then probably for about five minutes. [¶] Then all of a sudden she just come up behind me, grabbed me by my hair. And I just grabbed her by her hair, and we were on the floor just like that." (R.T. 5069)

The melee escalated into a fist fight that lasted for about five minutes. Nicole then tried to take her daughters and leave. "She wouldn't let me take my youngest daughter. I literally had to pry my babies from her arms..." (R.T. 5070) Nicole put her children in her car and drove directly to Jesse's place of employment, a Motel 6, but didn't see him, so she went to Carolyn's house. From there, she called Jesse and told him what had happened. (R.T. 5075, 5077) He told her to come back to his work site. When she got there, Jesse told Nicole to go back to his apartment, that Ruby was no longer

there, and to wait there until he got home. Jesse told her he would talk to Ruby. (R.T. 5076, 5079)

When Jesse came home that evening, despite his promise to do so, he did not talk to Ruby about what had happened. Nicole got mad at Jesse. "After that, in front of both of our daughters, you're not going to tell her anything?" Jesse told her that he had just come home from work and did not feel like dealing with the issue. The argument between Nicole and Jesse became physical and he "smacked" Nicole on her head. (R.T. 5080) Nicole pushed him back. Jesse told her to leave. She asked if she could take her daughters. He said no. She grabbed his shirt as he walked past her and he hit her again. Jesse, who was 6'6", literally picked Nicole up by her collar and the back of her pants and threw her out of the apartment, causing her to hit her head on the concrete. "At that point I was completely hysterical. I felt dizzy." (R.T. 5984-5085)

Nicole then went back to Carolyn's house and paged Correll. When Correll returned the call, Nicole was crying. "He asked me what's wrong and I told him what happened between Jesse and I. And I told him that I want him to come out, can he come out here and get Jesse...I was tired of him hitting me." (R.T. 4956-4957) Nicole told Correll that she was half dead as a result of what Jesse did. (R.T. 5113-5114)

The June 5th fight with Jesse was not the first time that there had been a physical confrontation between Jesse and Nicole; they occurred, on average, once every other week. (R.T. 5058) Sometimes she would be left with bruises and Correll would ask what happened. (R.T. 5054) Nor was it the first time that Nicole had called Correll right after a fight with Jesse had ended. (R.T. 5068) Typically she would call him after the fights and tell him, sometimes falsely, that they were all Jesse's fault. As a result,

sometimes Correll got even more upset about what happened to Nicole than she did. (R.T. 5057, 5061)

> "He would tell me -- he would just -- I could tell the way he -- his actions were about him. He would just, you know, continue to tell me, 'you know, he's going to get it some day. And he shouldn't be putting his hands on you because you're a female.'" (*Ibid.*)

In the past, when told about Jesse's mistreatment of Nicole, Correll had indicated his willingness to beat him up. This time, Nicole asked Correll to kill him. (R.T. 5087)

After the phone call, Nicole went to pick up Correll in southeast San Diego. When she arrived, Correll got in the car and they went to several other nearby locations. Each time they stopped, Correll would get out of the car and she would wait for him. At the last place, Correll came back with a gun. "He told me to open my trunk, and I did and I got out, and while we were both standing at the back of the trunk he pulled it out of his jacket, pants." Nicole described the gun as being similar to the Intra Tech 9 millimeter gun that she was shown in court. (R.T. 4959-4963)

After putting the gun in the car, they headed towards El Cajon. According to Nicole, Correll told her he was going to Jesse's apartment to shoot him. Nicole panicked and begged Correll not to do it. Correll became irritated.

> "I was telling him, 'no, Correll,' you know, 'you can't just do that. We're going to get in trouble. We're going to get caught,' you know. He told me, 'shut up. Why you call me then, you know? Why did you call me and say you wanted this done, you know, like call me up on a...'fake mission'..." (R.T. 4964-4966)

Nicole testified that she was more concerned with the consequences of getting caught than about inflicting harm on Jesse, although she claimed to profess some concern about harming the father of her children. (R.T. 5111-

5112) Nevertheless, as a result of Nicole's change of heart, instead of going to Jesse's house. Correll drove to the house of a friend, Don Juan, nicknamed, "J-Bone," who also lived in El Cajon. (R.T. 4966) Correll and Nicole arrived there at around 9:30 p.m. and stayed for two to three hours. Correll was mad at Nicole; she became frustrated because he would not talk to her. (R.T. 4968)

> "I kept asking him, 'I don't want to stay here anymore. I just want to go home. Just forget it, the way you're acting, everything. I'm sorry, let's just --' you know, 'shut up. Go sit down,' he said. He was in a separate room from the living room. 'Go sit in the living room. Shut up. Don't worry about it.'" (*Ibid.*)

Some time near 11:30 p.m, Nicole finally got fed up and told Correll that she wanted to leave. That started another argument. (R.T. 5124) By this time Correll had had at least one six pack of beer. (R.T. 5122) A few minutes later, when they left the house; Correll was "pretty drunk." (R.T. 5140) His speech was slow and his movements were slow. (R.T. 5155)

At trial, Nicole claimed that Don Juan's then-girlfriend, Vilma[10] had come outside to ask what was wrong. Confronted on cross-examination with the fact that she had told the police that only she, Correll, and Don Juan were in the house at that time, Nicole claimed that she was "heavily confused" when she spoke to the police. (R.T. 5117) Confronted with the fact of Vilma's prospective testimony that she had left earlier to be at work by 10:00 p.m., Nicole claimed that Vilma would be lying if she so testified. (R.T. 5116)

Nicole admitted that when she was questioned by the police about what happened, Nicole told a significantly different story about what happened after she left Don Juan's house than the version she presented at

[10] They had gotten married by the time of the trial.

trial. (R.T. 5127, 5138) She repeated this admittedly false story three times in her statement to the police. (R.T. 5135) Remarkably, Nicole asserted that when she gave her statement, she was not particularly concerned about how much time in jail she was facing. "Sure, I was concerned. But I wasn't thinking as far as what time I'm going to do in jail." (R.T. 5130) Although she testified that she "had no reason to lie," when she spoke to the police, that apparently did not deter her from making false statements to the detectives. (R.T. 5137)

> "Q. And you knew before you gave your statement to the police that the more that you said there was going to get you in trouble, the worse it might be for you; right?
>
> A. The more that I said? No, I didn't think that. I just knew what I had to say. If I thought that then, you know, I would have really lied." (R.T. 5130)

Nicole admitted that she was using crystal methamphetamine during this period in her life, although she claimed that during the month of May, 1996, she used it no more than three times. (R.T. 5121)

Nicole and Correll left Don Juan's house some time between 11:30 p.m. and midnight, with Nicole driving her car. (R.T. 4972) Nicole's Mazda had one unusual feature: the front passenger seat was off the track. When anyone sat in it, that person would sit very low and the seat would recline until it leaned on the back seat. A person sitting in the passenger seat of Nicole's car would not normally be visible to someone outside the car. (R.T. 4969-4971, 5116)

There was a considerable amount of jealousy in the relationship between Nicole and Correll. She would often be jealous of him and Correll would get jealous when people looked at her or were talking to her. (R.T. 5045) At this point in the relationship the mutual jealousy had become pervasive. "[T]here hardly would be a time where [we] ever would be together

where there would be a whole day or a whole time period where there wouldn't be an argument..." (R.T. 5046)

In May of 1996, Nicole found out that Correll had gotten married, which not surprisingly, made Nicole both mad at Correll and extremely jealous. (R.T. 5048) Because he was married, Nicole could not call him at his house, but had to page him and wait for him to return the call. (R.T. 5049) The arguments they had were intense; they each knew exactly how to push the other's buttons. (R.T. 5050)

Not only was Nicole mad about Correll ignoring her at Don Juan's house, before they got in the car, Nicole got even madder when Correll asked her to drop him off at the apartment of Keisha Thomas[11] at the Chevy Chase Apartments in La Mesa. (R.T. 4972) "I know he did that on purpose...[to] [m]ake me mad.... [b]ecause I didn't want to take him over there...[b]ecause I didn't want him to see her." (R.T. 5157) "When he told me to take him over there to Keisha's house, that was it." (R.T. 5159)

When they left Don Juan's house, they got on Interstate 8 heading towards Route 94. (R.T. 5155) The hostility between Nicole and Correll continued unabated as they drove. "I kept trying to talk to him, to Correll, in the car, asking him, '[p]lease talk to me. What's wrong?' He would not answer me. And that was making me mad." (R.T. 5156)

On the way to the Chevy Chase apartments, Nicole got off at the Spring Street exit and stopped at the traffic light, in the lane furthest to the right of the two left turn lanes. (R.T. 4973) Along side Nicole's car, in the other left turn lane, there was a VW Beetle, in Baja Bug gear, with two men in it, that was also stopped for the light.

---

[11] No relation to Correll; just a friend.

The driver of the VW, Creed Grote, and his friend, **Troy Ortiz**, were on their way to a topless strip bar on the border of La Mesa and Lemon Grove. (R.T. 5235) Earlier that evening, around 10:30 p.m., Creed had called Troy to ask him if he wanted to go out looking for girls; Troy agreed and came over to Creed's house. (R.T. 5232)

After they left Creed's house in Creed's VW, they went a bar near Creed's house in El Cajon where they had some beer and shot a game of pool. (R.T. 5232-5234) After 30-45 minutes, they got bored. "[T]here was no girls there." It was then decided to try the strip bar in La Mesa. (R.T. 5235) They left the bar at about 11:30 and took the 94 freeway and got off at the Spring Street exit, getting in the left turn lane once they got off. When they came to a stop, Troy noticed Nicole's car in then next lane. (R.T. 5236) When Troy looked over he saw a blonde in the driver's seat and he smiled. (R.T. 5239)

When Nicole looked over at the VW, she saw two men looking at her. "They were -- their mannerism was like they were trying to say hi to me, flirting kind of." (R.T. 4977) No words were exchanged. Nicole simply nodded in response. "I wasn't saying hi like that, but I was just like responding...just kind of doing the same thing with my head as they did, and I just was smiling." Correll asked if they were looking at her and, "in a smart mouth way" Nicole responded, "no, they're looking at you." (R.T. 4979) Nicole was trying to get Correll angry and she knew that telling him what had happened that way would get the job done. (R.T. 5166) "It worked." (R.T. 5167) Correll then sat up and looked over; the two men in the VW appeared to be shocked. "After they saw Correll, they were just like -- they just looked forward like and they weren't going to look no more over there." (R.T. 4980)

Nicole's perception was accurate. When he saw Correll sit up, Troy recalled that "we made eye contact...[he] looked upset." Troy told Creed that there was a man in the car and said, "oh, fuck, we're in trouble now." (R.T. 5241-5242) "It looked like a girlfriend/boyfriend scenario and we were looking at his girlfriend and he looked upset at me." (R.T. 5242) Creed told him not to worry. "We're not stopping to fight anyone," (R.T. 5243)

Troy could see that Correll appeared to be fumbling for something on the floorboard of the car. "He was staring at me the whole time he was fumbling around." (R.T. 5244)

When the light changed, the VW took off in a hurry, making the left turn, going under the freeway. Nicole started much more slowly. Correll told Nicole to make the turn and to go faster, to catch up to the VW. When they went under the freeway, the VW was in the right hand lane, about to turn right on to Broadway. Correll told Nicole to shut off her lights as she pulled up behind the VW; Nicole claimed that she did not. (R.T. 4985, 5173) Correll was angry "big time;" Nicole was angry with him. (R.T. 5179-5180) The VW turned into the lane the furthest to the right onto Broadway; Nicole went into the center divide lane. (R.T. 4987)

When they left the light, Troy told Creed that he was concerned because he could not see where Nicole's car was even though he was actively looking for it. (R.T. 5246) When they turned on to Broadway, Troy still could not find Nicole's car. (R.T. 5248)

As Nicole turned on to Broadway, she became aware that Correll had pulled out the gun from under his jacket and partially lowered the window on his side of the car. (R.T. 4988, 4993) Correll put the clip in the gun and pulled the slide. According to Nicole, she started saying, "don't, please"

and Correll said “shut up. Just be quiet...Just shut up and drive.” (R.T. 4990-4991)

Both cars headed westbound on Broadway. When the passenger window of Nicole was even with the back window of the VW. Correll leaned out the window, with his whole arm extended, and shot at the VW. (R.T. 4994-4995) Nicole thought she heard Correll say “fuck you” when the first shot was fired, She remembered hearing two shots being fired. “From the corner of my eye, I briefly saw the back window blown out.“ After the shots were fired, Nicole kept driving forward. (R.T. 4997-4998) In her rear view mirror, Nicole could see the VW veer hard to the right and roll. (R.T. 4999)

Nicole claimed that she “had no way of knowing Correll was going to actually shoot into the car, period.” (R.T. 5186) However, Nicole knew that Keisha lived in Building C of the Chevy Chase apartments, she knew where that building was, and she knew that is where Correll wanted to go, and yet she drove past that location before Correll fired the first shot. (R.T. 5185, 5188) Nicole claimed that she panicked. (R.T. 5191)

> "Q. Your panicked reaction to cause him to not shot (sic) was to drive straight towards the car and go past the spot you wanted to turn over on?
>
> A. Well, it just -- not on purpose, no, I didn't. As to when he shot the gun, I just kept driving...because when I saw him take out the gun I wasn't thinking about turning into the Building C any more." (R.T. 5191-5192)

Troy did not see Nicole's car until just before the shots were fired. “I seen the car off the left hand...There was someone hanging out the window with a gun.” (R.T. 5248) Troy identified Correll as being the person holding the gun. (R.T. 5252) The next thing he knew, the window shattered. “I reached over to grab Creed.” Troy knew he had been shot because his head

bobbed. The car then "hit the curb and wound up on the fence and rolled." (R.T. 5253)

After the car came to a rest, Troy attempted to wake Creed, but got no response; he did, however, find a pulse. Troy then got out of the car and unsuccessfully tried to get Creed out as well. He then ran across the street and called 911 from a pay phone. (R.T. 5254-5255)

After going about 2 blocks from the scene, Nicole pulled into a driveway and turned around. According to Nicole, Correll told her, "[t]urn around now, and if you don't I'm going to jump out of the car." (R.T. 5000) Nicole then headed back in an eastward direction to the scene of the shooting. Correll told her to pull over in front of the Chevy Chase apartments; she did, in front of building C. (R.T. 5002) Correll got out of the car, taking the gun with him and telling Nicole that he would call her later. He went off into the apartments and Nicole continued eastbound on Broadway. (R.T. 5004-5005)

Keisha Thomas lived in apartment 8 of building C. At the time of the shooting, she was asleep. Correll awakened her when he knocked on the door. (R.T. 5276-5277) When she opened the door, she saw that Correll was carrying a gun which looked like a Tech-9 she was shown in court. (R.T. 5278) Correll was drunk and appeared to be very upset. (R.T. 5283-5284) Once he came in, Correll took the gun apart and hid the pieces in different places in the apartment. Correll spent the rest of the night there. At one point, he went to the window and appeared to be looking to see what was going on out on Broadway. (R.T. 5279-5280)

Nicole went back to Don Juan's house and pounded on the door. When Don Juan answered, she told him what had happened. "He didn't believe me at first. I had to tell him for like five minutes." Nicole stayed for

20 minutes while she tried to page Correll, When she got no response, she left and went to Carolyn's house. (R.T. 5013) She had a key, went in, and woke Carolyn up to tell her what happened. (R.T. 5014) Correll called at about 3:30 a.m., about a hour and a half after she arrived. Correll called again about 3 hours later to tell Nicole that he thought that one of the men in the VW was dead because he saw them taking the body out. (R.T. 5016-5017)

At about 11:00 a.m., Correll called again and asked Nicole to come and get him. She did and they both went back to Don Juan's place, where she stayed for two and one half days. (R.T. 5020-5021) Over the next few days, Nicole told both Jody Deere and her sister what had happened. (R.T. 5021)

On direct testimony, **Carolyn Lanhan** recalled that Nicole came into her bedroom in the early morning hours of June 6th, woke her up, and told her that she had just been involved in a shooting. (R.T. 5307)

> "She told me that she was driving with Correll and these guys pulled up next to them and started saying something to -- looking at her or whatever, I guess, and that kind of ticked Correll off, and he told her to pull up next to them and I guess she did and put the gun out the window and shot them. She said that he shot the driver." (R.T. 5307)

On cross-examination, Carolyn admitted that she had previously told the police, and had testified at the preliminary hearing, that Nicole did not wake her in the early morning hours, but spoke to her later in the day. (R.T. 5309)

Some time between June 6th and June 10th, **Jody Deere** had a conversation with Nicole about a shooting in Lemon Grove. "She said that she was driving and this car pulled up on the side of her, and the guy that

was driving the other car had smiled at her, and she looked down at the guy that she was with and said that 'they're smiling at you.'" (R.T. 5396)

> "And then they were just driving, and then he had told her to turn the lights off. They were on his side first. They were on her side. Then the car was on his side and he pulled his seat forward and pulled out a gun and shot off five rounds." (*Ibid.*)

Ms. Deere testified that she told Nicole to turn herself in. When she did not, Ms. Deere contacted the police herself. (R.T. 5397)

H.

Grote Homicide -- Police Investigation

Deputy **Edward Lassiter** of the San Diego Sheriff's Department responded to a call to the scene of a vehicle rollover at about 1:00 a.m. on June 6th. "[O]nce we were at the scene and we saw the driver's still in the vehicle, it was apparent that there had been a shooting or something of that nature...[W]e [then] blocked off traffic from Spring Street and Broadway to Fairway and Broadway so no cars could enter, no people could enter and basically froze the scene." (R.T. 5346-5347)

Detective **Richard Scully**, a homicide investigator for the San Diego Sheriff's Department, arrived at the scene at about 3:00 a.m. (R.T. 5349) By the time he got there, cones had already been placed on top of bullet casings found in the street; Det. Scully retrieved the casings. (R.T. 5350-5353) Each of the casings were found in the street in a location that was approximately parallel to Building C of the Chevy Chase Apartments. (R.T. 5370)

Det. Scully also examined the bullet holes in the VW Mr. Grote was driving and, after putting dowel sticks in the holes to determine the trajectory, concluded that"[w] hoever fired these rounds would [have] be[en] in line -- in a line that would put them parallel to the vehicle...[s]lightly back to front, meaning from the rear of the vehicle to the front of the

vehicle." (R.T. 5363-5364) There was a odor of alcohol inside the vehicle. (R.T. 5374)

I.

Grote Homicide -- Autopsy

Christopher Swalwell, a forensic pathologist who was a deputy medical examiner for San Diego County, did an autopsy on Mr. Grote on June 6, 1996. (R.T. 5289-5291) Mr. Grote suffered three gunshot wounds. (R.T. 5292) The first entrance wound was "in the back of the head, the lower part of the head, upper neck area on the left side...and...had...a partial exit associated with it. That was on the right side of the back of the head." (R.T. 5292-5293) The second entrance wound was "on the back of the left shoulder...went in the shoulder, and there was an exit, partial exit...on the right side of the neck more towards the front." (R.T. 5294) The third wound was in the back, on the left side; it did not have an exit wound associated with it. (R.T. 5295)

The gunshot wounds were the cause of death. (R.T. 5304) At the time of his death, Mr. Grote had a blood alcohol level of .07. (R.T. 5305)

J.

Grote Homicide -- Appellant's Witnesses

The defense theory of the case was that by the time the shooting occurred, appellant's mental abilities had been severely impaired by the effects of heavy drinking in the hours immediately preceding. To make matters worse, within the preceding twenty-four hours, appellant had also taken mellaril and desyril, psychotropic medication that had been prescribed for him to treat paranoia and hallucinatory ideation. The combination of alcohol and the medication potentiated the effects of each and appellant

presented expert testimony establishing that such a mixture would prevent appellant from forming the requisite intent to kill.

In June of 1996, **Vilma Gold**, Don Juan's wife, was employed as a night shift nursing assistant at a home for the mentally disabled and normally started work at 10:00 p.m.. On June 5, 1996, Vilma slept for a good part of the day. "I believe I went to sleep at like 2:00 that afternoon, and I didn't get up until 20 minutes before I had to leave for work." (R.T. 5937-5938, 5940) When she got up, Correll and Nicole were there. Correll was a friend of Don Juan's and they frequently drank together. When she walked into the kitchen, Correll was taking a shot. She could see that Correll and Don Juan had been drinking "heavy. Very heavy." (R.T. 5939) Correll always brings over *Jose Quervo* [tequila] and Juan drinks whiskey or brandy." (R.T. 5940)

Don Juan took her took work just before 10:00 p.m. and brought her back the next morning. At about 9:30 a.m., when she arrived back at her house, the bottles of brandy and tequila were just about finished and there were beer cans all over. Correll was on the couch and Nicole was there as well. Correll did not have a gun with him in the house. (R.T. 5943-5945)

Don Juan Thompson normally worked as a security supervisor at the La Jolla Beach and Tennis Club, but on June 5, 1996, he was at home all day with an injured ankle. (R.T. 5949-5950) Correll arrived that morning and the two of them drank most of the day. "My ankle was hurting, and...if my mind wasn't there, my ankle didn't hurt." (R.T. 5951) Nicole was in and out of the house that day; she was there when he took Vilma to work but was not there when he came back. Upon his return, Don Juan and Correll continued to drink. Nicole returned and at some point, both she and Correll

left. "If he was half as drunk [as I was], he was gone...He was very intoxicated." (R.T. 5953)

After Correll and Nicole left, Don Juan passed out. Nicole did not come to his house later that night to tell him about a shooting. She did come back some time the next day. (R.T. 5953-5954) He never saw Correll bring a gun into the house that evening or the next day. (R.T. 5955)

Mr. Thompson admitted that on a previous occasion, when Correll was being investigated for a crime, he gave false information to the police. "When they threatened to take me to jail, they said regardless of what I said, I would go to jail...I realized that it was wrong to tell that lie, even to protect myself. So that, in general, is why I told the truth about that situation." (R.T. 5956)

Arlene Thomas, Correll's wife, had known Correll for several years prior to marrying him in March of 1996. One month before they were married, in February of 1996, Ms. Thomas accompanied Correll to the County Mental Health Center where Correll was given prescription medication. (R.T. 6055-6057) According to Ms. Thomas, when Correll took the medication, he was calmer. "He wasn't up and worried as -- at anything or his mind was at ease." (R.T. 6058-6059) The medication also affected Correll's speech. "He couldn't get his words out properly. He mumbled and it was slurred speech." Ms. Thomas had never seen Correll slur his speech before he took the pills. (R.T. 6059) The medicine also slowed him down physically. "He couldn't too much get up to walk, his body was -- it was just like -- he couldn't move. It was to the point where when he walked, he would find himself on his knees, to where he would drag himself to crawl." (R.T. 6060)

However, when Correll drank alcohol and took the pills, he became hyperactive. He would start talking to himself and would easily become upset. (R.T. 6063) During the time period from mid-May until mid-June, 1996, Ms. Thomas saw Correll mixing the pills and alcohol and getting upset as a result. (R.T. 6064-6066)

The last time Ms. Thomas saw Correll take the pills was on either June 5th or 6th; 15 minutes later, he started drinking. "I was angry. I wanted him to get his rest. I was angry with him because he was drinking...[H]is friend came over, he started drinking...[and then] he got up and left." (R.T. 6077-60778)

It was stipulated that, on February 21st and 26th of 1996, Correll was seen at San Diego County Mental Health services as a walk-in patient and that on the 26th, he was given a prescription for both desyrel and mellaril as well as a starter supply. Correll was advised to take desyrel at up to 400 milligrams per day and to take up to 300 milligrams per day of melaril in divided doses of not greater than 100 milligrams each. (R.T. 6099)

Dr. Clark Smith, a board certified psychiatrist, with a specialty in addiction and forensic psychiatry, explained the function and effects of both desyrel and mellaril. (R.T. 6101-6107.) Mellaril is used for the treatment of psychosis -- "seeing things that aren't there or hearing things that aren't there" and paranoia -- " a belief that people are watching you or talking about you." While the drug can reverse hallucinations, it is also heavily sedating and can affect a person's ability to perceive. (R.T. 6102)

> "What I've observed in my patients, basically at any dose, even the smallest pill available, which is a 10 milligrams dose, the effects on thinking can include marked sedation, marked slowing of thinking, so that people tell me they can't think fast enough to keep up with what's going on in the world around them." (R.T. 6104)

Desyrel is an anti-depressant. "In practice, because it is so sedating, it's usually used to reduce anxiety or to help people get off to sleep." (R.T. 6105) "Desyrel...causes more sleepiness, whereas mellaril...causes more slowing and foggy thinking. People are more likely to say that mellaril made them feel like a zombie, for example." (R.T. 6106-6107)

> "What my patients tell me is they feel like they don't have good control over their thought process. They feel like they're just kind of like a robot, you know, walking through their day, but don't feel that they have normal control over their thinking." (R.T. 6107)

Mellaril has a half life of 26-36 hours, meaning that 26-36 hours after ingestion, half of the medication would still be active in the body. (R.T. 6111) "As long as there's a mellaril level in the body, you could still have an effect on the function of the brain, on the way someone thinks." (R.T. 6113) "[M]ellaril can cause...people...[to] be alert and walking around, but very confused." (R.T. 6127) When one mixes alcohol and mellaril together, "the effect would be unpredictable...because alcohol levels can vary widely, and so it can be a dangerous combination." (R.T. 6114)

> "It's unpredictable when you mix with alcohol and sometimes what you get is additive effect with more confusion, and with more confusion, people can become agitated.... [¶] If an individual is prone to hyperactivity or agitation when they drink and use this medication, you would expect to see that over and over in that same person." (R.T. 6118)

Appellant thus sought to establish that he did not have the requisite intent to kill when the shots were fired at Mr. Grote's car.

K.

Appellant's Prior Juvenile Adjudications

It was stipulated that appellant had juvenile adjudications of robbery in 1980 and attempted robbery in 1981. (R.T. 5381)

Statement of Facts -- Penalty Phase

L.

Penalty Phase - Circumstances of the Crimes[12]
(Penal Code §190.3(a))

1.

McDonald Homicide - Prosecution Evidence

Nicole Halstead[13] testified as she did during the guilt phase of the first trial that she had been present when Correll punched and kicked Mr. McDonald. (R.T. 9802-9853) With regard to her agreement to testify and her sentence, the trial court informed the jury that Nicole received neither the minimum nor the maximum sentence. The jury was further admonished that they were not to speculate that the sentence Nicole received was based upon court's assessment of her credibility at the first trial and that the credibility of her testimony was for jury to determine." (R.T. 10070)

Carolyn Lanham also testified about going out with Nicole and Correll to meet Cesar and the confrontation with Mr. McDonald. (R.T. 10072-10088) In between the first and second trials, Carolyn had moved to Las Vegas had been arrested for narcotics and other charges, and was in jail when the prosecutor located her. The Las Vegas authorities agreed to drop those charges if she would testify in the second trial. (R.T. 10090)

---

12 Because there was a hung jury in the first penalty trial, what follows is the testimony presented at the second penalty trial. In order to present evidence of the circumstances of the crimes (Pen. Code § 190.2(a)), the prosecution recalled witnesses who testified at the guilt phase at the second penalty trial who repeated the testimony that they gave at the guilt phase. Rather than restate all of this testimony, appellant will simply take note of those witness who had previously testified at the guilt phase, the subject matter of their testimony at the penalty phase, and any significant deviations in their penalty phase testimony from their previous testimony.

