IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, v. BERNARD A. NELSON, Defendant/Appellant	S085193 Los Angeles County Superior Court BA162295

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	S085193
Plaintiff/Respondent,	)	
	)	Los Angeles County
	)	Superior Court
v.	)	BA162295
	)	
BERNARD A. NELSON,	)	
	)	
Defendant/Appellant	)	
	)	
	)	

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APPELLANT'S OPENING BRIEF

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Los Angeles Superior Court, Honorable Judge Jacqueline A. Connor presiding.

STATEMENT OF THE CASE

On September 9, 1998, following a preliminary hearing held on August 25th and 26th of 1998, an indictment was filed in Los Angeles

Superior Court, charging Bernard Nelson with the following crimes: Count I- the April 5, 1995, murder of Richard Allen Dunbar, pursuant to Penal Code section 187 (a), further alleging that during the course of the murder appellant was engaged in the commission of the crimes of robbery and attempted carjacking within the meaning of Penal Code section 190.2 (a) (17), it being further alleged that in the commission and attempted commission of the above offenses, appellant personally used a firearm pursuant to Penal Code sections 1203.06 (a) (1) and 12022.5 (a); Count II- the April 5, 1995 robbery of Richard Allen Dunbar, pursuant to Penal Code section 211, further alleging that during the commission of said crime appellant personally used a firearm within the meaning of Penal Code sections 1203.06(a) (1) and 12022.5, this crime and allegation being related in their commission to Counts I and III; Count III- the April 5, 1995 attempted carjacking, pursuant to Penal Code sections 664 and 215(a), further alleging that during the attempted commission of said crime appellant personally used a semi-automatic handgun, within the meaning of Penal Code sections 1203.06 (a) (1) and 12055.5 (a) (2), this crime and allegation being related in their commission to Counts I and II; Count IV- the August 16, 1996, premeditated, deliberate attempted murder of Miguel Cortez pursuant to Penal Code sections 664 and 187(a), further alleging

that during the attempted commission of said crime appellant personally used a semi-automatic handgun, within the meaning of Penal Code sections 1203.06 (a) (1) and 12022.5 (a) (2), further alleging that in the commission of this offense appellant inflicted upon the victim great bodily injury pursuant to Penal Code section 12022.7 (a); Count V the August 16, 1996, robbery of Miguel Cortez pursuant to Penal Code section 211, further alleging that during the attempted commission of said crime appellant personally used a semi-automatic handgun, within the meaning of Penal Code sections 1203.06 (a) (1) and 12022.5 (a) (1); further that in the commission of this offense appellant inflicted upon the victim great personal injury pursuant to Penal Code section 12022.7 (a), this crime and allegations being related in their commission to Count IV; Count VI- the attempted murder of Giovanni Buccanfuso, pursuant to Penal Code sections 664 and 187(a), further alleging that during the attempted commission of said crime appellant personally used a semi-automatic handgun, within the meaning of Penal Code sections 1203.06 (a) (1) and 12022.5 (a) (1) and that the attempted murder was deliberate and premeditated under section 664 (e) (1) ; Count VII- the May 7, 1997, attempted murder of Charles Coleman, pursuant to Penal Code sections 664 and 187(a), further alleging that during the attempted commission of said

crime appellant personally used a semi-automatic handgun, within the meaning of Penal Code sections 1203.06 (a) (1) and 12022.5 (a) (1), this crime and allegation being related in commission to Counts VI and VIII and that the attempted murder was deliberate and premeditated under section 664 (e) (1); Count VIII-the May 7, 1997, willful, deliberate premeditated attempted murder of John Doe, pursuant to Penal Code sections 664 and 187(a), further alleging that during the attempted commission of said crime appellant personally used a semi-automatic handgun, within the meaning of Penal Code sections 1203.06 (a) (1) and 12022.5 (a) (1), this crime and allegation being related in commission to Counts VI and VII. (Vol. 1 CT159 et seq.)

Jury selection began on September 1, 1999 (Vol. 2 CT253) and the jury was empaneled on September 9, 1999. (Vol. 2 CT259.) Respondent's case began that day with the government resting on September 16, 1999. (Vol. 2 CT272.) Appellant's case commenced on September16,1999,with appellant resting on September 20, 1999. (Vol. 2 CT273-276.) On September 21, 1999, the jury received the case for deliberation. (Vol. 2 CT278.) On September 23, 1999, the jury returned verdicts of guilty on all counts and true findings on all allegations. (Vol. 2 CT325 et seq.)

The penalty phase of the trial commenced on September 27, 1999.