13 (R.T. 9802-10070)

Kevin Collins testified concerning the liquor store incident where his friend, Darrel Milton was beat up. He was unable to identify Correll as someone he saw that evening, but thought it was possible that Nicole was the white girl he saw that evening, but could not be sure. (R.T. 10477-10487) **Darrel Milton** told how he was beat up outside the liquor store. Although he initially stated that he could not identify Correll, he then stated that Correll "vaguely" looked like one of the people who beat him up. (R.T. 10646) He admitted, however, that his memory of who assaulted him might have been influenced by seeing Correll seated at counsel table at the first trial. (R.T. 10648)

Cesar Harris once again testified about the Mr. McDonald homicide. (R.T. 10213-10244) Unlike the first trial, however, where he stated that the last violent act he saw inflicted on Mr. McDonald was Kazi hitting him with a bottle, Cesar now "recalled" seeing Correll kick Mr. McDonald after Kazi stopped hitting him with the bottle. (R.T. 10234) When confronted by the defense with this critical contradiction, Cesar explained "it's easy to get events mixed up." (R.T. 10267) In a tape recorded interview of Cesar, introduced as a prior inconsistent statement and played for jury, Cesar made no mention of his newly "remembered" allegation that appellant kicked Mr. McDonald. (R.T. 11003)

Dr. Brian Blackbourne, the coroner, testified that the cause of death was blunt force injury to the head and neck. (R.T. 10106-10136) He admitted that he could not rule out death from brain swelling. (R.T. 10150)

Det. Angiotti testified as to the condition of the scene of the homicide. (R.T. 10324-10340) She noticed that there was a large pool of blood under Mr. McDonald's head, but made no effort to quantify it. (R.T. 10355-10357)

Annette Peer, a criminalist, testified that there was blood on the shoes Correll was wearing at the time of his arrest and that DNA testing indicated that the blood spots taken from the shoes matched his and Mr. McDonald's blood. (R.T. 10387-10396)

Sgt. Alicia Lampert spoke to Correll the morning after the homicide, He identified himself as Bill Johnson and said he was in Tijuana all night. (R.T. 10437)

Jennifer Jones, Mr. McDonald's fiancee, testified about Mr. McDonald's habit of leaving the money from his paycheck at the house and carrying cash in his sock. (R.T. 4879-4891)

The morning after the Mr. McDonald incident, **Bradley Brooks** heard Ms. Jones scream, went outside, saw Mr. McDonald's body, which was completely unclothed except for a shirt, and put a pair of shorts over the groin area. (R.T. 10313) Mr. Brooks told the police that Mr. McDonald had socks on when he first saw the body. (R.T. 10322)

Eduardo Valdivia testified about going to the baseball game that evening with Mr. McDonald and that Mr. McDonald left his black bag at Mr. Brokamp's house. (R.T. 10370-10380) **Mark Brokamp** said that he looked inside the bag and did not see a wallet, only a picture album; he denied telling anyone that there was a wallet inside. (R.T. 10455-10475)

2.

McDonald Homicide - Defense Evidence

Like the prosecution, the defense presented essentially the same witnesses on the issue of the circumstances of the crime as the defense had presented in the guilt phase.

Det. Felix Zavala interviewed Mark Brokamp on two occasions and both times he told Det. Zavala that he saw a wallet inside the black bag that Mr. McDonald left at his house. (R.T. 10908-10919) Similarly, when Mr. Brokamp spoke to **Robert Martino**, an investigator employed by the defense, he also told him that there was a wallet in the bag and said nothing about a photo album. (R.T. 10920-10925)

Miriam Rodriquez, a former cellmate of Nicole Halstead, stated that Nicole told her that she was involved with the beating of a man and that she kicked him with boots that she was wearing. (R.T. 11020-11025)

Michelle Walker, another former cellmate of Nicole, corroborated the testimony of Ms. Rodriguez. Ms. Walker recalled that Nicole also told her that she participated in the beating of Mr. McDonald.

> "She said that the man had said something to her and Correll and another guy, Kazi, had got into it with the guy and they started fighting, and that she hit the man in the head with the E&J bottle and blood had got on her tennis shoes, so she took them off and put on her friend Jody's boots. And at the -- everybody had got back in the car and she started stomping the guy. Then she took his hat and his tennis shoes and his burrito and his doughnuts and they went to the beach." (R.T. 11071)

Dr. John Eisele, a forensic pathologist ruled out the injuries to Mr. McDonald's neck as a possible cause of death based upon [1] his examination of the larynx, which had been preserved from the autopsy, and [2] the observation made the doctor performing the autopsy indicating that there was only a tiny amount of hemorrhage in inside the airway. In Dr. Eisele's opinion, the two most likely causes of death were the loss of blood from the laceration on the top of Mr. McDonald's head and/or swelling of the brain. (R.T. 10929-10987)

Based upon the testimony given at the first trial, it was stipulated that if **Richard Scott** were called to testify, he would testify that Kazi used

to lift weights with him and that he was able to curl a 45-50 pound dumbbell with his right arm. (R.T. 10990-10991) Similarly, based upon his testimony at the first trial, it was further stipulated that **Dr. Robert Warren**, a neurologist, examined Kazi and concluded that although his use of his left arm and left leg were impaired, the right side of his body functioned normally. (R.T. 10092)

One evening, in the fall of 1995, **Amber Schuetzle**, a medical assistant, was at the home of Don Juan Thompson with Correll, Kazi, and her friend Christine. Although she had dated Correll in the past, she was not dating him at that time. Christine and Kazi were playing dominos and she won. Kazi then pulled a gun on Christine and pointed it at her, a few feet from her head. "Correll stopped him from pulling the trigger...[He] [t]old to him put the gun down." (R.T. 11487-11488)

About an hour later they all left the house. Kazi was drunk. When they got to Nicole's place, Christine carried Kazi up the stairs; Correll was unable to help because he had been shot recently and was using a cane. (R.T. 11488-1489) When they got upstairs, Kazi laid down. "Correll took the gun away from Kazi and emptied the bullets out." Kazi, who was "drunk really bad" demanded his gun back. Correll gave him back the empty gun and "Kazi pointed it at Christine and pulled the trigger five times or more...[and] then he went back to sleep." (R.T. 11490-11491) Not surprisingly, based upon her experience, she considered Kazi to be a "very violent' man. (R.T. 11492) Of the 50 or so times she had seen Correll, she had seen Kazi with him maybe three or four times. (R.T. 11503

By the time the trial took place, **Christine Reardon** was working with adult handicapped people in Sturdyvant, Wisconsin. At the time of the evening in question, she had met Kazi once before. Christine described the

atmosphere early in the get together as being friendly, with some drinking going on. The mood changed, however, when she and her partner won in dominos. "[K]azi got upset and he stood up and he pulled the gun on me....And he put it in my face. It was about an arm's length away...He was standing there across a little card table and reached out...[and pointed it] right at my face." (R.T. 11496)

Although it "seemed like hours," Kazi kept the gun pointed at her for five or ten seconds "cursing and calling me nice little bad names." Correll told him to put it away.

> "[Kazi] wasn't coherent at the time. He was just like he had these crazy eyes going and...[w]hen he told him to the first time, he kind of argued with him. But Correll had to tell him again, and then Kazi finally put it down." (R.T. 11497)

Christine drove Kazi and Correll over to Nicole's house. When they got there, "I carried him over my shoulders" and once inside, "I kind of put him down on the floor..." (R.T. 11498) Kazi passed out and Correll took the gun away.

> "He walked over and got the gun off of Kazi, and he had grabbed a wooden bowl out of the cupboard. He emptied the bullets out of -- and spun it around, made sure, pulled the trigger a couple times to make sure there were no bullets in it." (R.T. 11499)

About five minutes later, Kazi started yelling for his gun. Correll told him to hold on, "I'm getting it for you." Correll handed him his gun. Kazi looked at her and started cursing. "What is this bitch doing here?" Kazi "rolled over to his side and he started pulling the trigger. It was aimed at me." (R.T. 11500) Correll "saved my life twice." (R.T. 11501)

3.

Grote Homicide - Prosecution Evidence

Nicole Halstead testified that Correll shot at Mr. Grote's car after Mr. Grote and Mr. Ortiz had smiled at her. (R.T. 9854-9910) **Troy Ortiz** testified about being in the car with Mr. Grote with Correll fired on them. (R.T. 10562-10578)

Carolyn Lanham told the jury that Nicole told her about the Grote incident. (R.T. 10089)

Dr. Swalwell, a pathologist, found that gunshot wounds were the cause of Mr. Grote's death. (R.T. 10496-10507)

Roger Demshok, a deputy sheriff, located shell casings at the scene of the Grote shooting. (R.T. 10511) **Sgt. Clifford Johnson**, a firearms examiner, concluded that the shell casings found at the scene were fired from a tech-9. (R.T. 10523-10560)

4.

Grote Homicide - Defense Evidence

It was stipulated that if Detective Janet Polk of the San Diego Police Department were called to testify, she would testify that on February 21, 1996, about five months prior to the Grote incident, she participated in a surveillance of a funeral with ten fellow officers. A vehicle leaving the funeral was stopped and the two occupants were detained, moved to another location, and then released. (R.T. 11145)

Victor Hoyte, an officer with the San Diego Police Department, was part of the group of officers that detained Marvin Spencer and Correll in what was described as a "hot stop" -- a detention to look for weapons. (R.T. 11121, 11139) After they were handcuffed, they were taken to the parking lot of Villa View Hospital, about a mile away. (R.T. 11123) "We were directed by detectives to take them there. So I have no idea why they chose that location." (R.T. 11126) No weapons were found on either Marvin or Correll.

(R.T. 11139) Officer Hoyte could not recall whether any of the officers bothered to explain the reason for the detention to Marvin or Correll. (R.T. 11143) The detention lasted about one hour. (R.T. 11128)

On that day in February of 1996, **Marvin Spencer,** a 20 year old, had attended the funeral with Correll and left in a car driven by Correll. About five or ten minutes after leaving, the car was stopped by the police. Mr. Spencer recalled seeing between six and seven police cars and at least 10 officers. "I didn't really count...There was police cars coming from different directions." (R.T. 11149)

After they stopped the car, the officers drew their weapons -- handguns and shotguns -- ordered them out of the car; Correll, as the driver, was ordered out first. Some of the officers were in uniform and the others were in plain clothes, and others had A.T.F. raid jackets on. (R.T. 11156) The police officers told Correll to get down on the ground, "on the wet concrete, the pavement, with their guns pointed at us." (R.T. 11150-11151) Correll was told to kneel, with his ankles crossed, and his hands behind his head; he was then handcuffed. Marvin was then ordered out of the car and told to do the same thing; he was then handcuffed as well. By the time Marvin was handcuffed, Correll was lying face down on the ground. (R.T. 11153-11154)

After about five or ten minutes of lying on the ground, they were placed in patrol vehicles. When Marvin asked where they were being taken, "they didn't give me no response." The two of them were taken to a remote location with only the two of them and four of the officers. They were questioned and eventually released. (R.T. 111555-11158)

Coming as it did right after the funeral, the armed detention had a significant impact on Correll. "He just seemed like he just like was going crazy or something....He was just doing stuff that he never did before...I

mean, started talking to himself. I mean, it was just -- it was just all sorts of things that he was doing at the time." (R.T. 11161-11162)

Marvin was so concerned about Correll that he took him directly over to County Mental Health to see a psychiatrist. When he got there, Correll would not get out of the car. "I tried to convince him to go in" but he would not. Marvin then took Correll home. Later that same day, Marvin was notified that Correll had been taken back to County Mental Health and that this time, he went in. (R.T. 11159-11160) Some time after this incident, Marvin saw Correll exhibit the same kind of strange behavior and, in fact, took him to the pharmacy to pick up some medication for him. (R.T. 11164)

In fact, Correll was taken back to County Medical Center that same day by his wife, **Arlene Thompson**. Ms. Thompson's prior testimony from the first guilt phase, where she told about picking up medication for Correll from County Mental Health and the effects the medication would have on him, both when he was sober and when he was drinking alcohol, was read to the jury. Ms. Thompson also testified that Correll took his medication on June 5th or 6th, just before the Grote incident. (R.T. 11223-11251)

Both **Vilma Gold** and **Don Juan Thompson** testified that Correll and Nicole came to their house on June 5th and that Correll drank heavily. (R.T. 11165-11220) As Don Juan put it, between Correll and himself, they finished off at least a case of beer and most of a bottle of brandy and most of a bottle of tequila. " I would say he [Correll] was drunker than I was because he consumed more than I did." (R.T. 11198, 11204)

Dr. Clark Smith, a psychiatrist and pharmacologist, reviewed the records of Correll's visit to County Mental Health on the day of the funeral.

> "He was very upset. He was extremely anxious, experiencing nightmares, and also he was hearing voices, which the doctor described as hallucinations...."

> "Mr. Thomas had told the doctor that he was hearing the voices of people talking to him, and yet when he would look around the room, there was no one there. At times he would accuse other people in the room of saying something to him, and when they would say, "no, I didn't say anything," he would become very upset because he was convinced that someone was talking to him and he couldn't see that person...."
>
> The delusions in this case were his belief that people were trying to kill him, were making verbal threats against him, even though the voices were coming from nowhere and you couldn't see who was making the threats." (R.T. 11259-11260)

The medical records also indicated that Correll had suicidal ideation. The doctor who examined Correll at County Mental Health was convinced and that Correll's paranoia was very real to him and that it was the product of post traumatic stress disorder induced by the police detention right after the funeral. (R.T. 11265)

Dr. Clark also explained the purpose and effects of mellaril and desyrel, the two psychotropic drugs that were dispensed to Correll at County Mental Health. "Both of them have strong potential to muddle the clarity of thinking or to be sedating or clouding of the consciousness." (R.T. 11267) When combined with alcohol, some people "experience what's called a black out, in that they would still be walking around, still active physically, but mentally they could be unaware of what they were doing or of their surroundings." (R.T. 11270)

M.

Uncharged Criminal Activity (Penal Code §190.3 (b))

1.

Stockton Robbery/Homicide- Prosecution Evidence

With a cast of characters that would have felt comfortable in a Damon Runyard story, the prosecution presented evidence that in January, 1995,

appellant was involved in a robbery/murder that took place in a Stockton gambling den, euphemistically called the "social club." Although many of the witnesses who testified against appellant were charged and convicted for their involvement in the incident, appellant was never even charged.

By the time she testified, **Teresa Bird**, a former girlfriend of Correll, had known him for about five years, having met him in 1994. (R.T. 10655) Correll and Teresa had a child together. (R.T. 10657) The child was born prematurely and suffered from spinabifida and other problems. After he was born, Teresa put their son up for adoption and Correll was concerned because he wanted their son back. In Teresa's view, "it was a money issue. So I knew he was worried about that. So he just said, 'don't worry about it. We're going to be okay.'" (R.T. 10659) Because he wanted to attend a court hearing regarding the baby, in early January, 1995, Correll got a ride from **William Bird**, Teresa's brother, from San Diego to Teresa's apartment in Stockton. (R.T. 10681)

On January 11th, Correll met with some people at Teresa's apartment whom she identified as **William Johnson** and **Larry Harper**. Teresa could not hear what they were saying. "I really wasn't paying attention. I was just kind of there." At some point she became concerned because there were "[j]ust too many people running in and out and they were...real wired up." She asked Correll what was up and he told her not to worry about it, that they would be okay. (R.T. 10658) She did not see any guns that evening while those people were in the apartment. At some point, all the people left the apartment. "I didn't see how they left. I just know they all left." (R.T. 10660)

When he testified, **William Johnson**, also known as "Will," was in custody on a manslaughter conviction arising out of the robbery of the

gambling shack in Stockton. (R.T. 10729) He had originally been charged with special circumstance murder as a result of his involvement in this offense, but his trial ended in a mistrial and he pleaded guilty to voluntary manslaughter in return for agreeing to testify for the prosecution. (R.T. 10742-10744) Mr. Johnson had prior convictions for possession of rock cocaine and vehicle theft. (R.T. 10745)

When asked to describe his involvement in the robbery, Mr. Johnson explained that "[m]e and a couple dudes put together a little robbery thing, I guess and I don't know, something happened and it went bad and we all ended up in jail, I guess." (R.T. 10729) According to Mr. Johnson, Bam (Tyrone Harris), LL, (Larry Harper), Gator (Konstany Boyds), and someone named "T-Bone" were involved in the robbery. Mr. Johnson said he did not know T-Bone's real name because he had known him for only about 10 minutes before the robbery took place. When asked if Correll was the person he knew as T-Bone, Mr. Johnson said, "I believe so." (R.T. 10731)

Mr. Johnson claimed that his involvement in the robbery was limited to being the provider of weapons. "It was brought to my attention while I was at home, and I was asked if I had a couple of weapons that could be provided for the whole thing. So that's what I did." (R.T. 10731) Mr. Johnson produced a .38 revolver and a 12 gauge shotgun in the parking lot of Teresa's apartment house and gave the shotgun to Larry Harper. He believed, but was not too sure, that T-Bone had a .9 mm gun semi-automatic. (R.T. 10733, 10739) Johnson testified that Mr. Harper was loaded on rock cocaine, which Mr. Johnson had given him to encourage his participation in the robbery. (R.T. 10747)

At the penalty phase of appellant's first trial, Mr. Johnson testified that the robbery was planned at Tyrone Harris' house, not Teresa's apartment, as he maintained at the second penalty trial. (R.T. 10745)

> "Q. Isn't it true, Mr. Johnson, that you and Bam, Tyrone Harris, were the masterminds of this robbery?
>
> A. You could say that.
>
> Q. Well, I could say that, but do you say that? Isn't it true that you and Bam were the masterminds of this robbery?
>
> A. Yes.
>
> Q. And that when you planned this robbery -- you had talked about doing a robbery at the shack on many occasions with Bam, hadn't you?
>
> A. Yes.
>
> Q. And when you talked about it on the night of January the 11th, the only person who was there with you and Bam was L.L.; Isn't that correct?
>
> A. Yes." (R.T. 10747

According to Mr. Johnson, a fellow named Blanton Moses gave him, Gator, Bam, and T-Bone a ride and they headed towards the gambling shack. (R.T. 10743) At appellant's first trial, Mr. Johnson testified that he didn't know if Correll was in Blanton Moses' car. Indeed, the testimony established that Mr. Johnson, did not arrive at the gambling shack by car. (R.T. 10747)

> "We passed a police car that was parked, and after we continued to drive down the street, they got behind us. So Blanton pulled over and we both got out and he started to fumble with the car and I just took off walking. And before I knew it, the car was gone. It was driving past me and headed wherever, you know." (R.T. 10734)

Mr. Johnson went into the social club. On the way in, he saw Mr. Harper and Mr. Boyds standing in the parking lot. At trial, Mr. Johnson testified, as he had at the first penalty trial, that he did not recall seeing T-

Bone at the shack that evening. Apparently he had earlier told the police that he did see T-Bone there. (R.T. 10736, 10748)

Once inside the shack, Mr. Johnson played dice and shot some pool. The original plan was to rob everyone in the shack, but that plan was foiled when Mr. Johnson discovered that there were double locked doors securing the entrance and that once one entered the first door, there was a cage and one had to be buzzed in from there to get into the shack. (R.T. 10737)

Walter Gregory was the proprietor of *Gregory's Social Club.* Mr. Gregory's joint venturer in this enterprise went by the name of Prince Austin and was also known as Stinger. Mr. Gregory told the jury that entrance to the club was through a magnetically locked door. Once a person came past the magnetic door, they entered a cage which, if they were buzzed in, led, to a second door which led into the club. (R.T. 10696) Mr. Gregory explained that the reason for this secure entrance was that,

> "we sometimes gambled in there, so what we wanted to do was make sure nobody could just run directly in on us. If somebody rang the bell, we look out and open the magnetic door. Once it's locked then we can buzz the cage door to open if we want them in. If we don't, we won't buzz it." (R.T. 10697)

After discovering the double door set up, Mr. Johnson went outside the club to tell Larry Harper and the others. In court, Mr. Johnson denied being involved in any change of plan; he denied telling the police that he had gone outside to tell "T-Bone and the others that the plan now was to rob Stinger." (R.T. 10737) Moreover, at appellant's first trial, Mr. Johnson said that T-Bone was not there when he went outside. (R.T. 10748) When shown a picture of Correll by the police after the incident but before the trial, Mr. Johnson said that he had seen him, but that he was not one of the people that went to the shack that evening. (R.T. 10749)

When confronted with a statement he allegedly made to the police telling them that it was not him but Mr. Harris who had gone outside the shack and "told the three subjects that the plan would be changed and that they would instead rob Stinger," Mr. Johnson said that he had "learned that after the whole thing happened." (R.T. 10738) When defense counsel asked how anyone could believe anything he testified to given the multiplicity of conflicting statements he had given about the events of January 11th, Mr. Johnson replied, "I don't know." (R.T. 10752)

On the evening of January 11th, Stinger was there when Mr. Gregory arrived. Stinger told Mr. Gregory that he had won $10,000 that day. (R.T. 10698) Mr. Gregory recalled seeing Will Johnson, but did not recall seeing Tyrone Harris or Konstanty Boyds, whom he knew as "Silk," in the club that night; Mr. Gregory was unable to identify appellant from a picture he was shown by the police. (R.T. 10699, 10703) Mr. Gregory started playing dominos and Stinger told him that he was going to leave to put his money in his car. (R.T. 10700, 10707)

When first questioned on direct examination, **Larry Harper** asserted his right against self-incrimination. The trial court refused to accept his assertion of the privilege, citing Mr. Harper's previous plea of guilty to second degree murder, his written agreement to testify, and his testimony in the first trial. (R.T. 10819-10821) Like Mr. Johnson, Mr. Harper had been charged with special circumstance murder and after the mistrial, entered a plea to second degree murder and agreed to testify. (R.T. 10835-10836)

At the time of his testimony at appellant's second trial, Mr. Harper told the jury that he was under psychiatric care in prison and that was being medicated with "some pretty heavy psychotropic drugs," to wit: Prozac and Exparadon. (R.T. 10840) He was taking the medications because "I hear

voices...all the time." Mr. Harper stated that he had been hallucinating for the past ten years and was hearing those voices when he was being interviewed by the Stockton Police. The voices told him to "hurt others and kill myself." (R.T. 10841) Not surprisingly, Mr. Harper asserted that the medications impaired his memory of past events. (R.T. 10842)

Although Mr. Harper acknowledged in his testimony that he was serving time as the result of his involvement in the murder of Prince Austin, when asked how he ended up at the gambling shack on the evening of January 11th, he said he couldn't remember. (R.T. 10823) Mr. Harper identified Correll, but denied knowing most of the other alleged participants. When asked why he was being "non-cooperative," Mr. Harper replied,

> "I have a life sentence. I have a life sentence. There are things that I am asking to do to report to the -- report to the B.P.T. So I can have a date to report for parole. You know what I'm saying? Now, I was in computers the first time you subpoenaed me to come down here. Now that is gone. I was in dry cleaners, and I just got back to prison. You pulled me out again. That is gone. I do not want to be here." (R.T. 10825)

Mr. Harper's memory was somewhat refreshed when the prosecutor showed him a copy of a statement that he had made to the police, (R.T. 10828) Although he was loaded on crack when he made the statement, reading the statement in court reminded him that he knew Gator, Bam, Will, and T-Bone. (R.T. 10828-10829, 10839) Mr. Harper had just gotten out of prison a few months before the incident and, quite reluctantly, he recalled being given some rock cocaine by Will and Bam on the evening of January 11th and asked by them to take part in a robbery of the gambling shack. (R.T. 10831, 10837) His memory dimmed, however, when asked if he recalled Will and Bam coming out of the club to talk about the security doors and robbing Stinger. (R.T. 10831)

Eventually, the prosecutor led[14] Mr. Harper into testifying that he had made the following statements to the police [1] "Stinger came outside and T-Bone was supposed to grab him, but that T-Bone did not grab him," [2] "Gator came up with a gun, with the shotgun, and told Stinger 'don't move,'" [3] " Stinger ran and T-Bone shot him," and [4] "T-Bone fired five more shots and that Gator fired one with the 12 gauge." (R.T. 10831-10833) When asked if what he told the police was true, Mr. Harper replied, "if you want it to be." (R.T. 10834)

About a minute after Stinger left to put his money away, while still inside the gambling shack, Mr. Gregory heard four or five gunshots. "Everybody in there just ducked and stayed down." When he went outside to see what had happened, Will was lying on the floor in between the two entrance doors. (R.T. 10700) He saw Stinger lying at the street corner, bleeding from the mouth, with a woman named Rosette Beal, who had been in the club for the first time that night, holding Stinger in her arms. Mr. Gregory then walked back inside. (R.T. 10702-10703)

Although he was unable to say whether Ms. Beale knew that Stinger had won money that evening, or whether she had gone through his pockets as he lay there dying, Mr. Gregory did know that Ms. Beale purchased an Oldsmobile shortly thereafter. According to Mr. Gregory, she did not have the funds to make such a purchase prior to Stinger's death. (R.T. 10704)

It was stipulated that Mr. Austin died of single shotgun wound to the chest and it was further stipulated that a shotgun slug cannot be fired from a hand pistol. (R.T. 10720)

Later that same evening, Teresa became aware that the gambling shack had been robbed. Her friend Moses gave her a ride to the shack, but

---

[14] Literally, with leading questions.

they couldn't get close to it because the police had blocked the streets. Teresa was concerned about Correll, but did not see him there. (R.T. 10663-10664)

She went back to the apartment and Correll came back later. At first, he told her that someone had gotten shot but later told her that he had gone to the shack to do a robbery and that he had waited outside with Gator and that Bam and Will had gone inside. "Someone came out of the door and started running and turned around, and they had a gun in their hand and there was shots fired and so Correll shot his gun, too." (R.T. 10665-10666)

Shortly after the incident, Teresa was interviewed by the Stockton Police. She testified that she did not tell them what Correll allegedly told her because she loved Correll and because she did not want to be involved. She claimed that Correll had told her not to say anything to anyone and that when the police interviewed her, she was afraid that Correll was around the corner and could hear her; she did not tell what she remembered until after Correll had been arrested in the case at bar and she was interviewed by the prosecutor and his investigator. (R.T. 10667)

However, by the time she spoke to the prosecutor who interviewed her with his investigator before trial, Teresa was mad at Correll. "I was angry because he never came down -- I mean I was angry at him...[b]ecause I had a child. He came down, we were supposed to work everything out, and nothing ever worked out the way it was supposed to because of what happened." (R.T. 10669) At this penalty trial, Teresa, who was not a citizen, admitted that when she was interviewed by the prosecutor, she was concerned about her immigration status and worried that she could be forced to leave the United States, if she did not cooperate with him. (R.T. 10670) "I'm very

worried about that. I mean the system can pretty much pull you in and throw you back out." (R.T. 10672)

This admission was in contrast to her testimony at the first penalty trial where Teresa adamantly insisted that she was not worried about the immigration consequences of not cooperating with the Stockton Police. Likewise, at the first trial, Teresa denied telling the defense investigator that she had been worried her about her immigration status when the prosecutor spoke to her, and that she was worried about it still. When confronted with this contradiction, Teresa said she did not remember her former testimony. (R.T. 10672-10679)

About a week after the incident at the gambling shack, William Bird got a call from Correll. "He said he got to get out of Stockton because he's done someone in." (R.T. 10682) Correll told him that it was the result of "a mugging that went wrong." (R.T. 10683-10684) However, when he testified at the first penalty trial, Mr. Bird told the jury that he wasn't sure of what Correll had said when he spoke to him on the phone. (R.T. 10689) Mr. Bird acknowledged that he had prior felony convictions for assault with intent to commit rape and attempted murder, not to mention passing bad checks, beating up a cohabitant, and making harassing phone calls. (R.T. 10690-10691)

Nicole Halstead testified regarding admissions appellant allegedly made to her. Nicole recalled a conversation she had with Correll when they first met where they talked about going to hell. (R.T. 9928)

> "And he is like, 'I am anyways.' I was just kind of being facetious with him a little bit. And I said, 'yeah, you're not going to go to hell.' And I said, 'he will forgive you unless you kill somebody.' And he kind of looked at me and I go 'what?' and he just didn't say anything. I said, 'you killed somebody in your life?' And he just kind of looked at me, you know, and then he just -- I go, 'what? Tell me. What did you do,' you

> know, and he just mentioned just a little bit of what took place, I guess." (*Ibid.*)

Although Nicole did not remember much, she seemed to recall that it was in Stockton and that Correll and some others shot someone while collecting a debt or during a robbery. (R.T. 9929) At the time, Nicole did not take what Correll said very seriously. (R.T. 9947)

> "A. I took what he was saying to me about God and everything seriously. I felt his seriousness when he talked about him living a hard life and why should he believe in a God.
>
> Q. But when he talked to you about what you allegedly said, he talked to you about Stockton?
>
> A. Right.
>
> Q. You thought he was puffing to be acting like a tough guy in front of you?
>
> A. Right." (*Ibid.*)

Although she had given very lengthy statements to the police about her relationship with Correll shortly after she was arrested, the first time Nicole mentioned this conversation about the Stockton incident was 18 months later, after she had entered her guilty plea, while she was being questioned by the district attorney and his investigator. (R.T. 9946)

The prosecution also called **Cordell Thomas**, Correll's older brother, to testify about admissions Correll allegedly made about the Stockton incident to Detective Torgersen of the San Diego Police Department on March 6, 1995. Cordell stated that he did not remember talking any officer on that date, while he was in custody in the San Diego County Jail for possession of narcotics. (R.T. 10762) As of that March date, Cordell had been in custody for three days and knew he was facing prison time. (R.T. 10778)

When the prosecutor asked Cordell about phone calls he allegedly received from Correll in the winter of 1995, Cordell requested to speak to an attorney. When the court directed him to answer and he refused, Cordell was held in contempt. (R.T. 10763-10765)

At the side bar that followed, the prosecutor indicated that he was going to call that officer to establish that such a statement was made and asked for a ruling that Cordell was unavailable as a witness. Given that Cordell had already denied making any statement to the officer, the defense was first permitted to cross-examine Cordell as to his bias.

Cordell allowed as to how he had "five, maybe six" prior felony convictions. "I'm not sure." (R.T. 10777) Cordell later upped his estimated rap sheet to "over six, maybe eight" felony convictions. (R.T. 10785) When asked if he had been happy to be back in jail when he was arrested that March, Cordell replied that he had "mixed emotions," that he liked being institutionalized, and that he "would rather be in jail than be on the streets." (R.T. 10779-10780)

Cordell denied telling Det. Torgersen that he wanted to get out of jail. "I had no conversation with an officer." (R.T. 10780) In view of the above, it should come as no surprise that Cordell also denied telling Det. Torgersen that he would exchange testimony for help on his newest case. "I don't recall talking to any officer about my brother." (R.T. 10781) Cordell admitted that he had a history "of getting him [Correll] in trouble or doing something against him to save [himself] or to get [himself] out of trouble" but he denied that making a deal for testimony against Correll to help his case was an example of that trait of character. (R.T. 10782)

Cordell admitted that when Correll was 15 and he was 19, he brought a prostitute into the family home and when Correll threatened to tell their

mother, Cordell hit him on the leg with a board. When Correll tried to call the police, Cordell doused him with lighter fluid and threatened to set him on fire. "I didn't like him back then." (R.T. 10874) Cordell admitted that he frequently expressed his antipathy towards his sibling by inflicting beatings on Correll; he also admitted stabbing Correll with a knife when Correll was six years old. (R.T. 10784)

Following the defense examination, the prosecutor, on redirect, asked a series of leading questions about the statement to Det. Torgersen and each question was met with a "no." Specifically, Cordell denied telling an officer [1] that he had spoken to Correll on the phone during which time, Correll said he was facing a lot of time, [2] that Correll told him that he "had been up in Stockton visiting his three-month old baby who was in the hospital," [3] that he and "some other guys tried to rob some fool of $15,000 in Stockton," and [4] that "something went wrong and the dude tried to get away so he, Correll, smoked him." (R.T. 10787)

Terrence Torgersen, a detective with the San Diego Police Department, told the jury that he took a statement from Mr. Cordell Thomas on March 6, 1995. Torgersen had learned from a fellow officer that Cordell had said that Correll was involved in the Stockton murder. Torgersen testified that before giving a statement, Cordell tried to arrange a deal. "He wanted to get out." (R.T. 10794) Although Det. Torgersen told him that he couldn't make any promises, Cordell informed the officer that Correll had told him that "he had been involved in something up in Stockton" and that "he tried to rip somebody off of $15,000 and that he shot the person...He said that the guy was trying to get away or something went wrong and that they smoked him." (R.T. 10790-10791)

2.

Stockton Robbery/Homicide - Defense Evidence

Robert Strother arrived at the gambling shack at around dusk on the evening that Prince Austin was shot. "When I first got there, I pulled into the front of the building...and then something told me not to park there...[T]here was a second parking lot on the side...[and] [s]o I decided to park there." (R.T. 11028) While he was still in his car, from a distance of about fifteen feet, he noticed two black men who looked suspicious standing by the water cooler near the entrance to the shack. He then heard some gunshots, but was not in a position to see who was firing them. About five minutes later, Mr. Strother saw the same two black men running in a southerly direction. (R.T. 11031-11034, 11038, 11040)

Appellant was asked to stand up in court and Mr. Strother stated that he was not one of the men he saw in front of the gambling shack the night Prince Austin was killed. (R.T. 11036)

Lisa Porter, who was very familiar with the gambling shack, arrived there some time between 7:00-8:00 p.m.. At that time in her life, Ms. Porter "was in [her] addiction and [she] used to hang around there all day, every day." (RT. 11043)

> "At that time I arrived by myself, and I walked up to the two guys that were standing in front of the water cooler, because they sold drugs all the time. So I went up to them and I asked them, did they have anything, and they was acting all funny, you know, weird...They was talking mean to me. They told me, you know, to get on, you know." (*Ibid.*)

Ms. Porter used to be Mr. Strother's girlfriend and after her encounter with the gentlemen at the water cooler, she went over to his car and got in. At the time, he had parked in front of the shack and, feeling uncomfortable with that location, moved the car to the side lot. (R.T. 11045) After some

shots were fired, she saw three men running away; but she did not see any weapons. (R.T. 1046)

Appellant was asked to stand up and Ms. Porter was asked to identify him. "I hung around there 24-7, all day long, and I ain't never seen him... That night and all the other years I was there, uh-huh... Like I said, I damn near lived there. I ain't never seen him." (R.T. 11046-11047) When asked if she were certain that Correll was not one of the men she saw that night, Ms. Porter responded, "I was a good friend of the person they killed, and if he was that man I would tell you....No, he's not that man. I wish he was, but he's not." (R.T. 11050)

3. Doss Shooting- Prosecution Evidence

On September 17, 1995, **Ronald Doss** brought **Alton Brown** to **Tashna Wait's** apartment in El Cajon sometime in the early evening. Alton and Tashna had met Alton a few weeks earlier, but she had never met Ronald before. Also present in the apartment were Kimberly Braeutigan, her two children, and Tashna's son. (R.T. 10581-10582) After Alton and Ronald arrived, they sat around and "chilled for a minute" in the front room. Then Alton and Tashna went into the back room for about ten or fifteen minutes. (R.T. 10603)

When Alton came back into the living room, Ronald was on the couch and Alton stood behind him. At some point, the front door opened "and this big, dude, bald, he had no shirt c[a]me in talking about 'somebody paging me from here,' and pulled out a gun." At this trial, Alton identified Correll as the man with the gun; at the first penalty trial, he said that he couldn't be sure Correll was the man. (R.T. 10604, 10611) According to Alton, Correll was holding the gun in his right hand and waived it around, telling him to

sit down on the couch. He did. Correll said "one of you all might have a strap"[15] and had Alton and Ronald to take everything out of their pockets and to turn around and raise their shirts. (R.T. 10605)

Although Alton claimed that he did not know that Ronald had a gun on him when they were in Tashna's apartment, he knew Ronald owned a gun, he had seen him with the gun before, and they had discussed the propriety of bringing a gun to Tashna's house that evening, with Alton, naturally, advising against that course of action. (R.T. 10615) In response, Ronald told him in words to the effect that, "I might need the gun. We're going over to two girls' house. We don't know anything about them." (R.T. 10616)

While Alton emptied his pockets, Ronald "threw some stuff out his pockets, but not all the stuff he had in his pockets." Correll never made any attempt to take anything that they put on the table. (R.T. 10614) At this point. Correll, who never got further than an arm's length from the door, was standing by the door, holding the gun, pointing it at the floor. (R.T. 10606-10607, 10611)

> "The next thing I remember happening is that he was telling Ron to turn around, but Ron wasn't raising up his shirt all the way. He was only raising up the front part, not the back part. So he was getting kind of skeptical that he had a gun, so he was getting more -- like more panic, panic. So he kept telling us to come outside. So when Ron was about to go outside. He was standing by the door and Ron just shot him." (R.T. 10606)

Ronald fired five times. After the first shot, Correll fired back. One of the shots struck Correll and he fell on to a table. A person whom Alton assumed was Correll's "partner" grabbed his gun, and Alton ran off, jumped a fence, ran on to the main street, and ended up at his cousin Judy's house. From there, he called his uncle, **Ernest Brooks**. (R.T. 10607)

---

[15] Gun.

According to Mr. Brooks, when Alton called, he was very emotional. After Alton told him what happened, Mr. Brooks went to Alton's location and took him to the scene and then the El Cajon Police Department so that he could make a statement to the police. (R.T. 10620-10623)

Ronald Doss recalled being asleep on the couch in Tashna's living room when he awoke to see a man, whom he identified as Correll, standing at the door, holding a gun, pointing it at both him and Alton. "He said 'break yourself'...basically, you know, have to get up, take everything out of my pockets, throw it on the floor. In Ronald's mind, he was being robbed. Ronald had a gun in his back pocket and when Correll asked them to step outside, Ronald thought he was going to be shot. "I didn't make it outside like just then....As he was pointing the gun at me. I was able to shoot him, and then I was able to go outside after that." (R.T. 10902) When asked if he saw Correll fall, Ronald replied, "if you hit somebody with a bat, of course, if they fall, you run. You don't stand there and watch how they fall." (R.T. 10904)

As a result of this incident, Mr. Doss was convicted of a violation of Penal Code §12021, ex-felon in possession of a firearm. (R.T. 10906)

4. Doss Shooting - Defense Evidence

The defense evidence on this incident came in via two stipulations. (R.T. 11483) The first stipulation concerned the nature of the wounds Correll suffered after being shot by Ronald Doss.

> "The parties stipulate that on September 18th, 1995, defendant, Correll Thomas, was taken to Sharp Memorial Hospital for treatment of injuries and surgery in the aftermath of having been shot. The defendant, Correll Thomas, suffered the following injuries as a result of being shot by Ronald Doss: first, two gunshot wounds to his upper right arm which appear to be connected to two wounds on his pectorals muscle; second, one gunshot wound to the left forearm; third, two gunshot wounds

> to his left hand; fourth, one gunshot wound to the right buttock; and fifth, one gunshot wound to the right groin. There were separate entry wounds to the right buttock and to the right groin." (*Ibid.*)

The parties also stipulated that Lisa DeMeo, a criminalist who testified at the first penalty trial, had examined the boxer shorts worn by Correll on the date of the shooting and that there were "bullet holes in the right buttocks area above the right rear pocket of the pants." (*Ibid.*)

> "[T]he bullet hole in the right buttock area of the pants appeared to her to be an entrance wound because the fibers of the fabric are turned toward the inside and being through several layers of fabric, including the pocket lining and part of the seam. This indicated that at least as to this bullet hole, defendant, Correll Thomas, was shot from behind by Ronald Doss." (*Ibid.*)

5. DeMarco Atkins Shooting Incident - Stipulation

The following evidence was introduced by way of stipulation.

"[I]f Mr. Atkins were called and sworn as a witness...he would testify to the following: that he, Mr. Atkins, was at 1170 Sumner street on September 17th, 1995 between 10:00 and 11:00 p.m. He lived at that address. Also living there was his mother, his nephew and his cousin. Jesse Russell is the brother of DeMarco Atkins.

"DeMarco Atkins would further testify that he knew Nicole Halstead because she was his brother, Jesse Russell's, girlfriend. Something unusual happened. Two people came up to the window and asked for Jesse. DeMarco Atkins said, "he's not here." But that was it. It was the window by the driveway, a window to a bedroom all the way in the back.

"Also in that room with DeMarco Atkins was his cousin and nephew, his cousin being Derek Brown, his nephew being Ivory Payne. The people outside tapped on the window and a voice said, "is Jesse

here?" Atkins said, "no." Then DeMarco Atkins waited, and then he heard a gun cocked back. That was it. The voice said, quote, "Looking for Jesse. I'm going to get him. Looking for Jesse. We're going to get him.'"

"The next thing he heard was the gun cocked back, and he saw them start running up towards the front of the house. He and/or the other occupants of the apartment were laying down. Then he heard some shots. He, DeMarco Atkins, was laying down because he thought they were going to shoot the house.

"He recognized the person's voice who was speaking. It was Correll Thomas. He knew Correll Thomas from prior to that day. He heard about two or three shots. After hearing the shots, he waited for 3 to 5 minutes at the most and then called the police. The police came out and he gave them a statement about what had happened.

"Further testimony upon cross-examination by Mr. Bloom would be as follows: that all Mr. Atkins heard was one person. It was a male voice that said, "is Jesse here?" Atkins said no, and the male voice said, "I was looking for Jesse. I want to get him." To the best he can remember, those are the words that were said. Then a little while later he heard a cock of the gun and a little while after heard gunshots. It was as they crawled toward the front of the house that they heard the gunshots, which was a couple of minutes after he had heard the last words.

"He did not see anyone doing the shooting because he was inside the house. There was no way of knowing which of the two fired the shots. There were no shots inside the house. No shots came inside the house. No window was broken. No door was shot or

anything. He did not hear the shots strike anything at all." (R.T. 10815-10816)

N.

Penalty Phase - Evidence in Mitigation

Jimmy and Sheila Thomas, Correll's parents, met when Jimmy was 13-14 and Sheila was 11-12. (R.T. 11505) When Sheila was fifteen and still in school, in the 10th grade, she became pregnant with their oldest son, Cordell. (R.T. 11506) Jimmy and Sheila got married in 1973 and Correll was born in October of 1973. (R.T. 11423, 11301) Sheila came from a large, extended family of four sisters and two brothers, many of whom were involved in one way or another in Correll's upbringing. (R.T. 12299) **Arthurine McCapivor** was the oldest sister, followed by **Tyrone Taylor, Jimmy Taylor, Sheila, Shirley Abrams,** and **Sharon.**. (R.T. 11299-11300)

Shirley Abrams, Sheila's younger sister, recalled that the relationship between Jimmy and Sheila was "wild and crazy." (R.T. 11301) The testimony at the penalty trial established that Sheila and Jimmy fought, both verbally and physically, on a regular basis, in full view of the Cordell and his brother. (R.T. 11428) Shirley recalled times when she would see Sheila and she "would have different, like bruises or black eye or busted lip or stuff." One time, Jimmy broke her jaw. (R.T. 11305) According to Jimmy, the fights took place every couple of weeks. The violence was not, however, completely one-sided. Jimmy told of one occasion when he came home drunk Sheila knocked him out:

> "You know, I had been drinking. And she had told me not to be out in the streets drinking. And so I did it again, you know. I couldn't get my key in the door, and she -- when that door did open, she snatched me and then she swung on me." (R.T. 11513)

When Jimmy Thomas testified, he was in custody on a robbery conviction; at the time of his testimony, he had been in jail for almost eleven years and had not seen Correll in ten years. (R.T. 11505, 11528)

Drugs and alcohol were a serious problem for both Jimmy and Sheila. Jimmy had an alcohol problem. "At times I did overdo it...[I] had a little bit too much to drink...[I] remember times where I don't remember making it home, going home or driving home, but I was there that morning." (R.T. 11509)

For her part, Sheila had a major drug problem. She had been using drugs -- liquor, seconal, tuanol, and PCP -- since she was thirteen. (R.T. 11422-11423, 11430) She drank and took pills every day and she smoked PCP about twice a week. (R.T. 11432) When she used PCP, Sheila would become "incoherent...I didn't know where I was." The PCP would cause her to pass out and when she woke up, she would have no memory of what she had been doing. (R.T. 11430-11432)) After Correll was born, her drug habit escalated. To pick an example, when Correll was an infant, Sheila went to her sister Shirley's wedding. Sheila was so intoxicated on drugs that "she could hardly stand up...[S]he was...staggering...weaving back and forth..." (R.T. 11332)

Sheila said that Jimmy would lock her in the house when he left. (R.T. 11425) Jimmy denied doing it intentionally. (R.T. 11516) Sheila opined that Jimmy "had a mental problem." (R.T. 11425)

Because of her addiction, and related problems, Sheila was in a poor position to take care of Correll because "the drugs had taken over..." (R.T. 11427) At some point during the first few months of his life, Dorita Brazil, Correll's godmother, took him into her house and became his primary caregiver for the next few years. (R.T. 11301) Shirley Abrams observed that

'[b]ecause [Sheila's] relationship was, you know, rocky and we felt like because Dorita loved him so much that she could at that time possibly give him a better home." (R.T. 11306) Tyrone recalled Correll stayed with Dorita "most of the time." Dorita "did ask to take care of him and Sheila let him go there." (R.T. 11415-11417)

When Jimmy and Sheila lived together in Los Angeles, their house was in an abysmal state of disorder. **Gary Cook,** Sharon's husband, had become a good friend of Jimmy's, and when he and Sharon went over for a visit, they were shocked by what they saw. The house reeked of urine; "maybe sheets hadn't been changed where the kids had peed in the bed." (R.T. 11557-1159)

> "Things weren't put together. They were beds, but maybe they weren't put up...dishes maybe around and clothing. Nothing was straightened up. Some things looked like they needed to be washed....You could tell they hadn't been put up for sometime. " (R.T. 11559)

Jimmy Thomas moved out when Correll was about 3 years old. A short time later, Sheila began living with **Larry Hollings**. At the time he testified, Larry was serving a four year prison term in Nevada for robbery. (R.T. 11347) The last time he had seen Correll prior to testifying was when Correll was a little boy. (R.T. 11348)

Larry met Sheila in San Diego when he was on furlough from the federal penitentiary at Lompoc. "I seen this woman with rollers in her hair that really caught my eye. That was Sheila Taylor. We started talking and started dating and she started writing me and she started visiting me and a lot of sparks started flying between both of us..." (R.T. 11350)

After he was released, Larry moved in with Sheila. The relationship went on and off over a twelve year period. (R.T. 11350) Larry and Sheila had two sons, Larry Jr., born in 1979, and Terry, born in 1982. (R.T. 11348-11349) Correll was about 3 when Larry and Sheila began living together.

Larry testified that "[Correll] was real friendly with everyone...You could have just grabbed his hand and Correll would have went with anybody. He trusted everybody. He was real timid and real shy when he was a little kid. He didn't have that many friends coming up in his child..." (R.T. 11351-11352)

> "He used to be peeking out the window, waiting for me to come home. As soon as I pull up, ran outside to the car. He would jump in. Come out, wanted me to take him somewhere. I used to take him places with me. You know, me and Correll would have a good bond during that time." (R.T. 11353)

Initially things went well between Larry and Sheila. Larry was working at a legitimate job and they lived in a little white house across the street from Sheila's sister, Arthurine. This did not last long -- maybe two or three months "then there been would be chaos another two or three months." (R.T. 11353-11354) Larry and Sheila would get into physical fights in front of the children.

> "In the beginning he -- Correll used to start crying, kicking, and try to run out the house...He started kicking the ground, the floor. You know, he was upset. As time went on, we went on fighting, as months as months went on, Correll looked at us like we was just crazy. He got numb to it." (R.T. 11354)

As in her relationship with Jimmy, the fights between Sheila and Larry were not one way affairs and Sheila got her own licks in; sometimes it was Sheila who started the fights. "I got it proved right where she popped me in my mouth right here one time. It never healed." (R.T. 11355) In Larry's opinion, the fights were fueled by their mutual usage of drugs. He was using heroin and cocaine and Sheila was using PCP, seconal, quaaludes, and "anything she could get her hands on." Sheila developed a significant tolerance for seconal and would take "damn near a dozen of them" at a time. During many of their fights, the police were called. (R.T. 11355-11356)

On one occasion, the fight was particularly bad. "[T]here was blood drawn that time. I had grabbed his mother's hair. You know, we had broke the coffee table in the room. [Correll] heard all the commotion. He had no -- like didn't know if one of us was going to kill each other." Larry left the house and when he came back, he couldn't find Correll

> "[I] looked in his room and I couldn't find him. So I went outside...there's a garage in the back of that house. And Correll was outside in the garage and behind a trash dumpster, you know, crying...Like I said, he had got numb to it, you know, us fighting. But I had left. I guess he thought I was going to leave for good. " (R.T. 11356-11357)

When Sheila got high on drugs, she frequently became abusive to her children. Larry had to stop her more than once from beating on the children. She would beat them with "anything she get her hands on." Sometimes the beatings were so bad that Correll couldn't go to school "because he had big old welts on his back, on his legs." (R.T. 11358) Sheila admitted as much. (R.T. 11431) She used to use a leather belt and/or an extension cord to hit Correll. "He had whoopings. I didn't even beat him." (R.T. 11431)

Some times Correll would get beaten because he took Larry's side in an argument. "Correll would holler. He would sneak out and run and jump in my car; right. And when he come back in, she would whoop him for it..." (R.T. 11359)

> "You realize she was a big woman. When she would get high or I would get high too -- I don't want to blame it on her -- she gets very abusive. And whatever is in her way, if she can't get at me, she would get at Correll or Cordell. Little Larry was a baby. She didn't mess with him, but he had his coming, too." (R.T. 11358)

When he was little, Correll would some times wet his bed at night and he would be beaten for that too. "She would say, 'you little son of a bitch, you little black bastard, I told you about pissing in the bed.'" (R.T. 11359)

> "She get to wailing on him. That's when I wake up right then and I had to grab her. Then we get into an altercation. She'll say something like, 'well, this is my son. I do what the fuck I want.'" (R.T. 11360)

For his part, Larry was selling drugs out of the house and Correll was fully aware of what was going on. Sometimes, when Larry would come home loaded on drugs and was in no condition to take care of himself, Correll would "always ma[k]e sure that all my drugs is put up. He [would] stash[] my money to when I get up the next morning, he always give it to me." (R.T. 11361)

Frequently Sheila would leave the children alone and, as he got older, Correll would take responsibility for taking care of his little brothers. (R.T. 11453-11458) When there were parent-teacher programs at school, it was Correll, not Sheila, who went with the younger children. Correll was the one who woke them up in the morning for school, who got them dressed, and who made sure they did their homework. (R.T. 11467)

When asked what it was like living with his mom, Larry Jr. replied,

> "It wasn't good. I mean, it was a struggle for us, for my family. Basically, we did everything on our own with the help from Correll.
>
> Q. Who raised you more than anybody else, Sheila, your dad, grandparents, your aunts, your uncles? Who was the person who raised you more than anybody else?
>
> A. Like Correll did, but my grandparents, they had a lot to do with it, too." (R.T. 11466)

Birthdays and Christmas were not celebrated in the house; there were never presents for any of the boys. (R.T. 11461) When Correll was in

elementary school, Sheila typically started drinking gin early in the morning and by the time the kids came home from school, she would be "pretty drunk." (R.T. 11441) Although Sheila claimed to nevertheless care for her children during that time, she admitted that she only cooked when she wasn't drunk. (R.T. 11442)

> "Q. What about those days when you were drinking?
>
> A. I don't know." (*Ibid.*)

Terry, Correll's youngest brother, recalled that when his mother was drunk or high on drugs, there "would be a lot of rage in the house. Like stuff would be thrown all over the house. She would be cussing, stuff like that." (R.T. 11459) One time Sheila called the police on Correll and falsely told them that Correll had hit her. (R.T. 11461) According to Larry Jr. when Sheila got drunk, "[s]he wouldn't act like a mom was supposed to act...[She would] [s]tay out all night and cuss us out and lose the keys to the house. We wouldn't be able to get in." (R.T. 11469)

Sheila was constantly moving; during the first eleven years of his life, Correll lived in nine different houses, both in Los Angeles and San Diego. (R.T. 11439)

For much of the time when Correll was growing up, Sheila was on welfare. Although Sheila denied it, other members of her family recalled that Sheila would frequently spend the welfare check on drugs and alcohol, rather than for rent and food for her family. (R.T. 11443, 11378) Arthurine recalled that Sheila's welfare check arrived at the beginning of the month and that "[y]ou couldn't hardly find her after the mailman came...She didn't use [the welfare money] on food or clothing." (R.T. 11378) According to her sister Shirley, the family "knew Sheila would be drinking at the beginning of the month...because that's when she had money." (R.T. 11312)

Because Sheila would spend the welfare money on drugs, there were frequently times when there was no food in the house. Arthurine recalled one time when Correll called his grandfather and told him that "my mom's not home and we have no food." (R.T. 11379) When Shirley would come down to visit, "[t]here wasn't food. And we would go to the store and buy groceries and, you know, food to cook." Usually, she would try to coordinate her visits with when the mailman came with the welfare check at the beginning of every month. "I just wanted to make sure that she would do what she's supposed to with her check: pay her bills and buy food. And I thought I would go over early and wait with her." (R.T. 11313)

When asked if they had the things they needed in the house, Larry Jr. said "it was rough. It's just like we was always depending on my grandparents. If we didn't have nothing to eat at the house, we would depend on him to come over, give us some food, stay with us, clothe us all, everything." (R.T. 11470-11471) Similarly, when Terry was asked about the typical food situation in the house when his mom was drunk or on drugs, he answered "[t]here was nothing, sir. Just canned goods. That's it. Sometimes not even that." (R.T. 11454)

> "Q. How about bread?
>
> A. No, sir.
>
> Q. Your mom ever go through the bread lines to get bread?
>
> A. When she was sober.
>
> Q. How about peanut butter to spread on the bread?
>
> A. She got that from the bread line when she was sober, yes, sir.
>
> Q. You'd open up the refrigerator on A normal day in your house, what would be in there?

A. Water, and like water, spoiled oranges and spoiled apples, spoiled milk.

Q. What about meat?

A. No, sir." (*Ibid.*)

Sheila's desperate need for drugs drove her to steal Correll's money that he had saved from his paper route. As Shirley recalled, "he was really proud of his paper route and, you know, he collected all the money for his paper route, and she took his money and spent it on drugs." (R.T. 11316)

Joseph McDowell, an employee of the city parking enforcement office, also worked as a volunteer athletic director with the Boy's Clubs in San Diego as from 1975-1986. "I put on seasonal programs for the youth from ages 6 to 18...like football, baseball." He later worked with little league baseball. Mr. McDowell first met Correll when he was eight or nine, and through Correll, he met Sheila. (R.T. 11391-11392) Occasionally, when Sheila would come to watch the games, he would see her either drunk or under the influence of drugs. (R.T. 11393)

When Correll was in his early teens, he lived for about six months with his Aunt Arthurine. She took him to church with her and he sang in the choir and joined the church youth group. (R.T. 11383-11385) **Rev. Milton Chambers** was the senior pastor of the church and he recalled Correll's participation in the choir and the youth group bible study program. (R.T. 11388) One of the group's activities involved visiting seniors at convalescent homes. Rev. Chambers remembered Correll as being "very respectful. I never had any problems with him." (R.T. 11389)

When Correll was about 15, he called his father, Jimmy, and asked him if it was okay to call the police on his mother. When Jimmy asked why, Correll told him that Sheila "was getting welfare money and they didn't have

anything in the house and she was buying drugs with the money." Jimmy told him not to call the police, telling him that "[s]he doesn't need the police. She needs help." (R.T. 11530) By that time, Jimmy had remarried and was living in Lancaster. After consulting with Gary Cook, his brother-in-law,[16] the two of them went down to San Diego and brought Correll back with them.