(Vol.2 CT333.) Respondent rested its case the following day, whereupon appellant presented its case (Vol. 2 CT335 et seq.) On September 30, 1999, the jury returned a verdict of death. (Vol. 3 CT362.)

On December 21, 1999, appellant filed Motions for New Trial for both the guilt and penalty phases of the trial. (Vol. 3 CT375 et seq, 392 et seq.) On December 31, 1999, appellant filed a motion to change the sentence to life in prison without parole, pursuant to Penal Code section 190.4. (Vol. 3 CT370.) On January 10, 2000, the trial judge denied all of appellant's motions and sentenced appellant to death. (Vol. 3 CT424 et seq.) The sentence on the non-capital count were stayed pending appeal. (Vol.3 CT465 et seq.) This appeal is automatic under Penal Code section 1239(b).

STATEMENT OF FACTS

On May 7, 1997, Los Angeles Police Officer Giovanni Boccanfuso and his partner Charles Coleman were patrolling in their standard black and white cruiser in South Central Los Angeles. Both officers were in full uniform. (Vol. 5 RT762-763.) As the officers approached the corner of 57th Street and Crenshaw Avenue, they spotted a dark colored Chevy Monte Carlo. (Vol. 5 RT763.) This car caught the officers' attention

because this model was often the target of theft by gang members. (RT766.)

Officer Coleman, who was driving the police cruiser, followed the Monte Carlo to 52nd Street and 4th Avenue, while Officer Buccanfuso attempted to run a computer check on the licence plates of the car. (Vol. 5 RT769.)

Before he completed the computer check, Officer Buccanfuso observed a man sitting on the window sill of the front passenger seat of the Monte Carlo. Officer Buccanfuso could see the man's face and upper torso. He was gripping a handgun with both hands and pointing it in the direction of a green Jeep Cherokee on the north side of the intersection. The Jeep was either moving slowly through the intersection in a northbound direction or had just stopped. Officer Coleman observed a black male in the driver's seat of the Jeep. (Vol. 5 RT769-770, 884-887.)

Officer Buccanfuso then observed the individual on the window sill turn his attention from the Jeep and swing the handgun so it was directed toward the police cruiser and fire five or six shots. (Vol. 5 RT770.) The police car was approximately one car length from the Monte Carlo as the shots were fired at the cruiser[1]. The cruiser was not hit by the gunfire.

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1. On cross-examination, Officer Buccanfuso stated that some of the shots may have been directed toward the jeep. (Vol. 5 RT834.)

(Vol. 5 RT770-771.)

After firing the shots at the cruiser, the shooter sat down inside the vehicle as it continued to move. Officer Coleman turned on the overhead lights, but not the siren, and followed the car to the intersection of 48th Street and 11th Avenue, at which point the shooter opened the passenger door of the vehicle and tumbled out into the street. (Vol. 5 RT772-775.)

As the shooter fell, a gun fell out into the street. The shooter got up and fled in a northeasterly direction. (Vol. 5 RT776.) Officer Buccanfuso ran after him. During this chase, Officer Buccanfuso saw the man pull a gun and aim it at him. The gun never fired and the man dropped it and continued to run. (Vol. 5 RT777-778.)

The man was wearing a light blue "Starter" jersey and gray sweat pants. (Vol. 5 RT779.) He eventually jumped a wall and disappeared from view. (Vol. 5 RT779.) After losing sight of him, Officer Buccanfuso returned to the intersection of 48th Street and 11th Avenue. At that point, he saw the driver of the Monte Carlo attempting to retrieve the gun that had fallen into the street when the shooter exited. (Vol 5 RT780-781.) The driver, later identified as Mr. Yearwood, was taken into custody. (Vol. 5 RT783.)

After Yearwood was arrested, a perimeter was set up around the

location of the Monte Carlo. The police then ran a check of the license plate of the car and obtained an address very close to where they were currently located. Coleman and Bucannfuso went to that address. They arrived there about one and one-half hours after the original shooting incident. There they found about ten adults. In this group, Officer Buccanfuso was able to identify appellant as the individual that fired the shots from the Monte Carlo and then ran away. (Vol. 5 RT786.)

Appellant was wearing gray sweat pants and no shirt and was sweating. He also had abrasions to his knees, between his knuckles and on his elbows. (Vol 5 RT785-788. 898-899) Officer Coleman searched for the blue "Starter"shirt but could not find it. (Vol. 6 RT946.)