Although Jimmy's new wife had four kids of her own, initially things went well for Correll in Lancaster. Jimmy checked him out of school in San Diego and put him in summer school in Lancaster, where he did very well. (R.T. 11351) Sheila called and told Jimmy she wanted Correll back; Correll did not want to go back. (R.T. 11357) One evening, about a month and a half after he had arrived, at about 7-7:30 p.m., Correll was outside playing with the other boys and some neighbors. Jimmy "asked them to come in and stop making a lot of noise. We live next door to some older people elderly people and they get frightened at late hours of the night." (R.T. 11541)

They continued to make noise and so Jimmy told them to come in and to play in the den instead. Jimmy went to lie down and Correll and the others went back outside and continued to make noise. When Jimmy got up to remonstrate with Correll, he pushed Jimmy aside. Jimmy called him inside and grabbed Correll by the arm. "He told me to 'take your hands off of me.'" (R.T. 11542)

> "I got angry. Very angry. And I ran into my bedroom and I reached up under my mattress and I came back with my gun and put it up to his head. And he looked down at me and he asked me, "Daddy, you will hurt me?" (R.T. 11543)

[16] Sharon, Gary's wife, was Sheila's sister. (R.T. 11555)

Jimmy told his son that he "[w]ould take his fucking brains out...[Y]our mother brought you into this world and I'll fucking take you out of it." (R.T. 11544) The next day, Jimmy apologized for what he did but, nevertheless, he and Gary Cook took Correll back to San Diego. (R.T. 11544, 11568) Jimmy told Gary that "his wife really didn't want Correll there and that there was some conflicts with the children and things just wasn't as good as he would have liked them to be." (R.T. 11567) Both before and during the ride back, Correll begged them to let him stay in Lancaster. Gary recalled that, Correll "was hurt." (*Ibid.*)

> "He was quiet. You could see tears welled in his eyes and there was several times I looked back and I wondered -- and it's hard to say, you know, something to him. It was because I could see how hurt he was and just a quiet drive." (*Ibid.*)

Beverly Haynes knew Correll since he was 19, when he lived around the corner from where they lived in Lemon Grove in 1993. During this time period, Correll stayed with Ms. Haynes and her three young children for a period of a few months. Correll interacted well with the children, especially Benny, the eighteen year old. Benny is disabled. "He doesn't walk or anything. He doesn't talk and he's little -- he looks like he's a couple years old. I mean maybe 8 years old." (R.T. 11398-11400) Correll paid special attention to Benny. "He play[ed] with him, pick[ed him up, ma[de] him smile." (R.T. 11400) "He would just talk to him. Benny seemed to like that." (R.T. 11401)

> "Q. Does Benny still have a reaction when you talk to him about Correll or show him Correll's picture?
>
> A. Yes, Benny does.
>
> Q. What is that?
>
> A. He gets excited. He kicks. I mean all you have to do is mention Correll and he kicks.

Q. Your son, that's the way your son communicates?

A. Yes, with somebody. I mean, with -- when I mention him, yeah.

Q. When you mention Correll?

A. Yeah." (R.T. 11402)

When Ms. Haynes' daughter, Tiffany, turned 12, she started having problems with her running away, staying out all night. Tiffany's Dad was "no help." Although Correll had since moved out some time before, Ms. Haynes would call him and he would go find Tiffany for her. "I would tell him where she was at and tell him could he, you know, bring her home because she ran away again." (R.T. 11402-11403) Correll would also talk to Tiffany about her behavior. "He would tell her that she don't need to be out there in the streets; that there wasn't nothing out there for her, she could get hurt. She's 12 years old." (R.T. 11404)

When Correll was about 16 years old, he met Cathy Davis, who lived with her mother, **Elaine Howe**, in Escondido. One night, Ms. Howe came home at about 10:00 p.m. to find Correll visiting with Cathy, sitting on the couch, watching television. Ms. Howe did not permit Cathy to have boys visit her at the house at night. Ms. Howe "asked her about it. And she introduced me to Correll. And I told him he had to leave because it was a little late. It was too late. It was past her curfew." Ms. Howe told Correll that he had to leave and he did. (R.T. 11570-11571)

Later that evening, Ms. Howe went out again to pick up her sister from work and shortly after she came back, one of the neighbor's sons knocked on her door and told her that Correll was sleeping in the laundry room of the complex. At that point, Cathy told her mom that Correll had nowhere to go. At first, Ms. Howe took the position that "this is a teenager. He can't stay

here." Moreover, she thought that Cathy was making this up. "I wasn't going for it at first." A call was then placed to Correll's grandmother who explained the situation with Sheila and begged Ms. Howe to let him stay there. (R.T. 11571-11572) Ms. Howe was informed that Correll's mother was on drugs. (R.T. 11579)

> "He had no food in the house. He was taking care of the small children that were there living in the house, and he didn't want to get in trouble down in San Diego because when she came in sometimes she was drunk or -- and unruly and she wanted -- he would have got go and try to find food for the other kids, and he didn't want to steal." (*Ibid.*)

Ms. Howe relented and let Correll sleep on the living room floor. Like the proverbial guest who came to dinner, Correll ended up staying with Ms. Howe and her daughter for about a year or so, on and off. Along the way, Cathy and Correll became intimate and had two children. (R.T. 11573) Although most of the contact Ms. Howe had with Correll's family was through his grandmother, Sheila called one time and threatened Ms. Howe "because I had her son." (R.T. 11574)

Ms. Howe tried to enroll Correll in school in Escondido, but Sheila would not cooperate. "His mother would not send the proper paperwork. His grandmother kept telling me that she would get it, and she never got it.' Finally Cathy contacted Sheila and she still "wouldn't send the paperwork down there." (R.T. 11579)

One Thanksgiving, Sheila invited Ms. Howe, Cathy and Correll to her house for dinner. They spent a few hours there and everything was friendly and nice. "She said thank you. I said thank you. I said, 'I'm finally glad -- I'm finally glad to get to meet you,' because I had not met her. And we exchanged telephone numbers." However, shortly after they got back to Escondido, Sheila called and this time, "she was a different person." (R.T.

11575) "[S]he was cursing me out and threatening me. [¶] She called the law on me for taking her child, and thought I was this and that and whatever. I mean she was a totally different person." (R.T. 11574)

In 1990, Correll and Cathy had a baby who died at childbirth. The following year, they had another, Correll Jr. and one year later, Shalay. (R.T. 11578)

Not too long after Correll Jr. was born, Cathy fainted while she was at work and was taken to the hospital. She was diagnosed as having lupus and was transferred to UCSD hospital. Correll stayed with her the entire time she was in the hospital. After a week, Ms. Howe had to go back to her house, but Correll stayed. (R.T. 11575-11576) "He took care of my daughter. He was there for her. And she was doing really bad. They thought she might go or whatever. And what happened was Correll -- I had to leave after a week of not going home at all." (R.T. 11576)

> "Correll stayed there the whole time. He slept in the room with her. He took care of her. He had to help her up to go to the bathroom. He washed her, he bathed her, he did everything. Even after she went home, Correll took care of her." (*Ibid.*)

When she came home, Cathy began sleeping too much. Correll discovered bottles of store-bought sleeping pills that Cathy had apparently acquired on her own and had hidden in the couch. (R.T. 11580) "[M]e and Correll got together about these pills, and I told to him (sic) watch her. So he would make sure that she didn't get to the store. Then he would bathe her, he would help her, he would cook for her." (R.T. 11581)

> "He would just hold her sometimes, just hold her and sing. I forget the name of the song, but it was a certain song that he could calm her down with or, you know, get her to relax with." (*Ibid.*)

Throughout his incarceration, Correll kept in touch with his children, Correll Jr., aged 8, and Shalay, aged 7, and they with him. "They write him,

he calls, they talk to him." Ms. Howe brought them to the penalty trial at their request. "Correll [Jr.] wanted to come and talk to the court on behalf of his father" but trial counsel responded that "I don't think we're going to put him through that." (R.T. 11588-11589)

I.

The Trial Court's Erroneous Refusal to Sever the McDonald Homicide from the Grote Homicide Violated Appellant's Right to Due Process of Law and a Fair Trial, Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the California Constitution

A.

Introduction

Mr. Thomas was jointly charged, in one information, with both the murder of Mr. McDonald and with the murder of Mr. Grote. In that same information, Mr. Cooksey was also charged with the McDonald homicide. There were, however, no significant, material factual links between the operative scenarios of the McDonald homicide and the Grote homicide other than the fact that appellant was charged in both cases, The homicides occurred on different dates, in different places, and with wholly different scenarios.

- The McDonald homicide (Count One) took place on May 17, 1996 while the Grote homicide (Count Four) took place on June 6, 1996.
- The McDonald homicide took place in South San Diego while the Grote homicide occurred miles away, in eastern part of San Diego County.
- Mr. McDonald did not know Mr. Grote and Mr. Grote did not know Mr. McDonald
- The McDonald incident was a fist fight that got out of hand while the Grote homicide involved the use of a gun fired from a car

Nevertheless, relying *solely* on the fact that the McDonald and Grote incidents involved the same class of crime -- homicide -- the prosecution charged both homicides in the same information.

It is oft stated that the purpose of permitting the prosecution to consolidate the trial of unrelated cases involving offenses of the "same class of crimes or offenses" (Pen. Code §954) is that trying both cases before the same jury in a single trial "avoids...the waste of public funds which may result if the same general facts were to be tried in two or more separate trials." (*People v. Brock* (1967) 66 Cal.2d 645, 656; *People v. Ochoa* (1998) 19 Cal. 4th 353, 409; *People v. Johnson* (1984) 43 Cal. 3d 296, 451.) "Consolidation usually promotes efficiency...[by] obviat[ing] the need to select an additional jury ..." (*People v. Mason* (1991) 52 Cal. 3d 909, 935.)

In this case, however, trying the McDonald and Grote homicides together neither promoted efficiency nor served the cause of justice. Joinder of the counts did not prevent "the waste of public funds" (*Brock, supra*) by the selection of one jury to hear both cases; the trial court ordered two separately chosen juries to hear this case simultaneously, one jury for Mr. Thomas and one jury for Mr. Cooksey. Indeed, the whole purpose of joinder was undermined when the trial court impaneled two juries.

Having denied appellant's initial motion for severance of counts, the trial court nevertheless decided that separate juries should be selected to hear the case against each of the defendants to avoid the prejudice to Mr. Cooksey that might inure from the joinder of the Grote case and to obviate some of the problems inherent in jointly trying a capital defendant with a non-capital defendant. Thus one jury was selected to hear the McDonald case against Mr. Cooksey, and, in a separate voir dire proceeding, another jury was chosen to hear the charges against appellant in both the McDonald

and Grote cases. The trial was conducted in a courtroom that had two jury boxes, one on each side of the courtroom. (R.T. 1272)

Joinder of the McDonald and the Grote allegations saved not one minute of trial time.

- There were two separate voir dire proceedings, held on separate days, one for the jury that heard the cases against Mr. Thomas and one for the jury that heard the case against Mr. Cooksey.
- There were two sets of opening statements, one heard only by Mr. Thomas' jury and one heard only by the jury that tried Mr. Cooksey.
- There were two separate instructional conferences, one for Mr. Thomas and one for Mr. Cooksey.
- Mr. Thomas' jury was separately instructed, on a different day, as was the jury that rendered a verdict against Mr. Cooksey.
- There were two separate sets of closing arguments, given at separate times, one heard only by the jury that sat in the case against Mr. Thomas and one for the jury that heard the evidence against Mr. Cooksey.

In short, even though appellant's motion for severance of counts was denied, there were, nevertheless, two separate juries, two separate trials, but with none of the efficiency that joinder of counts was intended to accomplish, with none of the evidentiary protections that a true severance of the counts would have yielded, but with all the prejudice to appellant that is naturally attendant to the trial of two unrelated homicides in a single proceeding.

To make matters even worse, the trial court denied appellant's motion for a severance based upon the prosecutor's representation that one of his

witnesses would testify that Mr. Thomas allegedly made an admission that would, according to the prosecutor, tie the two cases together. Not only did the witness to that purported admission never so testify, the prosecutor never even posed a question to that witness that was designed to elicit the purported admission.

For the reasons set forth below, the trial court's refusal to sever the homicides was prejudicial error and, as a consequence, appellant's conviction must be reversed.

B.

Statement of Facts

On August 29, 1997, appellant filed a motion to sever the McDonald homicide from the Grote homicide. (C.T. 436) The prosecution filed opposition (C.T. 478) and appellant filed a reply. (C.T. 660) At the hearing on the motion (R.T. 959-977), the trial court initially indicated that of all the motions filed by the defense, "this is the motion that has given, and continues to give, the court the greatest pause." (R.T. 959)

In response, the prosecutor argued that the two charges should be tried together and proffered that Keisha Thomas, a witness in the Grote, but not the McDonald, case would testify that when appellant came into her apartment shortly after the Grote homicide, he told her, "this is the second time I've done this." (R.T. 964) Asserting that joinder would cause no prejudice because the purported admission of appellant in the Grote case brought evidence of the McDonald case into the Grote case, the prosecutor told the trial court that the severance motion should be denied because of

the purported admission of Mr. Thomas to Keisha Thomas.[17] According to the prosecutor,

> "Keisha Thomas is a witness to whom the defendant Thomas went to immediately after the shooting on June the 6th. One of the comments that he makes, that the defendant makes to Keisha Thomas at the time that he comes in with a gun, taking it apart in a frantic, paranoid type thing--manner--is, 'this is the second time I've done this.' [¶] Well, that alone is cross-admissible evidence as it relates to the Ricky McDonald murder which occurred just three weeks before the June 6th shooting of Creed Grote in Lemon Grove." (R.T. 964)

The prosecutor argued that the statement was "a critical piece of evidence which the people should be entitled to get in, and you can't get it in unless the jury understands what the context of it is." (R.T. 967)

The defense responded that the alleged statement in question was inherently ambiguous. Most significantly, because the Grote incident involved the use of a gun and the McDonald incident did not, the defense argued it was more logical to assume that the alleged statement referred to the Stockton incident -- concededly inadmissible in the guilt phase -- where appellant was alleged to have used a gun, rather than the McDonald homicide, where appellant's involvement was limited to fisticuffs. (R.T. 969)

Ultimately, the trial court accepted the prosecutor's argument and denied the severance motion.

> "I think Mr. McAllister's observation as to witness Keisha Thomas's prospective testimony regarding the statement that she attributes to defendant Thomas shortly following upon the shooting of Creed Grote and Troy Ortiz, I think that Mr. McAllister's observation is well taken, *that statement crosses the boundary, if you will, between these two incidents and brings them both together.* " (R.T. 973)(emphasis added)

Later, during a subsequent pretrial proceedings, the trial court reconsidered the severance issues raised by both defendants and ruled that

---

[17]No relation.

instead of severing counts, it would order the empanelment of two juries, one to hear the charges against appellant and one to hear the evidence in the McDonald case against Mr. Cooksey. (R.T. 1272)

At the close of the presentation of the prosecution evidence on the McDonald case, appellant renewed the motion to sever counts. (R.T. 4939-4943) Counsel argued that, based on the forensic evidence, "Mr. Thomas is very weakly joined to the homicide of Mr. McDonald." (R.T. 4941)

> "All the arguments that we talked about before about linking either a weak case with a strong one or linking two weak cases together now apply with greater emphasis and greater import. " (*Ibid.*)

The prosecutor responded that there was "ample evidence" of Mr. Thomas' involvement in the McDonald homicide and that, in addition, reminded the trial court of "the statement that was made by Mr. Thomas to witness Keisha Thomas after the Grote homicide, or the statement attributed to him by that witness was, 'why me? This is the second time I've done this.'" (R.T. 4943) The renewed motion to sever was denied. (*Ibid.*)

As it turned out, the twice-repeated prosecutorial representation, relied upon by the trial court -- that Keisha Thomas would testify that appellant made the purported admission -- did not come to pass. At trial, Keisha Thomas *did not testify* that appellant told her "this is the second time I've done this." She said nothing on the subject. Most significantly, the prosecutor *did not even ask* Ms. Thomas a *single question* that could have elicited the statement proffered to the court as the legal basis for joinder and the reason to deny the severance motion. Not one. (R.T. 5275-5281)

Consequently, at the close of evidence, counsel moved for a mistrial. (R.T. 6367) Counsel noted that each of the previous motions to sever were

denied on the basis that Keisha Thomas' statement would link the two cases together and no such evidence had been introduced.

> "This evidence was not -- evidence was not presented. Keisha Thomas made no such statement, and so the key, perhaps the only grounds for allowing the two homicides to be tried together as relates to Mr. Thomas was based on that, and it wasn't presented." (R.T. 6368)

The motion for mistrial was denied. (*Ibid.*)

C.

The Trial Court Abused its Discretion When it Denied Appellant's Motion for Severance

1.

The Trial Court Has the Authority to Sever Counts if a Joint Trial Would Prejudice the Fact-Finding Process

Penal Code §954 provides, in pertinent part, that

> "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or 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 or divided into two or more groups and each of said groups tried separately."

In *Williams v. Superior Court* (1984) 36 Cal.3d 441, this Court set forth the analytical framework that informs a trial court's resolution of a motion to sever multiple counts charged in one information.[18] This Court held that even if the prosecution could show that the crimes were properly joined under §954, "prejudice may require severance" if it is "clearly established by

[18] Although *Williams, supra,* was decided in the context of a pretrial writ, the *Williams* analysis applies with equal force to the analysis of a severance issue on appeal. (*People v. Balderas* (1985) 41 Cal.3d 144, 171.)

defendant." (*Id.* 36 Cal.3d at 447; *People v. Bean* (1988) 46 Cal.3d 919, 960; *cf. United States v. Vasquez-Velasco* (9th Cir. 1994) 15 F.3d 833, 845, ["Rule 14 recognizes that even when counts are properly joined under Rule 8(b), severance of the counts may be appropriate to avert prejudice to a defendant."].)

> "The determination that the offenses are 'joinable' under section 954 is only the first stage of analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts 'in the interest of justice and for good cause shown." (*Williams, supra,* 36 Cal.3d at 447; *People v. Lucky* (1988) 45 Cal.3d 259, 277; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135.)

As this Court stated in *People v. Bradford* (1997) 15 Cal. 4th 1229, "[r]efusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a "strong" case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*Id.* 15 Cal. 4th at 1315; *People v. Catlin* (2001) 26 Cal. 4th 81, 110.)

Because the joinder of the two homicides was the source of the multiple murder special circumstance charged in this case, the trial court was required to examine the propriety of that joinder with the highest degree of scrutiny. "If the cases are 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." (*Williams v. Superior Court, supra,* 36 Cal.3d at 454; *People v. Bradford* 15 Cal.4th 1229, 1318, ["The present case is one in which the joinder itself gave rise to the special circumstance

allegation (multiple murder, § 190.2, subd. (a)(3)), requiring that a higher degree of scrutiny be given the issue of joinder."]; *People v. Sandoval* (1992) 4 Cal. 4th 155, 173.)

Under *Williams, supra,* and its progeny, the first step in analyzing the propriety of joining two separate crimes for trial is to determine whether they are cross-admissible. If evidence of the commission of each crime is admissible in the trial of the other, that cross-admissibility "would ordinarily dispel any possibility of prejudice." (*Williams, supra,* 36 Cal.3d at 447; *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1284.)

To be sure, even if the crimes are not cross-admissible, that does not end the analysis. Penal Code §954.1, added by Proposition 115 in 1990, codified existing case law holding that the lack cross-admissibility of the evidence in each of the joined charges would not, in and of itself, prevent joinder in the absence of prejudice to the accused. "[E]vidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact." (*Ibid*; *People v. Carpenter* (1997) 15 Cal.4th 312, 361; *People v. Bean. supra,* 46 Cal.3d at 938-940.)

Nevertheless, while the lack of cross-admissibility is no longer the *sine qua non* for granting a motion for severance, it is still the critical factor to consider in determining if joinder would prejudice the defendant. "Cross-admissibility is the *crucial* factor affecting prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.)(emphasis added) "T]he first step in assessing whether a combined trial [would be] prejudicial is to determine 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. Carter* (2005) 36 Cal. 4th 1114, 1154; *People v. Balderas, supra,* 41 Cal.3d at 171-172.)

2.

The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Alleged Statement by Keisha Thomas Was Not Admissible in either the Grote or McDonald Cases Because it was Insolubly Ambiguous

The linchpin of the trial court's decision to deny the motion for severance of counts was its view that the testimony of Keisha Thomas would be relevant as an admission. The trial court was wrong. Evidence is relevant only if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code §210) The proffered testimony of Ms. Thomas was inadmissible because it proved nothing regarding the facts or elements of the charges against appellant.

The purported admission at issue here was inherently ambiguous, establishing nothing of relevance to the case without untrammeled conjecture as to its meaning. According to the prosecutor's representation, appellant told Ms. Thomas, "[t]his is the second time I've done this." (R.T. 964) Done what? Lost his temper? Had an argument with Nicole? Fired a gun? Taken apart a gun? Killed someone? The prosecutor noted that the statement was made "at the time that he [appellant] comes in with a gun, taking it apart in a frantic, paranoid type thing--manner..." (*Ibid.*) Thus, to the extent that there is anything in the proffer that suggests more specificity, the statement seems to be referring to something relating to using a gun. But there is no way of knowing with any degree of certainty. Given the lack of any specific contextual reference within the statement itself, any attempt to ascribe a specific meaning to the purported statement

that would be of relevance to the case must, of necessity, involve an unacceptable admixture of conjecture and speculation.

Evidence that is "insolubly ambiguous" is inadmissible. (*Doyle v. Ohio* (1976) 426 U.S. 610, 671; *People v. Sutton* (1993) 19 Cal.App.4th 795, 801; *Clayborne v. United States* (D.C. 2000) 751 A.2d 956, 971; *State v. Bright* (La, 2000) 776 So. 2d 1134, 1143; *Commonwealth v. Croft* (Mass. 1979) 186 N.E.2d 468, 469.) That concept was most notably expressed in those terms in *Doyle, supra*, where the Supreme Court held that silence following a *Miranda* warning was inadmissible because although silence in the face of an accusation could be considered an adoptive admission, after the *Miranda* warning, it could be equally indicative of reliance on the right to remain silent. The *Doyle* analysis is not limited to *Miranda* warnings. It is a matter of common sense, as the United States Supreme Court observed in *Pennsylvania R. Co. v. Chamberlain* (1933) 288 U.S. 333, that "[w]hen the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." (*Id.* 288 U.S. at 340; *Showalter v. Western Pacific* R. R. Co. (1940) 16 Cal.2d 460, 475; *Commonwealth v. Croft, supra,* 186 N.E.2d at 469.)

For example, evidence that a defendant failed to flee when apprehended by the police has been held to be inadmissible to establish consciousness of innocence because the failure to flee is equally susceptible to the interpretation that the defendant was simply submitting to authority as opposed to expressing a belief in his innocence. (*People v. Green* (1980) 27 Cal.3d 1, 37.) As the *Green* court explained, "[h]e may very naturally have been deterred from making an effort to escape from a fear that he would be recaptured, and that his fruitless attempt to escape would be evidence of guilt; or he may have felt so strong a confidence of his acquittal, for want of

the requisite proof of his guilt, that he deemed it unnecessary to flee." (*Id.* 27 Cal.3d at 37, quoting *People v. Montgomery* (1879) 53 Cal. 576, 577.)

In the case at bar, there is simply no way of knowing exactly, or even approximately, to what the proffered statement referred to with any reasonable degree of assurance. Any analysis of the intended meaning of appellant's purported admission would rise to a level no higher than mere conjecture. As this Court long ago observed, "[n]o rule is better settled than the one that '[m]ere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof.'" (*People v. Terry* (1962) 57 Cal.2d 538, 566.) "[S]peculation and conjecture do not constitute relevant evidence because they do not have any tendency to prove or disprove facts." (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal. App. 3d 813, 837. *People v. De La Plane* (1979) 88 Cal. App. 3d 223, 2324, ["Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose."].)

The prosecution's proffer of Ms. Thomas' testimony was thus inadmissible because its relevance to the issues in either the Grote or the McDonald case depended upon abject conjecture as to what the statement meant. "[I]f no facts are available upon which to found an inference, any supposed inference is actually only a matter of conjecture, speculation or imagination." (*People v. Pineda* (1973) 30 Cal.App.3d 860, 866; *People v. Bernal* (1967) 254 Cal.App.2d 283, 293.) ""A reasonable inference...may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Raley* (1992) 2 Cal.4th 870, 891; *People v. Morris* (1988) 46 Cal.3d 1, 21.)

3.

The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Alleged Statement by Keisha Thomas Was Not Cross-Admissible in the Grote and McDonald Cases

It is clear that the purported admission would not have been admissible in the McDonald case, had it been severed from the Grote case, because, by its very terms, it proved nothing and was therefore irrelevant. The fact that Mr. Thomas said, some three weeks after the McDonald incident, that "this is the second time I've done this" would hardly have been probative of a relevant issue in the McDonald case. In McDonald, the homicide was the result of a fist fight that Kazi escalated into a homicide by battering the victim over the head with a brandy bottle. Given that the principal issue in that case was the level of Mr. Thomas' involvement in the beating of Mr. McDonald -- whether Mr. Thomas kicked Mr. McDonald in the throat and whether that was the cause of death -- a statement made some three weeks later, while disassembling a gun after a shooting, that "this is the second time I've done this," would hardly have been relevant to any issue in the McDonald case.

Moreover, even if the admission in question might have been admissible in the Grote case, had it been tried separately, and even if, because of the purported admission, some evidence regarding the McDonald incident might have become admissible in the *Grote* case, that would not have made the evidence *cross*-admissible in the *McDonald* case. Cross-admissibility does not simply mean that some evidence in one case would be admissible in another, but *mutuality* of admissibility -- that "evidence of each incident would...be admissible in the separate trial of the other..."

(*Williams v. Superior Court*, *supra*, 36 Cal.3d at 451; *People v. Balderas*, *supra*, 41 Cal.3d at 171-172; *People v. Stewart* (1985) 165 Cal.App.3d 1050, 1056; *Verzi v. Superior Court* (1986) 183 Cal.App.3d 382, 388.) Unless there is mutuality of admissibility in each case, there is no cross-admissibility. (*People v. Sully* (1991) 53 Cal. 3d 1195, 1221, ["If the evidence in *each* case is shown to be cross-admissible *in the others*, ordinarily any inference of prejudice from joinder of charges is dispelled."](emphasis added).)

Thus even assuming, *arguendo*, that Theresa's testimony about the purported admission might have been admissible in the Grote case, that did not make it *cross*-admissible evidence in *both* the McDonald *and* the Grote cases. Consequently, the purported admission could not form the basis for trying both cases together on the theory that the purported admission was *cross*-admissible in *both* cases.

4.

The Trial Court Abused its Discretion When it Denied Appellant's Motion to Sever Counts Because the Inherent Prejudice of Joining Two Unrelated Murder Cases was Not Counterbalanced by Any Saving of Time or Public Funds

This Court has repeatedly cautioned trial courts weighing the merits of a motion to sever counts, "[w]hen exercising its discretion, the court *must* balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial." (*People v. Arias* (1996) 13 Cal.4th 92, 127 (emphasis added); *People v. Bean*, *supra*, 46 Cal.3d at 935-936; *People v. Keenan* (1988) 46 Cal.3d 478, 501.) For example, in *Keenan*, *supra*, this Court observed that "judicial economy was obviously paramount in this case, since separate trials would have required selection of two juries, one

death-qualified, and presentation of much the same evidence and witnesses to each." (*Ibid.*)

In this case, as noted above, no evidence was cross-admissible in both cases; evidence of the Grote homicide was not admissible in the McDonald case and evidence of the McDonald homicide was not admissible in the Grote case. Although such lack of cross-admissibility in and of itself does not bar joinder, "if the offenses are not cross-admissible, the accused in most cases will be able to demonstrate at least some measure of prejudice from joinder." (*People v. Smallwood* (1986) 42 Cal.3d 415, 425.)

What makes this case different from the ordinary challenge to the joinder of multiple counts is that the countervailing consideration that looms over every severance motion -- namely the consequent mitosis of the case into two separate trials and the concomitant necessity of picking two juries and presenting two sets of opening statements and two sets of closing arguments -- was completely absent. In appellant's case, whether or not the motion to sever counts was granted or denied, there were going to be two separate juries chosen, two separate sets of opening statements given, and two separate sets of closing arguments made.

At the time the motion to sever was heard, the court had already indicated two juries would be selected to try the case, albeit, one for Nicole Halstead and one for Mr. Thomas and Mr. Cooksey. (R.T. 857) After Nicole entered her plea of guilty, the trial court *sua sponte* reconsidered the previous severance arguments and, instead of simply severing the counts, which would have eliminated all of the problems attendant to both the joint charging of defendants and the joinder of charges, the trial court chose to deal only with the former, ordering empanelment of two separate juries to

hear both cases simultaneously, with Mr. Cooksey's jury hearing only the evidence pertaining to the McDonald case. (R.T. 1272)

While the procedure chosen by the court resolved the problems engendered by the joint trial of a capital and a non-capital defendant, it did nothing to ameliorate the prejudice to Mr Thomas that flowed from joining two unrelated allegations of murder in the same trial. The trial court abused its discretion in this regard because it never "balance[d] the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial" (*People v. Arias, supra)* in the light of its decision to empanel two separate juries.

Because the court had already ruled that there would be two juries hearing the case, trying both murder cases together would have resulted in absolutely no savings of time, energy, or money. Perforce, there were no countervailing considerations of trial efficiency that counter-balanced the prejudice of a joint trial of the McDonald case and the Grote case. Although the trial court had all of the severance motions in mind when it ordered the empanelment of two different juries,[19] the trial court never weighed the prejudice inherent in the joinder of two unrelated counts of murder with "the efficiency of a joint trial" under the unique circumstances of this case, namely that there was no such efficiency. (R.T. 1269-1273)

Judicial discretion is abused "when the trial court's ruling falls outside the bounds of reason." (*People v. Osband* (1996) 13 Cal.4th 622, 666; *People v. Carter, supra*, 36 Cal. 4th at 1153.) Under the unique circumstances of this case, the trial court's denial of the severance motion

---

[19] "Now, let me talk for a few moments about the subject matter of severance and/or the empanelment of dual juries for this case. I recognize that we have been over this territory previously, that we have litigated motions pertaining to severance either of defendants and/or of counts on any one or more of several grounds, and the court has ruled regarding those motions." (R.T. 1269)

fell "outside the bounds of reason." (*Ibid.*) Given that there was no factual connection between the two cases, other than the identity of the accused, given the indisputable proposition that trying one case at a time would have enhanced the accuracy of the fact finding process in each, and given that there was absolutely no resultant improvement in judicial efficiency from the joinder of the two cases, refusing to sever the McDonald case from the Grote case was an abuse of discretion.

5.

Given the Fact that the Trial Court was Aware that Joinder Would Not Save Either Public Time or Moneys. the Trial Court Used the Wrong Standard in Ruling on Appellant's Severance Motion

When the trial court reconsidered the severance issue and decided to empanel two juries, it should have been obvious to the trial court that there would be no savings of public funds by effected the joinder of the Grote case and the McDonald case because there were going to be two juries anyway. As Gertrude Stein might have said, two juries are two juries are two juries, no matter what evidence they hear. Because the primary justification for joinder of otherwise unrelated charges is avoidance of an unnecessary and expensive second trial, under normal circumstances, where severance of counts would mean two trials instead of one, "a defendant seeking severance must make an even stronger showing of prejudicial effect than would be required in determining whether to admit other-crimes evidence in a severed trial." (*People v. Bean, supra,* 46 Cal.3d at 936.) As this Court noted in *Beam, supra,* in assessing the merits of a severance motion, "the beneficial results of joinder are added to the probative value side" of the severance equation. (*Ibid.*)

> "The benefits to the state of joinder...[are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried." (*Id.* 46 Cal.3d 919, 939-940.)

However, where, as in this case, joinder of counts would save neither time nor public funds, the proper test for joinder should be the same as it is for the admission of evidence of other crimes under Evidence Code §1101(b). Absent some countervailing issue of judicial efficiency, the prejudice analysis of joining two separate criminal case into one trial is logically indistinguishable from the analysis of the propriety of admitting evidence of other crimes. Where there are going to be two trials anyway, there are no "beneficial results of joinder" to be added to the adjudicative equation and the resultant test is identical to the admission of other-crimes evidence.

Not surprisingly, this proposition must follow as a matter of logic, not precedent, since there are no cases so holding. But, as the court wisely observed in *Jeffer, Mangels and Butler v. Glickman* (1991) 234 Cal.App.3d 1432, "in the absence of a precedent stating the obvious, common sense will do." (*Id.* 234 Cal.App.3d at 1439.)

Appellant submits that where joinder of counts does not conserve judicial resources, there is no principled distinction between the prejudice that flows from the joinder of two counts of the same class of crimes and admission of evidence of other criminal conduct in the trial of a single incident. In both situations, if the evidence of other crimes is admitted without a purpose sanctioned by Evidence Code §1101(b), the accused will be prejudiced by the natural tendency of the jury to use the evidence of other crimes to draw the statutorily forbidden inference of criminal propensity. (*People v. Zimmerman* (1980) 102 Cal.App.3d 647, 660; *People v. Fries* (1979)

24 Cal.3d 222, 230, ["'A jury which is made aware of a similar prior conviction will inevitably feel pressure to conclude that if an accused committed the prior crime he likely committed the crime charged."].)

Just as a jury is more likely to draw an improper inference from a prior crime where the crime is of the same class as the charged crime, the danger applies with even greater force in a case such as appellants, where a second offense of the same class is joined in a single prosecution, especially where there is no evidentiary connection between the two cases. Indeed, the only common fact between the two cases was that appellant was charged in both and the only inference to be drawn by the jury was the improper inference of propensity.

To make matters worse, when there are two charged incidents being tried jointly, it is altogether likely that the jury will consider the evidence in the aggregate, viewing the two cases as one, using evidence from one to prove the other. (*Williams v. Superior Court, supra*, 36 Cal.3d at 453-454.)

> "[O]ur principal concern lies in the danger that the jury...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 might not be convictions on both charges. Joinder in this case 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." (*Ibid.*)

Consequently, in light of the trial court's decision to empanel two juries, the court should have placed the burden on the prosecutor to justify the joinder in the same manner that the burden is allocated when the prosecution seeks to admit evidence of other crimes under §1101(b). (*People v. Anderson* (1987) 43 Cal.3d 1104, 1136.) Under the unique facts of this case, the prosecution should have been required to establish the evidence in *each* case was admissible in the other case for some purpose sanctioned by

§1101(b). Absent such a showing, joinder would be prohibited by the principles underlying Evidence Code §1101(b).

6.

The Trial Court Abused its Discretion When it Denied Appellant's Motion for a Mistrial after the Prosecution Rested Without Introducing the Purported Admission that the Trial Court Relied Upon in Denying the Severance Motion

When the trial court denied the motion for severance, the trial court made it clear that the sole reason it had decided to go ahead with joint trial was the prosecutor's representation that Keisha Thomas would testify that, shortly after the Grote homicide, appellant told her that "this was the second time he had done this." (R.T. 973) No such testimony was elicited by the prosecutor and no such testimony was given by Ms. Thomas.

Leaving aside the interesting question of why no such testimony was even attempted to be introduced by the prosecutor -- a question unanswered on this record -- the fact remains that the raison d'être of the trial court's decision never occurred. While the trial court cannot be faulted for its reliance on the veracity of the representation made by the prosecutor, having previously ruled, in effect, that joinder was improper absent the purported admission, the trial court erred by denying the motion for a mistrial.

C.

Appellant was Prejudiced by the Trial Court's Denial of the Motion to Sever Counts Rendering His Trial Fundamentally Unfair, in Violation of the Right to Due Process of Law Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

1.

The Federal Guarantee of Due Process of Law and a Fair Trial is Violated When Misjoinder of Counts Results in Prejudice to the Accused

Although Penal Code §954 permits joinder of unrelated criminal accusations involving the same class of crimes, when that joinder results in prejudice to the defendant, when that joinder results in a trial that is fundamentally unfair, the failure to sever those counts violates the right of an accused to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (*United States v. Lane* (1986) 474 U.S. 438, 446 n.8, ["[M]isjoinder would rise to the level of a constitutional violation...if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."]; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503; *Richardson v. Newland* (E.D.Cal. 2004) 342 F. Supp. 2d 900, 920.) Similarly, in *People v. Hawkins* (1995) 10 Cal. 4th 920, 940, this Court recognized that a prejudicial misjoinder of counts would violate the federal guarantee of due process. "The severance provisions of section 954 reflect 'an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial.'[Citation]." (*Id.* 10 Cal. 4th at 940.)

2.

Appellant was Prejudiced By the Joinder of Two Unrelated Homicides that were Not Cross Admissible and Where the Evidence in the Grote case was Significantly Stronger than the Evidence in the McDonald Case

Generally speaking, informing a jury that the accused may have committed more than one crime of the same class of crimes, whether by

joinder of two charged crimes or by introducing evidence of an uncharged criminal act to prove a charged crime, always presents a substantial danger to the accuracy of the fact finding process. "Once joinder is made, three sources of prejudice may arise. First, the jury may confuse and cumulate the evidence. Second, the defendant may be prejudicially confounded in presenting his defenses. Third, the jury may erroneously conclude that the defendant is guilty of one offense and, therefore, convict him on the others because of his criminal disposition." (*United States v. Brashier* (9th Cir. 1976) 548 F.2d 1315, 1323.) As the Fourth Circuit long ago reasoned,

> "One inevitable consequence of a joint trial is that the jury will be aware of evidence of one crime while considering the defendant's guilt or innocence of another. If the rationale of the 'other crimes' rule is correct, it would seem that some degree of prejudice is necessarily created by permitting the jury to hear evidence of both crimes." (*United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 736; *Drew v. United States* (D.C.Cir.1964) 331 F.2d 85, 94.)

The danger of course, is not that evidence tending to establish that the defendant committed one crime is completely irrelevant as proof of whether he committed an unrelated crime of similar nature, but rather that presenting evidence of both to the same jury will prove too much, "that juries will tend to give it excessive weight." (*United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1116; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1180.) "There is a 'high risk of undue prejudice whenever...joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" (*Bean v. Calderon, supra,* 163 F.3d at 1084, citing *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.)

When evidence of other crimes is introduced as evidence to prove the charged crime, the danger is that instead of analyzing the evidence to

determine if the prosecutor sustained the burden of proof, the jurors will find guilt based upon the notion that the multiplicity of criminal accusations, in and of themselves, establish that the defendant had a criminal propensity and therefore must be guilty. That is why, under Evidence Code §1101, evidence of uncharged crimes is not admissible unless it is specifically relevant to a particular issue in dispute such as motive, identity etc. "While to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime, the law regards the inference from general to specific criminality so weak, and the danger of prejudice so great, that it attempts to prevent conviction on account of a defendant's bad character." (*United States v. Foutz, supra*, 540 F.2d at 736.)

When, as in this case, the issue involves two charged crimes, joinder presents the danger that the multiplicity of charges will cause the jury to weigh the evidence in the aggregate as to both charges, perhaps resolving doubts as to the sufficiency of the evidence as to one charge with the belief that if the defendant committed one crime, he must have committed the other. (*Williams v. Superior Court, supra*, 36 Cal.3d at 453; *Coleman v. Superior Court, supra*, 116 Cal.App.3d at 138; *United States v. Fautz, supra*, 540 F.2d at 736, ["the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated..."].)

This court has recognized that joinder of charges, otherwise proper under §954, could be prejudicial to a defendant if "(1) certain of the charges are unduly inflammatory, (2) a weak case will be unfairly bolstered by its joinder with other charges, and (3) any of the charges carries the death

penalty." (*People v. Arias, supra,* 13 Cal.4th at 127; *People v. Balderas, supra,* 41 Cal.3d at 173.)

This danger that joinder of the Grote case bolstered the evidence in the McDonald case was especially acute, given the disparate nature of appellant's involvement in each case. In the McDonald homicide, appellant was the minor player. Kazi started the confrontation and struck the first blow, Appellant punched Mr. McDonald once.[20] Kazi struck the fatal blows when he repeatedly pounded Mr. McDonald on the head with the brandy bottle. By way of contrast, in the Grote case, appellant was the sole person charged. Combining the two cases together inevitably caused the jury to give added weight to the evidence of appellant's involvement in the McDonald case because testimony in the Grote case tended to establish that appellant was capable of killing without Kazi's involvement and because the presence of a second charge against appellant naturally tended to diminish the primacy of Kazi's involvement in the McDonald homicide.

A jury whose deliberations were unsullied with the evidence of the Grote homicide could well have found that appellant did not share Kazi's intent when Kazi inflicted the fatal blows, that death was not a natural and probable consequence of appellant's single punch, and, at best, that appellant was guilty of manslaughter. Severing the Grote case would have permitted the jury to accord proper weight to appellant's impairment and inability to form intent due to his ingestion of alcohol and psychotropic drugs and would have avoided any tendency by the jury to discount defense evidence. Joined with the McDonald case, however, the jury would have

[20]Although there was some wildly conflicting testimony suggesting that Mr. Thomas kicked the decedent with the intent to silence him, the jury plainly did not believe it as witnessed by the second degree verdict as to both defendants.

been more likely to discount the defense evidence and conclude that appellant was guilty of first degree murder.

Because the unrelated homicides were tried together, the jury could not help but consider the evidence against appellant in the McDonald case in the aggregate, factoring into the McDonald verdict its impressions of appellant drawn from the testimony in the Grote case and vice versa. It does not require extensive speculation to posit that having heard that appellant fired the fatal shots in the Grote case, on his own, without Kazi, it was more likely than not that the jury resolved any doubts it harbored about appellant's culpability in the McDonald case based upon the evidence it heard in the Grote case.

3.

Appellant was Prejudiced by the Trial Court's Failure to Instruct the Jury that Evidence Pertaining to the Grote Charges Was Not Admissible as Proof of the McDonald Homicide and that Evidence Pertaining to the McDonald Charges Was Not Admissible as Proof of the Grote Homicide

Appellant was further prejudiced by the trial court's failure to instruct the jury that evidence of the Grote homicide was not admissible to prove the McDonald homicide, and vice versa. As previously noted, without the testimony of Keisha Thomas, even the prosecutor conceded that the evidence regarding each of the separate homicide scenarios was not cross-admissible as evidence to prove the other. Yet, despite the failure to produce the purported admission, despite the undisputed lack of cross-admissibility, the trial court never instructed the jury that they were not to consider evidence introduced regarding the Grote homicide as evidence establishing Mr. Thomas' guilt of the McDonald homicide and vice versa.

In *Bean v. Calderon, supra.* the Ninth Circuit held that the defendant in that case was prejudiced by the failure of the trial court to instruct the jury that evidence of one homicide could not be considered as proof of the other homicide. (*Id.* 163 F.3d at 1084.) "The instructions here did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other." (*Ibid*; compare *Herring v. Meachum* (2d Cir. 1993) 11 F.3d 374, 378, ["The jury at petitioner's trial was instructed on three separate occasions that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other."].)

True, the trial court did tell the jury that they "must decide each count separately" (R.T. 6413-6414), but telling a jury that they must decide each case separately is a far cry from telling the jurors that they may not infer guilt on one count from the evidence they considered in arriving at their verdict on the other count. There is no reasonable likelihood that by instructing the jury that they were to separately consider the charges and arrive at separate verdicts, the jurors would understand that they were also limited to the evidence presented as to each count in arriving at those separate decisions. Telling the jurors that they were to separately decide the Grote and McDonald cases is not the functional equivalent of telling the jurors that the evidence in the Grote case could not be used in arriving a verdict in the McDonald case. (*Boyde v. California* (1990) 494 U.S. 370, 380.)

The reality of the prejudice stemming from this instructional failure in appellant's case was acute in view of the disparity between the two cases of evidence regarding appellant's mental state and degree of participation. In the Grote homicide, the evidence introduced at trial established that appellant was the sole perpetrator who caused the death of Mr. Grote. By way of contrast, in McDonald, Kazi was the prime mover and the question

before the jury was whether appellant "share[d] the specific intent of the perpetrator." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Absent an instruction informing the jurors that they could not consider the Grote homicide in resolving the question of appellant's intent in the McDonald case, it is not only reasonably probable, it is altogether likely that the jurors inferred the intent requisite for conviction in the McDonald case from the evidence they heard about the Grote case.

4.

Appellant's Conviction Must Be Reversed

Where there is no cross-admissible evidence, it is axiomatic that joinder of unrelated crimes of the same class does not enhance the reliability of the fact finding process. Where evidence is not cross-admissible, joinder of criminal accusations raises the same issues of prejudice that the admission of evidence of other, uncharged crimes brings to the trial of a single incident, only worse, Whereas when the other crime evidence improperly admitted is an uncharged incident, the evidentiary error could pollute only one verdict. On the other hand, where the other crime evidence is an improperly joined charge, there are two presumptively tainted verdicts.

In noting that a defendant must make a stronger showing for severance of counts than for the exclusion of other crimes evidence, this Court has repeatedly cited the "beneficial results of joinder" as a justification for the higher standard, namely having one trial instead of two. (*People v. Bean, supra,* 46 Cal.3d at 936; *People v. Sully, supra,* 53 Cal. 3d at 1222; *People v. Walker* (1988) 47 Cal.3d 605, 623; *People v. Matson, supra,* 13 Cal.3d at 41.) By granting a *de facto* severance as to *defendants*, but not counts, the trial court structured the trial in a way that maximized the prejudice of joinder to appellant while, at the same time, eliminating any

possible benefit that would ordinarily ensue from joinder. When it ordered the empanelment of two juries, the trial court was concerned with ameliorating the conflicts that arise when a non-capital defendant is tried with a defendant facing the death penalty. All well and good. However, instead of simply severing the Grote homicide from the McDonald homicide, which would have accomplished the same result,[21] the trial court made the worst of a bad situation. Neither time nor money was saved, but appellant was prejudiced by trying both cases before the same jury.

The convictions must be reversed.

---

[21] If the trial court severed the counts, it could have tried McDonald homicide with both defendants before a non-death qualified jury and the Grote case separately with a death qualified jury, a result which would have satisfied the court's concerns of trying Kazi and Mr. Thomas together without saddling appellant with the prejudice of trying both cases before the same jury.

II.

The Erroneous Refusal of the Trial Court to Exclude Evidence of the Milton Incident and Evidence of Mr. McDonald's Habit and Custom of Leaving Money for his Wife Violated Appellant's Due Process Right to a Fair Trial, an Impartial Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article One of the California Constitution

A.

Statement of Facts

1.

The Robbery and Robbery Special Circumstance Allegations are Dismissed at Penal Code §995 Hearing

Initially, in the municipal court proceedings, appellant was charged with the substantive crime of the robbery of Mr. McDonald and the prosecution proceeded on the theory that the robbery allegation warranted a holding order on a robbery-murder special circumstance (Pen.Code §190.2(a)(17). After the preliminary hearing was over, however, the magistrate ruled that there was insufficient evidence to warrant a holding order on a robbery special circumstance. "[T]his killing of Mr. McDonald was an irrational act. I do not have evidence -- I have no evidence, in fact, that it was done with the intent to commit a robbery." (R.T. 708) Nevertheless, the magistrate did hold that there was sufficient evidence of the substantive crime of robbery to hold appellant to trial on that charge. (R.T. 709)

After arraignment in superior court, appellant filed a motion pursuant to Penal Code §995 to dismiss both the substantive robbery charge as well as the robbery-murder special circumstance allegation. (C.T. 89) After a

hearing on the motion before the trial court (R.T. 773-792), the trial court ruled that both the substantive robbery charge and the robbery-murder special circumstance were not supported by substantial evidence and dismissed those allegations. (R.T. 795)

> "Based upon the evidence, the court concludes that the requisite intent for robbery was not present prior to or in the early stages of the beating. If, as the court concludes, the necessary intent is not formed while the victim is conscious, then the taking of property cannot be by force or fear because the victim has been rendered incapacitated for an independent reason. Instead the subsequent taking of property becomes a simple theft." (*Ibid.*)

2.

Trial Court Rules Evidence of Milton Assault Admissible on Felony-Robbery Theory

Months after the 995 motion was heard, Nicole Halstead entered a guilty plea as part of a plea bargain that required her to testify at trial for the prosecution. (R.T. 1217-1225) Prior to the start of the trial, the prosecutor indicated that he wanted to introduce two areas of testimony to support a theory of robbery-felony-murder based upon the newly available testimony of Nicole Halstead. (C.T. 1204)

First, the prosecutor indicated that he intended introduce evidence of that appellant and Kazi took part in the beating of Milton a few hours before the incident. As this Court will recall, after appellant, Kazi, and Nicole had been at Cesar's for a while, they went to a liquor store to buy some beer and brandy. While they were there, Mr. Milton got into a fight with a third person. Appellant, and Kazi joined the fight, assaulting Mr. Milton. According to a statement that Nicole gave the police shortly after she was arrested, after the three left the liquor store, appellant and Kazi were mad because the people who started the fight with Mr. Milton got his money and they didn't. She also told the police that as far as she knew neither

appellant or Kazi took any money from Mr. McDonald after that fight. (C.T. 2026-2027).

Nevertheless, the prosecutor argued that "[e]vidence that THOMAS and COOKSEY beat and tried to take money from another victim just shortly before they beat and took items from McDonald is probative of their mental states prior to and during the beating of McDonald." (C.T. 1205) The prosecutor's proffered theory of admissibility was that the fight with Mr. Milton was part of a continuing course of conduct that led up to the fight with Mr. McDonald and that evidence that appellant and Kazi were upset that they did not get money from Mr. Milton was evidence that they intended to rob Mr. McDonald.

The second, related area of testimony that the prosecutor wanted to present to support his theory of robbery-murder was Mr. McDonald's habit and custom of cashing his paycheck and giving his wife the money. In this regard, evidence was introduced at the preliminary hearing that on the night of his demise, Mr. McDonald had been paid, cashed his check, and stopped off at his house with a friend on the way to a Padres night game, telling his friend that "he was going to give his wife some money. (Px.. 287) When Mr. McDonald's body was discovered outside his apartment, some six hours after the fight between him, Kazi, and appellant, he had no money on his person. (C.T. Mr. McDonald's wife testified that Mr. McDonald would leave the money under the mattress if she were not there, that she did not see him before he went the ball game and that when she checked under the mattress the next day, the money was not there. (R.T. 462)

A hearing was held on the admissibility of this evidence. (R.T. 1324-1336) When Kazi's counsel objected to the admission of evidence of Mr. McDonald's habit and custom of leaving his the proceeds of his paycheck for

his wife on the grounds that the trial court had dismissed the robbery allegation, the trial court interjected the availability of Nicole's testimony gave the prosecutor the option of proving that the homicide was a robbery-murder. (R.T. 1324-1325)

> "Although you're correct insofar as the Court having found insufficient evidence within the four corners of the preliminary examination transcript to permit the people to go forward on the special circumstance of robbery, as well as go forward on a separately-charged offense of robbery, what they are now seeking to do is introduce the evidence that you're objecting to on a felony murder theory to support a conviction of count 1 as charged." (*Ibid.*)

The prosecutor argued that Mr. McDonald's wife's testimony about the check cashing was "classic habit and custom" and that the primary reason the Milton assault was admissible was because Nicole "said that Cooksey and Thomas were still hyped up and aggravated about not getting money during the Milton beating" and that the McDonald homicide was part of a "continuing course of conduct" that started with the Milton incident. (R.T. 1328)

Appellant's counsel reminded the court that in her statement to the police, Nicole stated that she "saw no money taken during the McDonald homicide. "I remember at the preliminary hearing that his fiancee testified to all that, but I don't remember that." (R.T. 1330) The prosecutor responded that Nicole also said that she "thought they were going to rob him." (R.T. 1335)

Nevertheless, the trial court ruled that both evidence of the assault on Mr. Milton as well as Mr. McDonald's custom and habit of leaving money with his wife would be admissible. The custom and habit evidence, the court held, "is relevant [and]...survive[s] a 352 challenge." (R.T. 1336) The trial court found that, "there are sufficient similarities between this occurrence

and the killing of Ricky McDonald so as to permit the admission of this evidence pursuant to Evidence Code section 1101(b)." Further, the court held that the incident was admissible on the issue of intent "as demonstrating a continuing course of conduct" and was not excludable under Evidence Code §352. (*Ibid.*)

B.

In View of the Trial Court's Prior Ruling that Insufficient Evidence had been Presented at the Preliminary Hearing to Permit Appellant's Prosecution for Robbery and Robbery-Murder Special Circumstance, The Trial Court Erred in Permitting the Prosecution to Proceed on a Robbery-Felony-Murder Theory

When the trial court granted the Penal Code §995 motion dismissing the substantive robbery charge (Penal Code §211) and the robbery-murder special circumstance (Penal Code §109.2(a)(17), he could not have been more explicit in his ruling -- "Based upon the evidence, the court concludes that the requisite intent for robbery was not present prior to or in the early stages of the beating." (R.T.) Thus the trial court ruled that, as a matter of law, that the prosecution not produced sufficient evidence that would warrant having a trial on the robbery related charges.

It is axiomatic that the same standard of proof applies to a robbery, whether it is charged as a substantive crime or whether is an uncharged element of a prosecutor's felony- murder theory. In both cases, a jury is required to find beyond a reasonable that a robbery occurred and that the accused was the perpetrator. (*People v. Whitehorn* (1963) 60 Cal. 2d 256, 264; *People v. Hart* (1999) 20 Cal. 4th 546, 609; *People v. Berryman* (1993) 6 Cal. 4th 1048, 1085.) "Where it is claimed that a murder is of the first degree on the theory that it was 'committed in the perpetration' of one of the felonies

designated in section 189 of the Penal Code, the defendant is entitled, upon request, to a specific instruction directing attention to the necessity of proving the felony beyond a reasonable doubt even though a general instruction on reasonable doubt has been given" (*People v. Whitehorn, supra* 60 Cal. 2d at 264.)

As a general principle of law, where, at trial, the prosecution is required to prove an element of a crime at trial, the prosecution must present sufficient evidence of the existence of each element of the crime in order to obtain a holding order. (*People v. Superior Court (Day)* (1985) 174 Cal.App.3d 1008, 1020-1021; *Walker v. Superior Court* (1980) 107 Cal.App.3d 884, 890; *Roads v. Superior Court* (1969) 275 Cal.App.2d 593, 597.) For example, the dismissal of murder charges by the committing magistrate were sustained in appeal in *Walker, supra,* and *Roads, supra,* because the prosecutor failed to present sufficient evidence of the element of malice at the preliminary hearing. "[T]he Constitution protects a person from prosecution in the absence of a prior determination by either a magistrate or a grand jury that such action is justified." (*Parks v. Superior Court of Alameda County* (1952) 38 Cal. 2d 609, 611; *People v. Uhlemann* (1973) 9 Cal. 3d 662, 669; *Jones v. Superior Court* (1971) 4 Cal. 3d 660, 664; Cal. Const., Art. I, §14.)

Given that both the substantive crime of robbery and the robbery element of robbery-felony-murder must be proven beyond a reasonable doubt, and given that the prosecutor must present sufficient evidence of all the elements of robbery at the preliminary hearing to get a holding order or to charge robbery in an information, by parity of reasoning, where the court has ruled that there was insufficient evidence presented at the preliminary hearing to permit a jury to hear the substantive charge of robbery, the same

rule should apply to the robbery element of robbery-felony-murder. The prosecutor should not have been permitted offer proof of robbery, an uncharged element of the offense of robbery-murder when he was prohibited from presenting evidence of robbery as a substantive offense or as an element of robbery-murder special circumstance. "[F]undamental principles of fairness should not allow the government to get in through the back door when it clearly cannot through the front." (*Williams v. Turner* (W.D.Mo. 1988) 702 F. Supp. 1439, 1449; *Jackson v. State* (Fla. 1986) 498 So. 2d 906, 908, ["the well-established evidentiary principle that counsel may not 'get in through the back door that which he could not have gotten in through the front door.'[Citation]".]; *Arrieta-Colon v. Wal-Mart P.R., Inc.* (1st Cir. 2006) 434 F.3d 75, 91; *United States v. Davis* (C.D. Cal. 2004) 330 F. Supp. 2d 1098, 1100.)

Simply put, if there was insufficient evidence to go to the jury on the substantive crime of robbery or robbery-murder special circumstance, there was insufficient evidence to put to the jury on a robbery-felony-murder theory. The fact that Nicole Halstead made a plea agreement in return for testimony after the matter reached the trial court does not change matters one wit. It requires little citation of authority to assert that simply because a new witness supporting the prosecutor's robbery theory surfaced after the preliminary hearing, that would not allow the prosecutor to resurrect the substantive charge of robbery after it had been dismissed pursuant to a Penal Code §995 motion and proceed to trial on it based upon the discovery of new evidence. (Cal. Const., Art. I, §14.; *Parks v. Superior Court of Alameda County, supra,* 38 Cal. 2d at 611.) The same analysis applies with no less force to an element of felony-murder. The fact that the underlying felony of a felony-murder prosecution does not have to be formally charged in an

information or an indictment does not obviate the constitutional requirement that there was "a prior determination by either a magistrate or a grand jury" that there was sufficient evidence to support that element of the crime of felony-murder. (*Ibid.*)

C.

Even Assuming Arguendo that it was Constitutionally Permissible to Proceed to Trial on a Robbery-Murder Allegation Where Insufficient Evidence of Robbery had been Adduced at the Preliminary Hearing, The Trial Court Erred in Permitting the Admission of Evidence of the Milton Incident under Evidence Code §1101(b) on the Issue of Intent and/or a Continuing Course of Conduct Theory

1.

Evidence of the Milton Incident was Not Relevant to Intent in the McDonald Homicide

In his moving papers, the prosecutor argued that "there is little question that the similarity of these offenses [the Milton incident and the McDonald homicide] would make the evidence of the attack on MILTON admissible on the issue of intent during the MCDONALD attack." (C.T. 1206)

> "In both cases, the victims approached the defendants and engaged in conversation. In both cases, THOMAS and COOKSEY...joined in a merciless beating *without initially making any mention of an intent to rob.* In both cases the victims were robbed of property, the distinction being that others beat THOMAS and COOKSEY to MILTON'S property before they were able to take it." (*Ibid.*) (emphasis added)

The trial court ruled that because the prosecutor was tendering a robbery-murder theory to the jury in the McDonald incident, he would be allowed to bring in evidence of the Milton incident because of its relevance of intent to rob. Appellant will demonstrate that the trial court got it wrong,

for two reasons. First, because there was insufficient points of similarity between the two incidents to warrant admissibility of the Milton incident in the trial of the McDonald homicide on an issue of intent. Second, even if the two incidents were similar, which they were not, the purported similarity between them demonstrated that any theft that might have occurred during the Milton incident was an afterthought to the beating and consequently, irrelevant to prove a robbery-felony-murder theory.

2.

There Were Insufficient Similarities Between the Milton Incident and the McDonald Homicide to Warrant Admission of Evidence of the Former in the Trial of the Latter on the Issue of Intent to Rob

In order to be admissible under Evidence Code §1101(b) on the issue of intent, " the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance." (*People v. Ewoldt* (1994) 7 Cal. 4th 380, 402; *People v. Robbins* (1988) 45 Cal.3d 867, 879.) Simply put, the Milton incident was sufficiently dissimilar from the McDonald homicide that no reasonable person could infer that appellant had the intent required to prove robbery-felony-murder in the McDonald homicide from the events that occurred during in the Milton incident, some three hours earlier.

In Nicole's pre trial statement,[22] she told the prosecutor that when she, Kazi, and appellant went to the liquor store after leaving Cesar and

[22] Given that no evidence of the Milton incident was presented at the preliminary hearing and that this matter was considered prior to Nicole's testimony at trial, the trial court used the transcribed statement of Nicole Halstead, made on January 7, 1998, as the evidentiary basis for his ruling on this matter. Consequently, all references to the factual scenario of the Milton incident will be drawn from that account.

Carolyn at the barbecue, Mr. Milton[23] was standing outside the liquor store dressed "not appropriate" for the area. "He had on bermuda shorts and penny loafers" and he did not fit in with the "thugs hanging out in front of this store." Mr. Milton was quite intoxicated and he came up to Correll and Kazi "in a weird manner...saying belligerent stuff to them. *They ignored him*" and went in the store. Mr. Milton came in the store and continued to be belligerent. (C.T. 1666)(emphasis added)

The three of them left the store and were at Nicole's car when Mr. Milton called out, "where are you from," which Nicole intimated meant "what gang do you belong to." *Some other people* who had been hanging out in front of the store attacked Mr. Milton and Correll and Kazi joined the fight. Mr. Milton was being badly beat up and, according to Nicole, she kept telling them to stop. Finally she told them, that "I'm going to drive away if you don't stop." Correll then "went over and picked Kazi up in the middle of hitting and threw him in my car, and Correll drove away." Nicole never saw appellant rob or attempt to rob Mr. Milton. (C.T. 1667)

Nicole told the police that the other people who initially assaulted Mr. Milton "went through his pockets and ripped his gold off" as he went down. (*Ibid.*) According to Nicole, some time after he joined the fray, Correll went through Mr. Milton's left pocket but neither found nor took anything.

As for the McDonald homicide, there was no evidence either at the preliminary hearing, nor contained in Nicole's statement, that indicated that incident was robbery-inspired; the initial confrontation between Kazi and Mr. McDonald had nothing to do with a robbery, but rather was a product of Mr. McDonald's inebriation-inspired annoyance over the fact that Cesar and his friends were having a late night barbecue near his residence. Mr.

---

[23] She does not refer to him by name.

McDonald got in Kazi's face. Kazi hit Mr. McDonald. Mr. McDonald taunted him by saying it didn't hurt, but that he better not do it again. Kazi hit him again and when it looked like Mr. McDonald was going to retaliate, appellant punched him in the face, knocking him out. Kazi then beat Mr. McDonald with a brandy bottle. Nicole told the police that she did not see either appellant or Kazi take any money from Mr. McDonald.

The first problem in positing the admissibility of the Milton incident to prove appellant's intent in the McDonald homicide is, as the prosecutor obliquely conceded,[24] there is nothing to indicate that robbery was the motive for the initial confrontation in either the Milton incident or the McDonald homicide, Appellant and Kazi went to the liquor store to get beer, not to rob it.

Prior to the time when Mr. Milton was first struck by someone other than appellant or Kazi, there is absolutely no evidence that any one had intent to rob him. Rather, a very drunk Mr. Milton made a pest of himself and appellant basically ignored him. It wasn't until after someone else attacked Mr. Milton as appellant was getting into Nicole's car that appellant became involved. Appellant's conduct was assaultive in nature, not robbery inspired. Given that there is no evidence of intent to rob that preceded the assaultive conduct in the Milton incident, there is nothing that one can infer from the Milton incident about appellant's intent at the time the McDonald homicide. Nothing about the Milton incident established, or even suggested, that appellant "'probably harbor[ed] the same intent in each instance." (*Ibid.*)

---

24 "THOMAS and COOKSEY...joined in a merciless beating without initially making any mention of an intent to rob." (C.T. 1206)

The second problem in inferring anything about appellant's intent in the McDonald homicide from the Milton incident is that the victims in each case had a large role in provoking the incident in the first place. If Mr. Milton had not been drunk and obnoxious, if Mr. McDonald had not been drunk and hostile towards Kazi, neither one of these incidents would have occurred. To be sure, this observation is not being tendered as a defense or justification of what followed. However, given that appellant's involvement in both incidents was reactive, not pro-active, any clear analysis of appellant's intent in either case is precluded by the fact that the victims had an active role in provoking appellant's assaultive involvement.

The third problem with using the Milton incident to prove that appellant had the intent to rob Mr. McDonald is that appellant did not rob Mr. Milton. The only evidence suggesting that theft even entered appellant's mind during the Milton incident was Nicole's statement that appellant told her that the *other* persons involved in the beating had taken gold chains and money from Mr. Milton, that he was annoyed that they had taken that property, and that at some unspecified point during the incident, appellant had put his hand in Mr. Milton's pocket.

Thus it is plain that the Milton incident was improperly used as "similar" uncharged offense to prove intent to rob since the evidence is murky at best that appellant harbored an intent to rob at the moment in time when he became involved in the beating of Mr. Milton. Certainly there is nothing to indicate, by a "preponderance of the evidence" (*People v. Carpenter, supra,* 15 Cal. 4th at 382) that appellant had the intent to rob Mr. Milton when the incident began.

Not only was there no evidence of an intent to rob, the Milton incident and the McDonald homicide differed in their factual scenarios in a

fundamental, and ultimately decisive, way that fatally clouds any claim of similarity between the two. The Milton incident did not become violent until someone other than appellant and/or Kazi attacked Mr. Milton who, up until that point, had been loud, but not threatening. By way of contrast, the McDonald incident was precipitated by Mr. McDonald's loud accusations and complaints about the noise level outside his residence and a direct face off between Kazi and Mr. McDonald. Appellant became involved only after the initial confrontation between Kazi and McDonald.

Thus, again, at the very start of the analysis, it is difficult to find the requisite similarities and parallels from which to draw an inference of intent the Milton incident, where appellant and Kazi were not involved in instigating the violence in the case at bar, Kazi and, to a lesser degree, appellant, were involved in the initial confrontation. Simply as a matter of logic, as well as law. the strength of the inference of intent underlying the charged crime that one can draw from a prior act depends upon the similarity of the two events. (*United States v. Powell* (9th Cir. 1978) 587 F.2d 443, 448.) "Both the existence and the strength of an inference proceeds through an evaluation of the similarities between the prior offense and the charged crime." (*Id.* 587 F.2d at 448.) Here, not only does the evidence of intent to rob in the Milton incident rise to no higher than the level of murky, the two events were sufficiently dissimilar so that nothing of relevance can be inferred from the Milton incident to the McDonald homicide.

True, both incidents involved assaults by Kazi, and, to a lesser extent, by appellant, on the victims. Even assuming some similarity in the assaultive conduct, the proffered ticket of admissibility was the similarity of the intent to rob, not the intent to commit an assault.

3.

If There Were an Attempted Theft in the Milton Incident, It was an Afterthought to an Assault and Thus Inadmissible and Irrelevant to Prove Robbery-Felony-Murder in the McDonald Homicide

In *People v. Green, supra,* this Court held that when property is stolen from the victim of assaultive conduct as an afterthought to the assault, the crime committed is theft, not robbery. (*Id.* 27 Cal.3d at 53.)

> "[A] taking will at most constitute a theft...when an individual kills or renders another unconscious for reasons wholly unrelated to larceny -- e.g., because of anger, fear, jealousy, or revenge -- and then, seeing that his victim has been rendered defenseless, decides to take advantage of the situation by appropriating some item of value from his person." (*Ibid.*; *People v. Davis* (2005) 36 Cal. 4th 510, 565; *People v. Waidla* (2000) 22 Cal. 4th 690, 734.)

Consequently, even assuming that there was some marginal similarity between the two incidents, the question becomes was there evidence that appellant formed the intent to steal from Mr. Milton prior to the assault? If the intent to steal was an afterthought to the beating of Mr. Milton, the that incident would have no relevance to proving the prosecutor's robbery-felony-murder theory.

Simply put, in the Milton incident, there was no evidence that appellant had formed an intent to steal prior to or during the assault. According to Nicole's January, 1998 statement to the prosecutor, after the unknown persons assaulted Mr. Milton, appellant and Kazi dragged him closer to Nicole's car where Kazi began to hit him and appellant kicked Mr. Milton's head. "I'm sure he...knocked him out unconscious completely." (C.T. 1667) In that statement, Nicole claimed that appellant told her that

he checked Mr. Milton's pocket, but she did not say when this happened in relation to the assault. (*Ibid.*)

As is plain from Nicole's recitation of the Milton incident, this was not a robbery that descended into violence, but an altercation initiated by others which appellant joined that morphed into a theft by persons other than appellant. Even if Nicole's statement supported the inference that after the altercation, appellant attempted to take Mr. Milton's property, that conduct does not support an inference of robbery-murder in the McDonald incident, particularly given the circumstances that led up to the McDonald incident, It is clear that appellant had nothing to do with precipitating the incident between Kazi and McDonald and certainly had nothing to do with a robbery.

At best, any attempted taking by appellant was an afterthought which would not support an allegation of attempted robbery in the Milton incident or an inference of the requisite intent to support the prosecutor's robbery-felony-murder theory in the McDonald incident. "[I]f the larcenous purpose does not arise until after the force has been used against the victim, there is no 'joint operation of act and intent' necessary to constitute robbery." (*People v. Green, supra,* 27 Cal.3d at 55; *People v. Davis* (2005) 36 Cal. 4th 510, 561, ["If the defendant does not harbor the intent to take property from the possessor at the time he applies force or fear, the taking is only a theft, not a robbery."].)

Because there was an absence of proof by a preponderance of the evidence that appellant had the intent to steal from Mr. Milton prior to the assault, the prior incident had no probative value in establishing the requisite intent for robbery-felony-murder in the McDonald case.

For the same reasons that the Milton incident would not be admissible on a theory of relevance on the issue of intent, it would not be

admissible, as the prosecutor urged, on a theory that the two incidents were part of a continuing course of conduct. If there was no attempted robbery in the Milton incident, perforce, there was no continuing course of conduct that would be relevant to prove a robbery-felony-murder theory in the McDonald homicide. Consequently, even assuming for the sake of argument that the evidence of the Milton incident could be considered part of a course of conduct, it would be a course of conduct that demonstrated that appellant was easily provoked, not that he engaged in robberies.

D.

The Admission of Evidence of the Milton Liquor Store Incident Denied Appellant a Fair Trial, an Impartial Jury, and a Reliable Penalty Determination in Violation of the Due Process Clause of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Appellant was prejudiced by the admission of the Milton liquor store incident, but not in the way prejudice is typically alleged when the error claimed is the improper admission of evidence relating to a robbery-murder allegation. By the end of the guilt phase, the trial court readopted its original posture and ruled that the jury would not be instructed on felony murder because any taking from Mr. McDonald was merely incidental to the homicide. (R.T. 6281)

> "Having considered the totality of the evidence it's my determination that it is not proper to submit this theory of first degree murder to the jury for its consideration. I do not believe that there is sufficient evidence to merit allowing the jury to determine whether the homicide was committed in the course of a robbery. I think fairly stated the substantial weight of the evidence, that is, that the taking of items of property was incidental to the killing itself, and, therefore, based upon the case law it would not be appropriate to permit the jury to find otherwise." (*Ibid.*)

Inexplicably, in view of the fact the robbery-murder theory was no longer in play, instead of instructing the jury to disregard the liquor store incident and striking that testimony, the trial court ruled that "that counsel are [not] precluded from arguing the evidence of taking as being probative of the state of mind or intent of one or the other or both of the alleged perpetrators in this case." (*Ibid.*) To compound matters, even though the robbery-murder theory was not presented to the jury, the trial court nevertheless instructed the jury that

> "Evidence has been introduced for the purpose of showing that the defendant engaged in conduct, more particularly the liquor store incident, other than that for which he is on trial. This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show the intent and/or mental state which is a necessary element of the crime of murder of Ricky McDonald as charged in count 1 of the information. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider this evidence for any other purpose." (R.T. 6384)

In view of the fact that the liquor store incident was introduced on the theory that it supported the prosecution's robbery-murder theory of the McDonald homicide by providing evidence of a motive to rob, once the trial court ruled that there was insufficient evidence to go to jury on that theory, it would seem obvious that the liquor store incident then became totally irrelevant to the adjudication of the McDonald incident. Yet inexplicably, the trial court not only did not strike the evidence, but instructed the jury that they could consider the liquor store incident as evidence of "the intent and/or mental state which is a necessary element of the crime of murder of Ricky McDonald." (*Ibid.*)

What intent? What mental state? The liquor store incident could only be relevant to the mental state of appellant and Kazi if appellant's and Kazi's alleged disappointment that they did not get any of the money taken during the liquor store incident was evidence that they formed the intent to rob Mr. McDonald prior to the assaultive conduct. But the trial court properly ruled that there was no evidence of a pre-existing intent to rob and therefore, no robbery-felony murder.

True, appellant was found guilty of second, not first, degree murder in the McDonald homicide. That, of course, does not end the discussion. The prejudice of admitting evidence of other violent crimes in a homicide case is not capable of such discrete segregation. Rather it is appellant's contention that the admission of evidence of the Milton allegation tipped the scales against appellant on the issue of whether the homicide was second degree murder or manslaughter.

While the evidence that appellant punched Mr. McDonald once, apparently knocking him out, was undisputed, the evidence concerning the allegation that appellant kicked him in the neck after Kazi hit him with the brandy bottle -- evidence that was critical to a verdict of second degree murder -- was very much in dispute. For example, although Cesar Harris testified at trial that after he pulled Kazi off Mr. McDonald, appellant went back and stomped Mr. McDonald in the area of his head (R.T. 4251-4253), at the preliminary hearing, Cesar testified that he did not see appellant do anything to Mr. McDonald after he pulled Kazi off him. (Px. 398)

With no theft-related charge pending, the beating of Mr. Milton could only bear on the issues in the case to the extent that it was improper evidence of appellant's violent propensities. Though the trial court did instruct the jury that the liquor store evidence could not be used as evidence

of "bad character" or "disposition to commit crimes," in the absence of a robbery-murder allegation, that was, in fact, the *only* possible and improper way the evidence could have been used by the jury. (Evid. Code §1101)

By permitting the jury to consider the evidence of the liquor store incident, a violent act completely unrelated to the McDonald incident, as bearing on appellant's intent during the McDonald homicide, when there was no robbery-murder charge pending, the trial court unconstitutionally permitted the jury to consider evidence of other crimes from which "no permissible inferences" could be drawn, (*Jammal v. Van de Kamp* (9th Cir. 1991), 926 F.2d 918, 919.) The trial was thus rendered fundamentally unfair, in violation of due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (*Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1103; *Kealohapauole v. Shimoda* (9th Cir. 1986), 800 F.2d 1463, 1465.)

III.

The Trial Court's Erroneous Refusal to Instruct the Jury that Each Element of the Charged Crimes Must be Proven Beyond a Reasonable Doubt Violated Appellant's Right to Due Process of Law, to Trial by Jury, and to a Reliable Penalty Determination in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Statement of Facts

Prior to the instructional conference, appellant submitted an objection to utilizing CALJIC 2.90 as written on the grounds that it failed to inform the jury that the prosecution must prove *everty element* of the crimes and enhancements charged beyond a reasonable doubt. (C.T. 2932) In his moving papers, appellant contended that "the Fifth and Sixth Amendments to the United States Constitution require that in order to convict a person of a crime, the jury must find...each element beyond a reasonable doubt." (*Ibid.*) The trial court refused to modify 2.90 as requested. "2.90 will be given in its standard CALJIC form as set out in the sixth edition thereof." (R.T. 6232)

Consequently, the jury was instructed as follows:

> "The defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the people the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: it is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (R.T. 6388)

B.

Appellant's Proposed Modification of CALJIC 2.90 Was and Is a Correct Statement of the Constitutionally Mandated Reasonable Doubt Standard

It is settled law that in order to obtain a conviction of a criminal offense, the prosecutor must prove, and the jury must find, proof beyond a reasonable doubt as to each element of the crime charged. (*United States v. Gaudin* (1995) 515 U.S. 506, 511; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281; *United States v. Booker* (2005) 543 U.S. 220, 230; *United States v. Salazar-Gonzalez,* (9th Cir. 2006) 445 F.3d 1208, 1212; *United States v. Alferahin* (9th Cir. 2006) 433 F.3d 1148. 1157; *People v. Posey* (2004) 32 Cal. 4th 193, 208, fn.6; *People v. Sengpadychith* (2001) 26 Cal. 4th 316, 324.) In accordance with this long established 'basic tenet of due process' (*United States v. Alferahin, supra,* 433 F.3d at 1157), instruction No. 220 of the newly-minted CALCRIM jury instructions, promulgated by the California Judicial Council, now informs the jury that the presumption of innocence "requires that the People prove *each element of a crime* [and special allegation] beyond a reasonable doubt." (CALCRIM 103)

Even without a request from counsel, a trial judge is required to instruct the jury "on those general principles of law which are closely and openly connective with the facts and are necessary for the jury's understanding of the case." (*People v. Holt* (1997)15 Cal.4th 619, 687; *People v. Vann* (1974) 12 Cal.3d 220, 226.) It hardly requires a citation of authority to assert that, when requested, the trial court has a constitutional duty to give a proper instruction on reasonable doubt because it is "necessary for the jury's understanding of the case." (*Ibid.*;*Sullivan v. Louisiana, supra,* 508 U.S. 275, 281

Although Penal Code §1096a states that if the trial court gives the reasonable doubt instruction set forth in §1096,[25] "no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given," this Court has made it clear that "[n]othing in that section prohibits trial courts from modifying the instruction." (*People v. Freeman* (1994) 8 Cal.4th 450, 503.)

[25] "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

IV.

The Trial Court's Failure to Ask Juror Garganera if She Could Follow the Court's Penalty Instructions Despite Her Opposition to the Death Penalty Violated Appellant's Right to an Impartial Penalty Determination in Violation of the Right To Due Process, a Fair Trial, an Impartial Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Introduction

Sitting on a jury in any criminal case is an awesome task for the average layperson whose only connection to the court system typically is the jury notice that arrived in the mail. While attorneys and judges who participate in capital trials are cognizant of the seriousness and enormity of the task that jurors face in adjudicating guilt and punishment in a capital murder case, all too frequently we lose sight of just how unnerving it is to the average venireperson to learn they may be chosen to decide whether another human being will live or die. Because the potential jurors are typically randomly chosen from DMV and voter registration lists, the variety of pre-existing opinions on the death penalty will usually run the entire gamut from an eye-for-an-eye to fervent opposition to the death penalty. Moreover, for many potential jurors, filling out the jury questionnaire will be the first time they have been asked to articulate with some specificity what are often inchoate views on those issues.

While the questionnaires that jurors fill out prior to being questioned during voir dire are valuable for the time they save in the voir dire process and for the basic information they reveal about each potential juror, the

responses given are, at best, no more than tentative indications of a juror's initial thoughts on the issues involved. Only when jurors are questioned in open court about their ability and willingness to follow the instructions of the court, even if those instructions conflict with their previously held views, can an accurate assessment can be made of a juror's suitability to sit in judgment on a capital case. (*cf. People v. Stewart* (2004) 33 Cal.4th 425.)

Of course, the qualification of a juror to serve in a capital case is not defined by the nature of a juror's pre-existing opinions on the death penalty, but by whether that juror can set aside those opinions, whether that juror can follow the instructions of the court, whether that juror's ability to follow those instructions will be substantially impaired by their pre-existing views on the death penalty, or whether they "will nevertheless conscientiously apply the law to the facts adduced at trial." (*Wainwright v. Witt* (1985) 469 U.S. 412, 421; *Lockhart v. McCree* (1986) 476 U.S. 162, 176; *People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

Because the trial court neither asked Juror Carganera if she would be able to set aside her feelings about the death penalty and follow the law as the court instructed nor made a finding that her views on the death penalty would substantially impair her ability to sit as a juror, Juror Carganera's excusal for cause was unconstitutional error mandating reversal of the sentence of death.

B.

Statement of Facts

Laura Garganera, a life long resident of San Diego County, had never served on a jury before being called to sit as a juror in the second trial of appellant's case, where the only issue was penalty. (C.T. 11517) In her questionnaire, Ms. Garganera wrote that she did not want to be a juror in

this case. When asked about her response by the trial court, she explained that "at the time in June, coming down here I had no idea. This was a kind of a shocker of what this was all about and I don't (sic) want to be involved with anything like that." (R.T. 8559)

> "But then since then, up to this point today made me realize that it might be -- it would be wrong not to do it if it I was asked, because it would be an experience and my chance to get involved with the community and, hopefully, do what's right." (*Ibid.*)

Although she indicated in her answers to the questions posed in the jury questionnaire that she had a general antipathy towards the death penalty, when questioned in open court, Ms. Garganera revealed that her opposition to the death penalty was not nearly as absolute as one might have gathered from reading her questionnaire. For example, when the trial court asked her if "you were creating a system of law, okay, and you were the one deciding what the laws ought to be, would you provide for a death penalty," Ms. Garganera said she would. (R.T. 8553) "*As far as the death penalty*, including what's right and what's wrong, *I would probably have that as an option.*" (R.T. 8554) (emphasis added)

Ms. Garganera told the court she had an "open mind" on the issue and even though she "really [didn't] believe in the death penalty...upon hearing facts and really going into detail, *there's something that could change my mind.*" (R.T. 8556) Moreover, it appears that her inclination towards life without parole did not stem from a desire to extend mercy, but a belief that "a life imprisonment sentence is a way to make a person that's guilty suffer longer..." (R.T. 8558) Most importantly, in answer to the trial court's question of whether appellant's convictions themselves dictated to her what the penalty should be, Ms. Garganera indicated that her penalty decision

would depend upon "knowing the circumstances leading up to [the convictions]." (*Ibid.*)

Ms. Garganera was never asked, either in the questionnaire or in open court, if she could set aside her general feelings about the death penalty and follow the court's instructions to weigh the aggravating and mitigating evidence in arriving at a penalty verdict in appellant's case.

Following the voir dire in open court, the prosecutor moved to excused Ms. Garganera for cause.

> "Your honor, the People would bring a challenge based upon the fact that as many times as the court tried to get her to commit to whether or not she could, in fact, vote for either option, she just simply would not answer the question. And I think in fairness the people have to bring a challenge to Miss Garganera and any other inhabitants from the planet from which she arrived."[26] (R.T. 8559)

Over the objection of trial counsel, the trial court excused Ms. Garganera for cause. (R.T. 8560)

> "I am satisfied that the challenge for cause ought to be sustained, that Miss Garganera exhibits a very strong implied, if not actual, bias against the death penalty based upon her responses in open court and mindful of her written answers to the questionnaire inquiries." (*Ibid.*)

C.

The Erroneous Excusal of Ms. Garganera for Cause Violated Appellant's Right to an Impartial Jury and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Ever since the seminal decision of the United States Supreme Court in *Witherspoon v. Illinois* (1968) 391 U.S. 510, it has been black letter constitutional law that a prospective juror may not be excused simply

[26] The genesis of the prosecutor's rather cruel remark is not obvious from the record.

because he or she is opposed to the death penalty. "A man[27] who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it." (*Id.* 392 U.S. at 519; *Wainwright v. Witt, supra,* 469 U.S. at 420.) As this Court observed in *People v. Stewart, supra,*

> "a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty." (*Id.* 33 Cal.4th at 447.)

Rather, a juror may be excused because of that juror's opposition to the death penalty only if the trial court finds that the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45; *Wainwright v. Witt, supra,* 469 U.S. at 419; *Lockhart v. McCree, supra,* 476 U.S. at 176, "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."].)

> "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude, or *appreciably impede,* him from engaging in the weighing process and returning a capital verdict." (*People v. Mickey* (1991) 54 Cal.3d 612, 681, fn 19.) (emphasis added)

While it is true that Ms. Garganera expressed some views against the death penalty in the written questionnaire, it is equally clear from the open

---

[27] *Witherspoon* was obviously written in a less politically correct era.

court voir dire that she thought that imposition of the death penalty was appropriate under some circumstances. She told the court that if she were writing the penal code on the issue, she would include provision for a death penalty because "[d]eep down in my heart, I know that there's got to be more than just life imprisonment if somebody has really done something bad." (R.T. 8554) Moreover, she specifically told the court that she could not categorically rule out imposing the death penalty in appellant's case, noting the possibility that "upon hearing facts and really going into detail, there's something that could change my mind." (R.T. 8556)

Most importantly, Ms. Garganera was never asked if she could set aside her personal views about the death penalty and follow the instructions of the court in determining the appropriate penalty. The mere fact that a venireperson is opposed to the death penalty does not disqualify him or her as a juror, if he or she can do their duty as a citizen and juror and follow the instructions of the court, "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." (*Wainwright v. Witt, supra.* 469 U.S. at 423; *Gray v. Mississippi* (1987) 481 U.S. 648, 658-659.)

While Ms. Garganera responded "yes" to the questionnaire's inquiry whether her "opposition to the death penalty [was] so strong that you would be unable to impose the death penalty, regardless of the facts" (C.T. 11522), not a single question in that questionnaire asked Ms. Garganera if she could "temporarily set aside [her] own beliefs in deference to the rule of law" (*Lockhart v. McCree. supra,* 476 U.S. at 176) or if she "could nonetheless impose the death penalty if this were shown to be appropriate *by the facts*

and law in a particular case." (*United States v. Battle* (N.D. Ga. 1997) 979 F. Supp. 1442, 1450.)(emphasis added)

As her responses to questioning in court revealed, her antipathy to capital punishment was not categorical. As Ms. Garganera explained, there should be a death penalty provision in the law because, "[d]eep down in my heart, I know that *there's got to be more than just life imprisonment* if somebody has really done something bad." (R.T. 8554) and had she been asked the constitutionally mandated questions by the trial court, her qualification to sit on a penalty jury would have been even more patent than already shown by the record.

As this Court commented in *People v. Stewart, supra,*

> "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." (*Id.* 33 Cal. 4th at 446.)

The prosecutor based his challenge for cause on Ms. Garganera's alleged repeated failure to "commit to whether or not she could, in fact, vote for either option, she just simply would not answer the question." (R.T. 8559) The prosecutor was wrong. The problem lay with the trial court's question, not Ms. Garganera's answer. The trial court asked Ms. Garganera if, "you were seated as a juror and you heard all of the evidence about the crimes, you heard all of the evidence about Mr. Thomas, you went back into the jury room with the other jurors, you deliberated upon a verdict, if you felt that death was the just and appropriate result, could you support that verdict and announce it publicly here in the courtroom?" Ms. Garganera responded that

> "Truthfully, with all the circumstances and if it led up to that, where knowing all the facts, if all the facts were there -- it's hard for me to make that decision right now because I'm not there." (R.T. 8558)

The court's question mixed apples with oranges. The issue was whether or not Ms. Garganera could follow the court's instructions in arriving at a penalty, not whether she could "announce it publicly here in the courtroom." At the end of a penalty trial, jurors are not required to stand up, look at the defendant, and say "I sentence you to death." At most, an individual juror may be polled as to whether the verdict tendered by the foreperson reflected the individual juror's verdict choice.

Moreover, the prosecutor's representation that the trial court had asked Ms. Garganera this question more than once and that she ducked the issue is simply not true. The court asked only one other somewhat similar question; contrary to the prosecution's assertion, Ms. Garganera did not duck the issue, but gave a responsive answer indicating that she still had an open mind.

> "Q. Do you personally believe that in any case you could vote in favor of the death penalty? I'm not talking about in this case. I'm talking about any case that you could imagine.
>
> A. See, it's hard for me to answer that because I've never been in this situation of the reality of it. So it's hard for me to answer that. Like I said, at one time I believed in the death penalty, depending on circumstances. And I'm just kind of in between." (R.T. 8553)

Rather than ducking the issue, Ms. Garganera gave a truthful, and quite frankly, appropriate answer to a question that bordered on inappropriate. One can never really know how one will react to the type of evidence presented at a penalty phase where the issue is life or death. Ms. Garganera answered it as best she could. Her answer did not eliminate the possibility she could render a death verdict; she simply said that she could

not know for sure until she heard the evidence; " I'm just kind of in between." (R.T. 8553) As Judge Kozinski of the Ninth Circuit observed, "keeping an open mind as to whether the death penalty is appropriate, before any evidence has even been presented, strikes us as a virtue in a juror, not a basis for disqualification." (*Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946, 951, fn. 7, *rvsd. on other grounds, Uttecht v. Brown* (2007) __U.S.__, 127 S. Ct. 2218.)

Most importantly, the trial court never asked Ms. Garganera the fundamental question that is at the heart of *Witherspoon-Witt* death qualification of jurors, namely "whether a prospective juror's 'views on capital punishment...would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*People v. Stewart, supra,* 33 Cal.4th at 441, fn. 3.)

Nor was there an equivalent question on the written questionnaire. While the questionnaire asked if jurors would be unable to render a verdict of death "regardless of the facts," jurors were never asked if they would be able to set aside their views, live up to their oath, and follow court's the instructions in determining penalty. In *Stewart, supra,* this Court found remarkably similar questions to be insufficient to meet the *Witherspoon-Witt* standard for disqualification.[28]

---

[28]"(1) Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you:

(a) To find the defendant guilty of first degree murder regardless of what the evidence might prove?--( ) Yes ( ) No

(b) To find a special circumstance to be true, regardless of what the evidence might prove?--( ) Yes ( ) No

(c) To ever vote to impose the death penalty?--( ) Yes ( ) No

> "As noted above, question No. 35(1)(c) asked each prospective juror whether his or her conscientious opinions or beliefs concerning the death penalty would either 'prevent or make it very difficult" for the prospective juror "to ever vote to impose the death penalty.' (Italics added.) 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. As explained below, however, 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." (*Id.* 33 Cal.4th at 446.)

In upholding the prosecutor's challenge for cause, the trial court simply ruled that "Miss Garganera exhibits a very strong implied, if not actual, bias against the death penalty." (R.T. 8560) There was no ruling that Ms. Garganera would be unable to set aside her opinions about the death penalty and follow the court's instructions. She was never asked that question. There was no finding that Ms. Garganera's views would "substantially impair" her ability to sit as a juror in appellant's case. There is no basis in the record for so finding. "[T]he 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

---

If your answer to (a), (b) or (c) is 'Yes,' please explain [in the space provided]."

(2) Are your opinions or beliefs about the death penalty of such a nature that you would:

> (a) Vote for first degree murder regardless of what the evidence proved so that the death penalty could be imposed?--( ) Yes ( ) No
>
> (b) In all cases vote for the death penalty if there is a verdict finding the defendant guilty of first degree murder and a special circumstance to be true regardless of what mitigating evidence might be presented?--( ) Yes ( ) No

If your answer to (a) or (b) is 'Yes,' please explain [in the space provided]." (*Id.* 33 Cal.4th at 284, fns. 7, 8.)

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." (*People v. Stewart, supra*, 33 Cal.4th at 446.)

The trial court erred in granting the challenge for cause to Ms. Garganera.

D.

The Judgment of Death Must be Reversed

Where a juror has been improperly excluded based upon his or her views on capital punishment, the death verdict cannot stand and must be reversed. (*Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

V.

By Instructing the Jury that, as a Matter of Law, the Jurors "Must Consider and Accept that Death is a Greater Penalty than Life Imprisonment Without Possibility of Parole," the Trial Court Violated Appellant's Right to Due Process of Law, Trial by Jury, and a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Introduction

In the thirty years that have passed since the United States Supreme Court first held in *Furman v. Georgia* (1972) 408 U.S. 238 that the penalty of death could violate the constitutional prohibition against cruel and unusual punishment, it has become an axiomatic principle of death penalty jurisprudence that, because of its finality, "death is different," (*Gardner v. Florida* (1977) 430 U.S. 349, 357; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) While a person who protests his innocence, but is nevertheless convicted and sentenced to a life sentence, may later be vindicated on the basis of newly discovered evidence, once a sentence of death is carried out, no such mistakes can be rectified. Because death is different, our legislatures and courts have fashioned numerous procedural and substantive protections that apply only when the charged crime puts the possibility of a sentence of death in play.

Be that as it may, it is also fair to say that not everyone believes that death is a worse punishment than life without parole. While it is probably accurate to say that most persons would agree that death is a more severe punishment than LWOP, that does not mean that the view is either unanimously held or that it rises to the level of a maxim of death penalty

jurisprudence. A juror may well conclude that life without parole, a punishment that may endure for decades, is a greater punishment than a death sentence, which is over in an instant.

In the case at bar, the trial court instructed the jury that they *must* treat death as the greater punishment as a matter of law. In other words, regardless of whether an individual juror thought that the prospect of spending the rest of one's life in custody, with no hope of parole, was a worse punishment than death, the court instructed them that they had to set aside their personal feelings on the matter and vote for death. In making the choice between death and life without parole, jurors who wanted to impose the most severe punishment available, who thought that life without parole was the worst possible punishment, who thought that death was too good for the defendant, and who wanted to sentence the defendant to life without parole as the more severe punishment were nevertheless instructed that they could not do so, that they were required as a matter of law to treat the death penalty as the greater punishment.

It is appellant's contention the trial court erred as a matter of law because this was an issue for the jurors to decide. Indeed, when the trial court instructed the jurors that they "must consider and accept that death is a greater penalty than life imprisonment without possibility of parole," ((R.T. 9715, 11686) the trial court unconstitutionally usurped and interfered with the jury's sentencing role and undermined the reliability of its penalty determination. Appellant had a constitutional right to have the sentencing body to determine the appropriate sentence unconstrained by a judge-imposed dictat as to which penalty was greater. The instruction thus unconstitutionally "precluded juror consideration of a[] factor[] constitutionally relevant to imposition of the death penalty." (*People v.*

Brown (1985) 40 Cal.3d 512, 540; *People v. Murtishaw* (1989) 48 Cal. 3d 1001, 1027; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.)

B.

Statement of Facts

During the instructional conference of the first penalty trial, the prosecutor requested that the trial judge instruct the jury that death was a greater punishment than life without parole. (R.T. 7531)

> MR. MC ALLISTER: "[I]n a previous case the court considered an instruction regarding death versus life and which punishment is considered the greater punishment for the purposes of the jury's deliberations. I feel that would be appropriate in this case so that we do not have a jury wondering to themselves which is greater punishment. And as I review the instructions, it certainly gives the jury the option of choosing one other the other, but it doesn't indicate which one is considered by law to be considered the greater punishment." (*Ibid.*)

The trial court indicated that it would take the request under consideration. (*Ibid.*) Later, during that same session, the trial court commented that "[c]learly the law provides that death is the greater penalty. I don't think we have any dispute about that. The only question is whether the jury ought to be specifically instructed up-front." (R.T. 7551-7552) The defense asked for time to consider the matter. (R.T. 7552) The following day, the defense indicated that it would not object to the giving of the instruction requested by the prosecutor. (R.T. 7642)

The first penalty trial ended in a hung jury. In the second trial, there was no discussion regarding this issue; the instruction was simply included in the trial court's packet of proposed penalty instructions. (C.T. 4455) The trial court instructed the jury, both before and after the penalty phase testimony, that

"For all purposes, you must consider and accept that death is a greater penalty than life imprisonment without possibility of parole." (R.T. 9715, 11686)

C.

By Erroneously Instructing the Jurors that they were Required to Consider Death as the "Greater" Penalty Trial Court's Unconstitutionally Prevented Jurors in Appellant's Case from Choosing LWOP as an Appropriate Sentence Based Upon a Juror's Belief that LWOP was a Greater Punishment than Death, in Violation of Appellant's Right to Trial by Jury, Due Process of Law, and the Right to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, §§7, 15, 16, and 17

1.

The Trial Court's Instruction was an Erroneous Statement of the Law

The trial court instructed the jury that they "*must* consider and accept that death is a greater penalty than life imprisonment without possibility of parole." (R.T. 9715, 11686) (emphasis added) Simply put, there was and is no basis in law or logic that is supportive of that instruction. True, as previously stated, both this Court and the United States Supreme Court have recognized that "death is different," in part because the punishment itself is the ultimate act of violence that can be inflicted on a person convicted of a crime, but also, most importantly, because of its finality. Whereas an improper conviction can be remedied so long as the person convicted is still alive in prison, an executed sentence of death affords no such opportunity. "In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability...This especial concern is a natural consequence of the knowledge

that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585; *People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

That being said, there is nothing in California's death penalty statutory scheme, the cases interpreting the statutory language, or the jurisprudence explicating the constitutional limitations of those statutes to support the notion that there is any compulsion for *jurors* to treat and consider death as a "*greater*" or worse punishment than life without parole. As this Court has repeatedly emphasized, there is no "right" or "wrong" in the jury's penalty determination. The decision making process in the penalty deliberations is a normative one, calling for the jurors' judgment on what the appropriate punishment should be in a particular case, taking into account the evidence presented in aggravation and mitigation. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779 .)

While there are limitations on the evidence that a juror may consider as aggravation, there are no such limitations on how a juror may come to the decision to spare the life of the defendant in a capital case. "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." (*McCleskey v. Kemp* (1986) 481 U.S. 279, 306; *Romano v. Oklahoma* (1994) 512 U.S. 1, 6; *Payne v. Tennessee* (1991) 501 U.S. 808, 824.) While, to be sure, one may posit that most people think that the death penalty is a greater punishment than any sentence that spares the life of a defendant, as indicated above, some people think that execution is "too good" or "too quick" for a person convicted of a heinous crime and that the prolonged pain of a sentence of life without

parole, a life without any hope of freedom, a life defined by the certainty of the walls of a prison cell is a "greater" punishment than a sentence of death.

To give just one recent example, in the trial of Zacarias Moussaoui for his alleged role in the 9/11 attack on the World Trade Center, Mr. Moussaoui's attorney "urged the jury to sentence Moussaoui, 37, to life without parole, arguing that a life sentence for the admitted terrorist would be a fate worse than death." (http://www.denverpost.com/nationworld/ci_3748149.) When the jury returned an LWOP sentence in that case, Mr. Moussaoui's mother was quoted as saying that the LWOP sentence "was more cruel than putting him to death because now he will 'live like a rat in a hole.'" (http://www.courttv.com /trials/moussaoui/050506_mom _ap. html)

Similarly, when Governor George Ryan commuted the death sentences of Illinois prisoners, he noted that "[l]ife without parole has even, at times, been described by prosecutors as a fate worse than death." (http://www.initiative-gegen-die-todesstrafe.de/George%20Ryan%20.htm.) In the same vein, while promoting legislation banning the death penalty for minors in Nevada, Assemblywoman Chris Giunchiglian observed that ""[l]ife without the possibility of parole is a worse sentence in my mind," (http://www.geocities.com/nevadahelp/news.html.)

In yet another expression of this view, the family of a young Philadelphia woman who was killed by her boyfriend told the press that they thought that sentence of life without parole was worse and more fitting punishment than death.[29] "'[L]ife without parole is a terrible punishment, worse than being executed," said the victim's younger brother, John. 'We want him in an environment where every day will be longer than the

---

[29] In fairness, it should be noted that for extraneous reasons, death was not a sentencing option in that case.

previous one, and where he'll know that he'll never leave but feet-first. And we hope he lives another 30 years.'" (http://dir.salon.com/story/news/feature/2002/10/18/einhorn/index.html)

While the foregoing is neither intended as nor should be taken as a definitive quantitative analysis of the prevalence of persons who have the opinion that LWOP is a worse punishment than death, suffice it to say that the diversity of sources quoted above strongly suggests that such a belief is not some aberrational anomaly, but rather represents the opinion of a statistically significant portion of the jury pool. In fact, in this very case, one potential juror, who was challenged for cause, Ms. Laura Garganera, expressed the view that "a life imprisonment sentence is a way to make a person that's guilty suffer longer..." (R.T. 8558) (See also *People v. Guerra* (2006) 37 Cal. 4th 1067, 1109, ["some jurors also may have believed that the punishment of life without parole was worse than the penalty of death..."]; *State v. Brown* (Mo. 1999) 998 S.W.2d 531, 544), ["The prosecutor stated that he struck Joanne J. because she stated that she thought that life without parole was worse than the death penalty..."].)

There is no California statute nor court decision, state or federal, that specifies that death is a "greater" punishment than LWOP or that enjoins a juror who believes that life without parole is a "greater" punishment than death from adhering to that view in deciding what the appropriate sentence in a capital case should be. Consequently, the trial court egregiously and unconstitutionally erred by instructing the jurors that, as a matter of law, they were required, they had no choice, but to put aside any personal view they might have that LWOP was a worse punishment than death when deciding whether death or LWOP was the appropriate punishment in this case. To preclude a juror from voting for LWOP because that juror believed

that LWOP was a worse punishment than death violated the most basic tenet of death penalty jurisprudence: "[a juror] must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown, supra,* 40 Cal. 3d at 540; *People v. Stitely, supra,* 35 Cal. 4th at 521; *People v. Marshall* (1996) 13 Cal. 4th 799, 858.)

2.

The Trial Court's Erroneous Instruction Violated Appellant's Eighth Amendment Right to a Reliable Penalty Determination

If there is any principle of death penalty jurisprudence that can be characterized as fundamental, it is that no juror can be forced to vote for the death penalty if that juror thinks that death is not the appropriate punishment for the defendant. (*McCleskey v. Kemp, supra*; *Romano v. Oklahoma, supra.*) A juror may vote to spare a capital defendant's life for any reason. It follows, *a fortiori*, that a juror may vote against the death penalty because of their belief that life without parole is a greater punishment that death. (*People v. Brown, supra,* 40 Cal.3d at 540; *People v. Marshal, supra,* 13 Cal. 4th at 858.) Jurors cannot be required "to impose death on any basis other than their judgment that such a verdict was appropriate under all the facts and circumstances of the individual case." (*People v. Brown, supra,* 40 Cal.3d at 540; *People v. Lucas* (1995) 12 Cal. 4th 415, 493; *Lockett v. Ohio* (1978) 438 U.S. 586, 604)

There can be no doubt that jurors in other cases have voted to spare a defendant's life, not out of a sense of mercy, but in the belief that death would be too easy, that confinement in the state prison with no hope of release was a worse punishment. To give just one example of a case in

which that happened, in the capital prosecution of Tore Malvo, one of the two snipers who terrorized the area around Washington D.C. and Northern Virginia a few years ago with a series of random shootings, the Virginia jury that heard Mr. Malvo's case hung on penalty, with some of the jurors voting for life in prison instead of death because they thought that would be a worse punishment. The *Washington Post* reported that "[j]uror James Wolfcale, a Virginia Beach pastor who also favored the death penalty for Malvo, said...some of those who supported a life sentence argued that the punishment would be worse than a death sentence for the young defendant." ("Death Penalty Deliberations Tore Malvo Jury Apart," *Washington Post*, June 19, 2004, §B, p. 5.)

Simply put, by instructing the jurors at the urging of the prosecutor that they "must consider and accept that death is a greater penalty than life imprisonment without possibility of parole" the trial court undermined the reliability of the penalty determination by informing those jurors who might have been inclined to spare appellant's life because they thought that LWOP was worse than death that they were precluded by law from so doing. As this Court observed in *People v. Brown, supra,* "[t]he jury must be free to reject death if it decides on the basis of any constitutionally relevant...observation that it is not the appropriate penalty." (*Id.* 40 Cal.3d at 540.) By telling those jurors who wanted to give appellant the worst punishment the law allows, that even though they believed that LWOP was that worst punishment, they were legally enjoined from imposing it, the instruction violated the most fundamental tenet of death penalty jurisprudence: that a juror may not be forced to vote for death if he or she thinks that death is not the appropriate penalty. (*McCleskey v. Kemp,*

supra; *Romano v. Oklahoma, supra*; *Eddings v. Oklahoma, supra.* (1982) 455 U.S. 104, 114)

3.

The Court's Instruction Removed an Issue of Fact From the Jury's Consideration in Violation of Appellant's Right to Trial by Jury Guaranteed by the California Constitution and the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution

Under Article One, §16, as well as Penal Code §§190 *et seq.*, appellant had the right to have the jury consider all relevant evidence and make the decision as to what would be an appropriate punishment, whether appellant would receive the death penalty or be sentenced to life in prison without possibility of parole. More recently, in a series of cases -- *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270, 127 S. Ct. 856 [hereinafter *Cunningham*] -- the United States Supreme Court has held the Sixth and Fourteenth Amendments command that factual findings that have the effect of increasing a penalty are reserved for and must be found by a jury. In *Ring, supra*, the high court explicitly held that '[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it [did not] encompass[] the factfinding necessary to put [a defendant] to death." (*Id.* 536 U.S. at 609.)

Although this Court has repeatedly stated that the sentencing decision in a death penalty case is "inherently moral and normative, not factual" (See, e.g., *People v. Rodriguez, supra*, 42 Cal.3d at 779), this language simply describes the nature of the reasoning process that the jury should employ to determine penalty, not the findings that result from the

jury's penalty determination. The product of the penalty deliberative process is a factual finding that "the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified." (Cal.Crim. No. 766)

That is a factual finding that is indistinguishable from other factual findings that *Apprendi* and *Ring* require be made by the jury in accordance with the Sixth and Fourteenth Amendments. A deliberating penalty jury must find *as a fact* that "the aggravating circumstances...are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.(*Ibid.*)." A factual finding is no less a factual finding because it is relevant to the penalty determination rather than guilt. "[T]he characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." (*Ring, supra,* 536 U.S. at 605; *United States v. Booker, supra,* 543 U.S. at 231

By instructing the jury that they were precluded from voting for LWOP instead of death if they felt that LWOP was a worse punishment, the trial court's instruction invaded the province of the jury and unconstitutionally withdrew an issue from their consideration that the Sixth Amendment reserves for the jury's decision. The trial court could no more do that consistent with the guarantee of the right to jury trial than it could direct a verdict on a finding of fact. (*People v. Harris* (2005) 37 Cal. 4th 310, 350; *People v. Rodriguez, supra,* 42 Cal.3d at 766.) "The trial court may not...expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*Ibid.*)

VI.

The Erroneous Admission of Evidence of the Firing of a Gun Nearby Jesse Russell's House and the Erroneous Instruction that Permitted the Jury to Consider the Incident as Aggravating Evidence Undermined the Reliability of the Penalty Determination in Violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Statement of Facts

Although there was live, eyewitness testimony concerning this incident presented at appellant's first penalty trial. at this second penalty trial, the only such evidence that came before the jury did so via a stipulation as to what the witnesses would have said, had they been called to testify at that trial. The jury was told that:

> "[I]f Mr. [Demarco] Atkins were called and sworn as a witness...he would testify to the following: that he, Mr. Atkins, was at 1170 Sumner street on September 17th, 1995 between 10:00 and 11:00 p.m. He lived at that address. Also living there was his mother, his nephew and his cousin. Jesse Russell is the brother of Demarco Atkins.
>
> Demarco Atkins would further testify that he knew Nicole Halstead because she was his brother, Jesse Russell's, girlfriend. Something unusual happened. Two people came up to the window and asked for Jesse. Demarco Atkins said, 'he's not here.' But that was it. It was the window by the driveway, a window to a bedroom all the way in the back.
>
> Also in that room with Demarco Atkins was his cousin and nephew, his cousin being Derek Brown, his nephew being Ivory Payne. The people outside tapped on the window and a voice said, "is Jesse here?" Atkins said, 'no.' Then Demarco Atkins waited, and then he heard a gun cocked back. That was it. The voice said, quote, 'Looking for Jesse. I'm going to get him. Looking for Jesse. We're going to get him.'
>
> The next thing he heard was the gun cocked back, and he saw them start running up towards the front of the house. He

> and/or the other occupants of the apartment were laying down. Then he heard some shots. He, Demarco Atkins, was laying down because he thought they were going to shoot the house.
>
> He recognized the person's voice who was speaking. It was Correll Thomas. He knew Correll Thomas from prior to that day. He heard about two or three shots. After hearing the shots, he waited for 3 to 5 minutes at the most and then called the police. The police came out and he gave them a statement about what had happened.
>
> Further testimony upon cross-examination by Mr. Bloom would be as follows: that all Mr. Atkins heard was one person. It was a male voice that said, 'is Jesse here?' Atkins said no, and the male voice said, 'I was looking for Jesse. I want to get him.' To the best he can remember, those are the words that were said. Then a little while later he heard a cock of the gun and a little while after heard gunshots. It was as they crawled toward the front of the house that they heard the gunshots, which was a couple of minutes after he had heard the last words.
>
> He did not see anyone doing the shooting because he was inside the house. There was no way of knowing which of the two fired the shots. There were no shots inside the house. No shots came inside the house. No window was broken. No door was shot or anything. He did not hear the shots strike anything at all." (R.T. 10815-10816)

In addition, testimony was presented indicating that shell casings were found some 40-50 yards from Mr. Atkins' house. (R.T. 10727)

During the instructional conference, defense counsel objected to the jury considering this incident as evidence in aggravation. "I don't think there's any evidence whatsoever to support that the discharge of this firearm could have resulted in injury or death to a person." (R.T. 11655) The trial court overruled the objection, noting that the "offense of grossly negligent discharge of a firearm *may* fall within the ambit of the evidence related to that incident" and so instructed the jury. (R.T. 11656, 11664) (emphasis added)

B.

The Stipulated Testimony Regarding the Russell Incident Did Not Establish a Violation of Penal Code §§246 (Shooting at an Inhabited Dwelling) or Penal Code §243.6 (Discharge of a Firearm in a Grossly Negligent Manner)

The spare stipulation recited above established neither a violation of Penal Code §246 nor a violation of Penal Code §246.3 and, even assuming that such a violation was established, there simply was no evidence that appellant was the person who fired the gun that would have warranted consideration of this evidence as aggravation relevant to the penalty determination in appellant's case.

Penal Code §246 provides that it is illegal to "maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building..." The stipulated evidence did not speak to the issue of where the bullets were fired from or what the bullets were fired at. There was no evidence that the shots were fired at anything in particular, at any house, no less at the house that Mr. Atkins lived in. "There were no shots inside the house. No shots came inside the house. No window was broken. No door was shot or anything. He [Mr. Atkins] did not hear the shots strike anything at all." (R.T. 10816)

Penal Code §246.3 prohibits anyone from "willfully discharg[ing] a firearm in a grossly negligent manner which could result in injury or death..." There is simply no evidence in the record concerning how -- in what direction -- the weapon was fired and, most importantly, if it was fired in a "manner which could result in injury or death." While the fact that there was no evidence that any one was injured or property damaged by the firing of the weapon is some, if not conclusive, evidence that the shots

weren't fired in a "manner which could result in injury or death," fatal to the admissibility of the incident as evidence in aggravation, however, is that there simply was no other evidence on that all important element of the crime.

Finally, there no evidence as to who fired the gun and, *a fortiori*, there was no evidence that it was appellant. While Mr. Atkins said he only heard one voice that he claimed to have recognized as appellant's, that aural recognition occurred along side the of his house, more than a hundred feet away from where shells were found. Moreover, this was voice recognition only; Mr. Atkins never saw appellant that evening. Nor was he able to identify the other person present. Significantly, and attenuating the probative force of Atkins' alleged recognition of appellant's voice, the shots were not fired until some time -- at least "a couple of minutes" -- after Mr. Atkins heard the voice he believed to be appellant's. For all that the record reveals, the shooting could well have been completely unrelated to appellant's purported presence in the neighborhood.

Although one might speculate on any number of scenarios that would fill in details of what Mr. Atkins heard, but did not see, as this Court has frequently reminded, "[s]peculation is not evidence." (*People v. Berryman, supra*, 6 Cal.4th at 1081; *People v. Waidla, supra*, 22 Cal. 4th at 735; *People v. Dennis* (1998) 17 Cal. 4th 468, 508; *People v. Perez* (1992) 2 Cal. 4th 1117, 1145.)

In short, the totality of the evidence presented regarding this issue established that [1] two people came to the side of Mr. Atkins's house, [2] that Mr. Atkins heard the voice of someone who sounded like, but did not identify himself, as appellant, [3] that this person said that he was going to get Jesse and that "we're" going to find him." and that [4] several minutes

later, Mr. Atkins heard, but did not see, what sounded like a gun being fired in an unknown direction in an unknown manner. None of the bullets, which were apparently fired from 120-150 feet from Mr. Atkins's house, struck his house.

The evidentiary stipulation established neither a violation of Penal Code §246 nor of Penal Code §246.3.

C.

The Firing of a Gun Near Mr. Atkins's House Was Not Admissible as Aggravating Evidence Pursuant to Evidence Code §190.3(b) Because it was Not Directed at a Person

Evidence Code §190.3(b) provides that unadjudicated criminal conduct may be admitted as evidence in aggravation in a penalty trial of a capital case if " involved the use or attempted use of force or violence or the express or implied threat to use force or violence." However, not all threats to use force or violence are admissible under this section; only those that involve threats to persons, as opposed to property, are admissible. (*People v. Kirkpatrick* (1994) 7 Cal 4th 988, 1013-1014; *People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyd* (1985) 38 Cal.3d 762, 776.) As this Court observed in *People v. Kirkpatrick, supra,* "[t]o be admissible under this factor, a threat to do violent injury must violate a penal statute and must be directed against a person or persons, not against property." (*Id.* 7 Cal 4th at 1013.) The purpose of excluding threats to property, as explained by this Court in *People v. Boyd, supra.*

> "is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. If theft of property is inadmissible — and it clearly is under the statutory language — then we cannot find that damage to property — still less the mere threat to damage property — is entitled to any greater consideration." (*Id.* 38 Cal.3d at 776.)

As we have seen, the firing of the two shots, without more, would not have been admissible as aggravating evidence under §190.3(b) because not only was there *no* evidence that appellant was the person who fired the gun or that the firing of the gun was in any way related to the Atkins house, but because the evidence adduced relating to the firing of the gun did not constitute a crime of violence directed at persons, not property, the *sine qua non* of a violation of either §246 or §246.3 of the Penal Code.

There was *no* evidence that the shots fired were "directed against a person or persons, not against property." (*Ibid.*) All that the record reveals is that [1] Mr. Atkins heard what sounded like two gun shots that occurred a little while after he heard a voice that sounded like appellant's near his house and [2] that two shell casings were found between 120 and 150 feet away from the Atkins residence, presumably, though not conclusively, marking the general area from which the shots were fired. That's it. Simply put, there were no evidentiary facts from which it could be inferred that the shots that were heard, but not seen, were "directed against a person or person." (*Ibid.*)

D.

The Trial Court Erred by Instructing the Jury that The Shooting Near Jesse Russell's House Could Constitute the Offense of Grossly Negligent Discharge of a Firearm

The trial court instructed the jury that "[t]he shooting in the area of Jesse Russell's residence on September 17th, 1995, you are limited to a consideration of the possible or potential offense of grossly negligent discharge of a firearm. Every person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a crime." (R.T. 11664)

In order to warrant instructing a jury on an unadjudicated offense offered under Penal Code §190.3, there must be evidence sufficient to permit the jurors to find beyond a reasonable doubt that the criminal activity alleged took place. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-55; *People v. Davenport* (1985) 41 Cal.3d 247, 281.) In the case at bar, there was simply no evidence to support the trial court's instruction other than the testimony that the witness heard sounds that could have been consistent with the sound made by the cocking of a trigger and with shots fired. Not only was there no evidence that appellant was in possession of a gun, much less that he fired it, there was no evidence whatsoever from which a juror could infer which direction the shots were fired, no less that they were fired "in a grossly negligent manner which could result in injury or death to a person." (R.T. 11664)

It is, of course, fundamental that a jury should not be instructed that they may consider conduct as evidence in aggravation when the evidence is plainly insufficient to permit a reasonable juror to find that the criminal conduct alleged was proven beyond a reasonable doubt. (*People v. Phillips, supra,* 41 Cal. 3d at 66; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1075; *People v. Zambrano* (2007) 41 Cal. 4th 1082, 1161.)

E.

The Trial Court's Error in Permitting the Jury to Consider the Shooting Near Jesse Russell's House Violated Appellant's Right to Due Process of Law and to a Reliable Penalty Determination Guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

By now, it is axiomatic that a defendant in a capital case is entitled to a reliable penalty determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; *Woodson v. North Carolina, supra,* 428 U.S. at 305.) "[B]ecause the death

penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled..." (*People v. Jones* (1998) 17 Cal.4th 279, 321 (Mosk, J. concurring); *Johnson v. Mississippi* (1978) 486 U.S. 578; *Harris v. Vasquez* (9th Cir. 1990) 949 F.2d 1497, 1528.)

The dearth of evidence establishing any connection between the gunshot-like sounds heard and the Russell residence and, equally importantly, with appellant, makes it plain that the Russell incident should not have been admitted and the jury should not have been instructed that it could be considered as a factor in mitigation. It is equally plain that permitting a jury to consider an improper aggravating factor in determining whether appellant should live or die violated the Eighth Amendment's command that penalty determinations must be reliable, that a penalty determination must be based solely upon evidence properly admitted and instructions properly given at the penalty phase of a capital case. (*Brown v. Sanders* (2006) 546 U.S. 212, 220.)

Where a jury is permitted to consider an improper aggravating factor in making its sentence determination, the Eighth Amendment's reliability mandate is violated because consideration of the improper aggravator "creates the possibility of randomness by placing a thumb on death's side of the scale, thus creating the risk of treating the defendant as more deserving of the death penalty" than the evidence warrants. (*Sochor v. Florida* (1992) 504 U.S. 527, 532; *Stringer v. Black* (1992) 503 U.S. 222, 233.) As the United States Supreme Court more recently explained in *Brown v. Sanders, supra,*

> "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors

enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.* 546 U.S. at 220.)

VII.

The Prosecutor's Prejudicial Argument to the Jury that Appellant Should Receive the Death Penalty Because He was Likely to be a Danger to Prison Personnel Violated Appellant's Right to Due Process of Law, a Fair Trial, and to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A.

Statement of Facts

On March 22, 1999, appellant filed a motion requesting the trial court to preclude the prosecutor from arguing that appellant should receive the death penalty based upon a prosecutorial prediction that appellant will present a danger to prison personnel if he received a sentence of life without parole. (C.T. 3985) In the first penalty trial, over defense objection, the prosecutor had been permitted to make that argument[30] (R.T. 7716) In the motion to preclude such argument at the second penalty trial, appellant contended that the prosecutor's earlier argument had been improper because

---

[30] "The possibility of parole does not mean that you are removed from human contact. And I mean human contact in two ways. I mean human contact in the fact that you still can have that correspondence, that letter writing, the human touch with those that are important to the defendant, to Correll Thomas, the thing that he's asking for. So what's the other human touch? Prisons, no matter how high security, are not boxes where we place someone and say that's it, you have no contact with people. Somebody's son, somebody's daughter is a prison guard. Somebody's son, somebody's daughter is --

Mr. Bloom: Your honor, object.

The Court: Overruled.

Mr. McAllister: Somebody's son, somebody's daughter transports a prisoner from point a to point b. somebody's a cook in the prison. Other inmates are in prison for other offenses. And I submit to you, ladies and gentlemen, that those people, based on Correll Thomas's long criminal behavior, are at risk from Correll Thomas. He poses a danger to them." (R.T. 7716)

it was "not based on facts specific to Correll Thomas...different from those present in any first degree murder case." (C.T. 3988)

On April 12, 1999, prior to the start of the second penalty trial, a hearing was held on appellant's motion. (R.T. 7963-7969) At that hearing, trial counsel urged the court to preclude such argument on the grounds that it would tend "to direct the jury's attention away from the actual facts of the case and to have them speculate...as to what Mr. Thomas' conduct might be if he is sentenced to LWOP..." (R.T. 7963-7964) Counsel noted that arguments regarding future dangerousness must be based on evidence in the case and that, at that point, Mr. Thomas had been in custody for over two and one half years awaiting trial on these charges and that he had "not engaged in any violence or threats of violence...." (R.T. 7965)

In response, the prosecutor argued that Mr. Thomas had engaged in a course of violent conduct while out of custody and that such conduct "ma[de] it fair argument to say that just because you put Correll Thomas in prison doesn't mean he doesn't pose a violent danger to other prisoners and to people who will supervise him in that custodial setting." (R.T. 7968)

The trial court denied appellant's motion to preclude a "future dangerous" argument. "[I]n the court's view, to preclude the prosecutor's argument of future dangerousness based upon an asserted pattern of violence over the span of a number of years on the part of Mr. Thomas is to inappropriately deprive the prosecutor of permissible argument and argument that, in the court's view, has been endorsed by the California Supreme Court." (R.T. 7969)

During final minutes of his closing argument, the prosecutor concluded his presentation by telling the jury:

"The last set of my comments are going to be addressed to what in the law is known as future dangerousness. Now, you need to understand something. I want the record to be absolutely clear for any reviewing court, and I want you especially to understand that's what is more important. When you vote, what you say means what you say. That's what the judge has told you, and that's what you have to accept. That is, that life without possibility of parole means that. And death means that.

The reason that that's important is I don't want anyone thinking, I don't want anyone misinterpreting my comments when I talk about future dangerousness. Not future dangerousness to society as a whole, but future dangerousness as it relates to what happens next. If you think for one minute that by coming back with a verdict of life without possibility of parole that means that they will take Correll Thomas and put him in a little box where he has no other human contact ever, you would be mistaken. He will have contact with other human beings. Unlike Ricky McDonald, unlike Creed Grote, he will have contact with other human beings. And he will have the opportunity to impose his will on other human beings.

Now, the defense lawyer raised a point during opening argument. Now, of course, what we lawyers say isn't evidence, but it was an interesting observation. The observation was as follows: You will find out, as you realize more about Correll Thomas, that if he likes you, if you have done something nice for him, then he's nice to you. Well, what if you don't fall in that category? What if you're the prison inmate in prison for a different offense totally unrelated to this who Correll Thomas doesn't like, hasn't done anything for him?

Mr. Bloom: Your honor, I'm going to have an objection regarding this line.

The Court: Overruled.

Mr. McAllister: What if you are the prison guard, not you specifically, but I mean what if -- there are prison guards in prison obviously. There are civilian workers. There are all these people, medical staff, other inmates, all of these people in which he will not be isolated.

So the question that you have to ask yourself is with all of that in mind, what justifies giving him what he wants? Why should he go off to prison recognizing that he gets to keep the very thing he took from his victims? Why?

See, the thing with Correll Thomas is kind of like that old parable, and I've heard it about a dozen different ways and I probably don't tell it as well as some. But if you look at this course of conduct, ten years of conduct in the life of this defendant, if you look at this, you see this pattern developing. Sure, if Correll Thomas wants to be nice to you he can talk to the witnesses that testified for him. Oh, he could be the nicest guy. you know, "I had a disabled child and he picked that disabled child up and made that child happy." Well, that tells you a ton. That tells you if he wants to be nice he can. So when he isn't nice he chooses that course of conduct.

And the parable that I was getting to is apropos in this case. And you may have heard it. Like I said, it's been told a lot of different ways, and I apologize if I don't get it exactly the way you heard it, but it's the old story of I call it the beaver and the scorpion.

What happens is there's this forest fire and there's a river dividing the area that's on fire from the part of the land that's not on fire. And the scorpion scampers down to the river's edge and sees a beaver there and says, "Mr. Beaver, would you please -- I'm going to die if I stay here. The forest fire is coming and it's going to bake me. Could you give me a ride on your back over to the other side of the river? And the beaver says, "Are you crazy. You're a scorpion. If I give you a ride to the other side of the river, you're going to sting me and I'm going to die." The scorpion says, "oh, come on now. I'm going to get burned up in this forest fire if you don't give me a ride. So let me hop on your back. I'll go across. why would I sting you? If I stung you while you were taking me across the river, you'd drown and we'd both die."

The beaver thinks about it and thinks that makes sense, lets the scorpion climb on his back, starts their way across the river and halfway across the river the scorpion stings the beaver. The beaver starts to sink in the water and says, "what did you do that for? Now we're going to die." "it's in my nature. I'm a scorpion. That's what I do."

Ladies and gentlemen, that is Correll Thomas. That's what he does." (R.T. 11716-11718)

B.

Permitting the Prosecutor to Argue Future Dangerousness in the Absence of Evidence of Future Dangerousness, Violated Appellant's Right to Due Process of Law and to a Reliable Penalty Determination Guaranteed by the Fifth, Eighth, and Fourteenth Amendments

1.

Introduction

In *People v. Murtishaw, supra*, this Court was presented with the question of whether the prosecution's use of an expert witness' prediction of the defendant's "future dangerousness" was a matter that could be considered by a jury in determining the appropriate sentence in a capital case. In rejecting the use of such expert testimony, this Court observed that it "is uncertain and conjectural...whether defendant, if imprisoned for life, will at some uncertain future date assault some yet unidentified victim. The calculus of risk...does not justify executing a defendant to avoid improbable and speculative danger." (*Id.* 29 Cal.3d at 770.)

Appellant recognizes that this Court has held on more than one occasion subsequent to *Murtishaw* that while expert evidence of future dangerousness is not admissible, a prosecutor may argue that a defendant in a capital case should receive the death penalty because he is likely to be a danger in the future. (*People v. Harris, supra*, 37 Cal. 4th at 357; *People v. Champion* (1995) 9 Cal.4th 879, 940; *People v. Davenport, supra*, 41 Cal. 3d at 288.) "The prosecution may argue future dangerousness if the argument is based on the evidence." (*People v. Harris, supra*, 37 Cal. 4th at 357.) Under the decisions of this Court, evidence of out-of-custody conduct may be the

predicate for an argument that a capital defendant may be a danger to others if imprisoned. (*People v. Poggi* (1988) 45 Cal.3d 306, 337.)

The vice of the argument in the case at bar is that there simply was no evidence that, if imprisoned for life without parole, appellant would be a danger to other inmates or prison personnel. The broader, constitutional problem is that is that the California rule, which, though it properly prohibits so-called "expert" testimony on the issue, does not set forth the type of evidentiary showing that must be made by the prosecution as a predicate to making such an argument. The California rule undermines the reliability of the jury's penalty determination. It is well established that a prosecutorial argument that undermines the reliability of the penalty determination violates the Eighth Amendment. (*Caldwell v. Mississippi, supra*; *cf. Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, 1051.) "Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury. For this reason, misconduct by the prosecutor...must be scrutinized carefully." (*Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1459.)

2.

There was No Evidence to Support the Prosecutor's Argument that Appellant Would Present a Danger to Other Inmates and/or Prison Personnel if Imprisoned

In *People v. Murtishaw, supra*, this Court observed that "forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty [and] such forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant." (*Id.* 29 Cal.3d at 767.) Although those words were penned more than 25 years ago, they are no less pertinent

today. As indicated above, although this Court has prohibited expert testimony on this issue, decisions of this Court have permitted prosecutors to urge the jury to sentence a defendant to death based upon conjecture as to the defendant's "future dangerousness" so long as the argument is "based on the evidence."

In the case at bar, there was no evidence introduced that could reasonably support a prosecutorial argument that the jury should impose the death penalty because appellant was likely to present a danger to others if imprisoned. To the extent that such evidence may exist, the best evidence to support such an argument would be evidence of a defendant's conduct while in custody. For example, evidence that the defendant in a capital case had assaulted other inmates while awaiting trial, that he possessed weapons while incarcerated, or had threatened jailers or prison personnel are all examples of evidence that could form the basis for a guess about how the accused will comport him or herself if given a life sentence.

No such evidence was adduced at appellant's trial. The sole evidentiary basis cited by the prosecutor for his argument to the jury that appellant was likely to be danger to others if incarcerated was that the evidence showed that appellant had been good to people he liked and by inference -- the prosecutor was elliptical in his phraseology -- bad to those he didn't like. The prosecutor argued that appellant would be dangerous to others in the prison system because "[t]hat's what he does."(R.T.)

From a logical, not to mention practical, standpoint, it is well understood that no reliable inference can be drawn about a person's behavior in prison from the nature of the crime for which they have been incarcerated. Persons convicted of relatively minor crimes may behave violently in prison and persons convicted of violent crimes not infrequently

become model prisoners. (*cf. Williams v. Woodford* (9th Cir. 2002) 384 F.3d 567, 628, ["We are aware of Williams's 2001 Nobel Peace Prize nomination for his laudable efforts opposing gang violence from his prison cell, notably his line of children's books, subtitled 'Tookie Speaks Out Against Gang Violence,' and his creation of the Internet Project for Street Peace. [Citation]...Williams's good works and accomplishments since incarceration may make him a worthy candidate for the exercise of gubernatorial discretion..."].)

Simply put, appellant's homicide convictions, in and of themselves, did not provide a sufficient factual, logical, or empirical basis for the prosecutor to argue that the jury should impose the death penalty because appellant was likely to be a danger to other persons in the prison system. To hold otherwise would permit the prosecution to argue in *every* capital case that because the defendant had been convicted of homicide, he was likely to be a danger to others in prison.

3.

The California Rule Prohibiting the Introduction of Expert Evidence of Future Dangerousness and Permitting the Prosecution to Argue Future Dangerousness as a Basis for Imposition of the Death Penalty Based Solely on Out-of-Custody Conduct Unconstitutionally Undermines the Reliability of the Jury's Penalty Determination in Violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

Although, in *People v. Murtishaw, supra*, this Court prohibited expert testimony on the issue of future dangerousness, this Court has also held that "argument concerning a defendant's future dangerousness as a life prisoner is proper where it is based on evidence of past crimes admitted under one or more statutory factors in aggravation" (*People v. Millwee* (1998)

18 Cal. 4th 96, 153; *People v. Bradford, supra,* 14 Cal. 4th at 1064; *People v. Ray* (1996) 13 Cal. 4th 313, 353), so long as the prosecutor does not refer to "future dangerousness" as a "factor in aggravation."

In *Davenport, supra,* the first case to consider the impact of the *Murtishaw* holding on a prosecutor's future dangerousness argument, this Court simply noted that the argument was "not based upon inadmissible evidence of expert testimony predicting future dangerousness," citing *Jurek v. Texas* (1976) 428 U.S. 262 for the proposition that "a state statute requiring the jury to determine the probability of future criminal conduct at the penalty phase has withstood constitutional scrutiny." (*Id.* 41 Cal.3d at 288.)

Therein lies the rub. Although the United States Supreme Court has held that "future dangerousness" is a proper consideration for a penalty jury, it has never held that it is proper to argue "future dangerousness" untethered to any specific statutory aggravating factor or instruction set forth in a state statute governing penalty determination. Although the issue of "future dangerousness" has come before the high court in different contexts on more than more than thirty occasions, with just a handful of exceptions, it has come in the context of cases arising out of Texas,[31]

[31] *Smith v. Texas* (2004) 543 U.S. 37; *Banks v. Dretke* (2004) 540 U.S. 668; *Penry v. Johnson* (2001) 532 U.S. 782; *Brown v. Texas* (1997) 522 U.S. 940; *Johnson v. Texas* (1993) 509 U.S. 350; *Graham v. Collins* (1993) 506 U.S. 461; *Powell v. Texas* (1989) 492 U.S. 680; *Penry v. Lynaugh* (1989) 492 U.S. 302; *Franklin v. Lynaugh* (1988) 487 U.S. 164; *Satterwhite v. Texas* (1988) 486 U.S. 249; *Smith v. Murray* (1986) 477 U.S. 527; *Barefoot v. Estelle* (1983) 463 U.S. 880; *Ake v. Oklahoma* (1985) 470 U.S. 68; *Jurek v. Texas* (1976) 428 U.S. 262

Virginia,[32] and Oklahoma[33] where the state death penalty statute makes "future dangerousness" a specific statutory factor for the jury to consider. In every case that the high court upheld the propriety of considering future dangerousness, the state statute required a jury finding on that issue.

Under the Texas statute, for example, if the prosecution proves, along with two other factors, that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," the jury must impose the death penalty. (Tex. Code Crim. Proc., Art. 37.071[34] In Oklahoma, "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" is an "aggravating circumstance" and is one of several aggravating circumstances must be proven beyond a reasonable doubt in order to impose the death penalty. (21 Okla. St. §§701.11, 701.12) Finally, the Virginia statute specifically requires the prosecutor to prove beyond a reasonable doubt that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society..." (Va. Code Ann. § 19.2-264.4.)

In *Jurek v. Texas, supra*, the first case to consider the issue, the Supreme Court upheld the Texas statute that permitted the death penalty to be imposed if the jury found beyond a reasonable doubt that "there is a

---

32 *Atkins v. Virginia* (2002) 536 U.S. 304; *Ramdass v. Angelone* (2000) 530 U.S. 156; *Williams v. Taylor* (2000) 529 U.S. 420; *Strickler v. Greene* (1999) 527 U.S. 263; *Buchanan v. Angelone* (1998) 522 U.S. 269; *O'Dell v. Netherland* (997) 521 U.S. 151; *Gray v. Netherland* (1996) 518 U.S. 152; *Tuggle v. Netherland* (1995) 516 U.S. 10.

33 *Romano v. Oklahoma, supra; Ake v. Oklahoma* (1985) 470 U.S. 68.

34 "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result...

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." (*Id.* 428 U.S. at 269.)

Seven years later, in *Barefoot v. Estelle, supra*, the high court again considered a challenge to the Texas statute and upheld the use of expert testimony on the issue of future dangerousness.

> "If the likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, *Jurek v. Texas*, 428 U.S. 262 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify." (*Id.* 463 U.S. at 896-897.)

Of the remaining cases[35] only one merits further discussion. In *California v. Ramos* (1983) 463 U.S. 992, the court upheld the Briggs instruction. In the course of finding that the instruction was did not violate the federal constitution, the high court analogized the Briggs instruction, which informed the jury of the Governor's commutation power, to the Texas statute considered in *Jurek, supra.*

> "By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. Like the challenged factor in Texas' statutory scheme, then, the Briggs Instruction focuses the jury on the defendant's probable future dangerousness." (*Id.* 463 U.S. at 1003.)[36]

---

[35] *Skipper v. South Carolina* (1986) 476 U.S. 1 and its progeny, *Simmons v. South Carolina* (1994) 512 U.S. 154 and *Shafer v. South Carolina* (2001) 532 U.S. 36, concerned the right of the defense to rebut future dangerousness evidence and argument introduced by the prosecution. The right of the prosecutor to make such an argument or present such evidence was not at issue in those cases. A Florida case, *Wainwright v. Goode* (1983) 464 U.S. 781, simply upheld the state Supreme Court's finding that the trial court did not improperly rely on 'future dangerousness," which, in Florida, is an impermissible non-statutory aggravator.

[36] This Court subsequently held that the Briggs instruction violated the state due process clause in *People v. Ramos* (1984) 37 Cal.3d 136.

Thus it is apparent that despite broad language in some of the high court opinions that considered the constitutionality of "future dangerousness," the Supreme Court has never approved a prosecutorial argument that a defendant should receive the death penalty because of his potential "future dangerousness" absent a specific jury finding, to that effect, based upon proof beyond a reasonable doubt.

Given that "future dangerousness" is not a factor in aggravation that can be considered in making the penalty determination, it is appellant's contention that permitting a prosecutor to nevertheless argue for the imposition of the death penalty based upon a prediction of "future dangerousness" undermined the reliability of the penalty determination in appellant's case.

By permitting the prosecutor to use testimony concerning out-of custody conduct to serve as a speculative and conjectural basis for the prosecutor's argument that the death penalty should be imposed because of appellant's perceived future dangerousness, the trial court's ruling fatally undermined the reliability of the penalty determination in this case, in violation of the Due Process Clause and the right to a fair trial guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

VIII.

California's Death Penalty Statute, As Interpreted By This Court And applied At Appellant's Trial, Violates the United States Constitution.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system and on the particular facts of appellant's case.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 178, fn. 6.)[37] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

---

37 In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Id.* 126 S.Ct. at p. 2527.)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials

for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California only a few offenders to receive the ultimate sanction.

A.

Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in Pen.Code §190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make <u>all</u> murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 33 special circumstances[38] purporting to narrow the category of first degree murders to those murders most deserving of the death

---

38 This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three .

penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent, rendering the constitutional command of "narrowing" no more than an empty formality in California.

In this state, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Pen.Code §190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that, in California, virtually every person accused of murder is eligible for death, in effect turning the clock back to the pre-*Furman* statutory scheme.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down because it is so all-inclusive that it virtually guarantees the arbitrary imposition of the death penalty in

violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[39]

B.

Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(A) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

Pen. Code §190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[40] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three

---

39 In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

40 *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

weeks after the crime,[41] or having had a "hatred of religion,"[42] or having threatened witnesses after his arrest,[43] or disposed of the victim's body in a manner that precluded its recovery.[44] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no

---

41 *People v. Walker, supra*, 47 Cal.3d at 639, fn. 10, cert. den., 494 U.S. 1038 (1990).
42 *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, cert. den., 112 S. Ct. 3040 (1992).
43 *People v. Hardy* (1992) 2 Cal.4th 86, 204, cert. den., 113 S. Ct. 498.
44 *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. 496 U.S. 931 (1990).

basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420.) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C.

California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§190.2) or in its sentencing guidelines (§190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact,

except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1.

Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected

by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey, supra*; *Ring v. Arizona, supra*; *Blakely v. Washington, supra*; and *Cunningham v. California, supra.*

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether

the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker, supra*, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra*, 543 U.S. at 244.)

In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra*, Section III.) In so doing, it explicitly

rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a.

In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[45] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt*

---

45 This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (R.T. 11639) (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[46] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[47]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey, supra,* 35 Cal.4th at 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

---

46 In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though Ring expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (Id., 59 P.3d at p. 460)

47 This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown, supra.*)

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[48] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court (*Id.* 127 S.Ct. at 868 That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra*, 127 S.Ct. at 869.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting,

---

48 *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in Black ("Nothing in the high court's majority opinions in *Apprendi, Blakely,* and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black, supra,* 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* *127* S.Ct., at 876.)

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). " (*Cunningham, supra*, 127 S.Ct., at 874.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at 263.)

This holding is simply wrong. As section 190, subd. (a)[49] indicates, the maximum penalty for any first degree murder conviction is death. The

49 Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra,* 127 S.Ct. at 863.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> "This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." [Citation]. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151."(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra,* 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring, supra,* 530 U.S. at 604.) In *Blakely,* the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Id.* 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham,* is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b.

Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase

instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (*State v. Ring* (Az. 2003) 65 P.3d 915. 943; accord, *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); *Woldt v. People*, 64 P.3d 256 (Colo. 2003); *Johnson v. State, supra.*[50])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[51] As the high court stated in *Ring, supra*, 122 S.Ct. at pp. 2432, 2443:

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

---

50 See also Stevenson, The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in Ring as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

51 In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2.

The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a.

Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be

proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. at 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b.

Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra,* 397 U.S. at pp. 363-364; see also *Addington v. Texas, supra,* 441 U.S. at 423; *Santosky v. Kramer, supra,* 455 U.S. at 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra,* the U.S. Supreme Court reasoned:

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants... When the State brings a criminal action to deny a defendant liberty or life,..."the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." (*Id.* 455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship, supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to

capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' (*Bullington v. Missouri*, 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

c.

California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[52] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital

52 A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh*, *supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

d.

California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra*, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*." (*Id.* 465 U.S. at 51.) (emphasis added),

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have

made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro, supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

e.

The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were

Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra*; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) In the case at bar, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses; in fact, it is fair to state that unadjudicated criminal accusations constituted almost the entirety of the prosecution penalty phase presentation against appellant.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker, supra*, *Blakely v. Washington, supra*, *Ring v. Arizona, supra*, and *Apprendi v. New Jersey, supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

f.

The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*; *Lockett v. Ohio, supra*.)

g.

The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d at 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death.

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. [Citations] Indeed, *"no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors."* (*People v. Arias, supra*, 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.) (*People v. Morrison* (2004) 34 Cal.4th 698, 730.) (emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter, supra*, 15 Cal.4th at 423-424.)[53]

---

53 There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to aggravate the sentence. See *People v. Cruz*, No. S042224, Appellant's Supplemental Brief.

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra,* 38 Cal.3d at 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black, supra,* 503 U.S. at 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern

instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D.

The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook*

v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[54] as in *Snow*,[55] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by

---

54 "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra,* 30 Cal.4th at p. 275; emphasis added.)

55 "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra,* 30 Cal.4th at p. 126, fn. 3; emphasis added.)

court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[56]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante.*) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante.*) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[57] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d at 421; *Ring v. Arizona, supra.*)

---

56 In light of the Supreme Court's decision in *Cunningham, supra,* if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

57 Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra,* 536 U.S. at p. 609.)

E.

California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*): Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma,*, supra, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11

Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra,* 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina,* O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See Atkins v. Virginia, supra, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

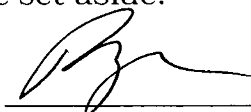
Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most

serious crimes."[58] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. Ford v. Wainwright (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments.

Appellant's death sentence should be set aside.

Dated: May 18, 2008



BARRY L. MORRIS
Attorney for Appellant
CORRELL THOMAS

---

58 See Kozinski and Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L.Rev. 1, 30 (1995).

Certificate of Word Count

I, Barry L. Morris, attorney of record for appellant CORRELL THOMAS hereby certify that appellant's opening brief contains 73,196 words.

Dated: May 18, 2008

BARRY L. MORRIS
Attorney for Appellant
CORRELL THOMAS

Proof of Service by Mail

Appellant's Opening Brier

I, Barry L. Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1260 B Street, Hayward, California, 94541; and I am not a party to the within action. On the date shown below, I deposited a true copy of the above-entitled document(s) in the mail in the City of Hayward by placing said document(s) in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Mr. Correll Thomas
San Quentin Prison
P.O. Box P-55743
Tamal, California 94974

Clerk, Superior Court
San Diego County
220 West Broadway
San Diego, California 92101

District Attorney
San Diego County
Hall of
330 W.
San Diego, CA 92101

Mr. Allen Bloom
Attorney at Law
550 W. C Street
San Diego, California 92101

Office of the Attorney
110 West "A" Street, Suite
P.O. Box 85266-5299
San Diego, CA 92186-5266

Ms. Aundre Herron
California Appellate Project
101 Second Street, Suite 600
San Francisco, California 94105

Ms. Elizabeth Missakian
Attorney at Law
110 West C Street
San Diego, Califorinia 92101

Executed on May 19, 2008 at Hayward, California

I declare under penalty of perjury that the foregoing is true and correct.

BARRY L. MORRIS