Detective Peter Razankas was called out to the scene of the shooting at 52nd Street and 4th Avenue in the early morning hours of May 7th. Detective Razankas recovered, and identified as Exhibits 6 A-D, four expended shell casings and booked them into evidence under identification number DR97-1215376. (Vol. 6 RT953-954.) A pager was also recovered at the same scene. (Vol. 6 RT956.)

Two handguns were recovered at the intersection of 48th Street and 11th Avenue. "Item 1" on the property report, was located at the southwest corner of the intersection. This firearm, a Glock .40 caliber Model 22, was

loaded, with a round in the chamber. (Exhibit 5-B; Vol. 6 RT956-958, 961.) A second firearm, a Glock .40 caliber model 23, denominated as "Item 2", was also recovered at the scene , without a magazine and with one expended round in the chamber indicating that the gun malfunctioned. (Exhibit 5-E, Vol. 6 RT959, 961, Vol. 7 RT1213.) These firearms were booked into evidence under the same number as the casings.(Vol. 7 RT1216.)

Richard Catalini, a firearms expert for the Los Angeles County Sheriff's Office, did an analysis of the two guns and the four expended cartridges. He concluded that three of the four cartridges were fired from the model 22 and the fourth was fired from the Model 23. (Vol. 5 RT866-867.)

Testimony of Robert Cross

Robert Cross was an acquaintance of appellant who had known him since 1984. Mr. Cross had heard appellant referred to by others as "Terry" or "Jaye." In March, 1997, appellant accompanied Mr. Cross to a place of business called "Bateman's," where Mr. Cross purchased three handguns for his own protection; a .45 caliber and two 9 millimeters, also known as .40 caliber Glocks. (Vol. 6 RT966-967, 969, 971.) He intended to use the guns for target practice. (Vol. 6 RT968.) Mr. Cross identified photos of the

two guns found at the scene of the police shooting (Ex 5B and 5E) as the two Glocks that he purchased at Batemans.

At the time of the purchase, Mr. Cross was living at 1 North Venice Boulevard. (Vol. 6 RT974.) Due to a waiting period, Mr. Cross was not able to pick up his guns until March 28, 1997. On that date, he took appellant and Ameer Fountano with him for protection. Mr. Cross picked up the guns, drove home and hid them in a closet where his hospital supplies were located. (Vol. 6 RT976-980.)

Two to three weeks after the guns were picked up, appellant and Ameer visited Mr. Cross at his residence. At some point during this visit, Mr. Cross had to go down to the street and talk to a friend, leaving appellant and Ameer alone in the Cross apartment. (Vol. 6 RT981-982.) Mr. Cross believed that appellant was carrying a bag with him on that day. (Vol. 6 RT983.) A week or so later, Mr. Cross discovered that his guns were missing. He thought that he had hidden the guns well and opined that the thief would have had to have been familiar with the apartment to have found them. (Vol. 6 RT986-987.) He also testified that he had many visitors to his apartment during the time period between March 28th and the day he discovered the guns to be missing. (Vol. 6 RT990.)

RICHARD DUNBAR MURDER RELATED COUNTS I-III (APRIL 5, 1995)

On April 5, 1995, Richard Dunbar shared an apartment with Mauricio James. At approximately 9:45 that evening, Mr. James observed his roommate leaving the apartment to pick up his friend, Raynard Scott, who lived on Alvern St. (Vol 6. RT1040-44.) Mr. Dunbar took with him his house keys and the keys to his 325I BMW. (Vol. 6 RT1041.) Mr. James stated that Mr. Dunbar never carried a wallet with him, only money and identification. (Vol. 6 RT1046.)

Later in the evening, the police brought Mr. James to the scene of a shooting, where he identified a body lying on the street as Mr. Dunbar. (Vol 6 RT1044-45.) He also identified the BMW at the scene as Mr. Dunbar's car. (Vol. 6 RT1045.)

Mr. Dunbar died of two fatal gunshot wounds, the first striking his right lung and the second perforating his aorta. (Vol. 7 RT1177-1179.)

Mr. Dunbar's sister, Christina Dunbar went to the crime scene at the request of Mr. Dunbar's friend, James Constantino. She saw her brother's body and his car. The alarm of the car was going off even when it was being towed away to her apartment. Ms. Dunbar stated that she never got back the keys to her brother's car, although the police did give back to her

brother's driver's licence, identification card and thirty dollars in cash. (Vol. 6 RT908-912.)

About 10:30-10:45 that night, Christie Hervey was about to enter her Alvern Street apartment from her second floor balcony area when she heard two gunshots. She immediately told her son, who was inside her apartment, to dial 911. (Vol. 6 RT1047-1049.) Between the time period when her son dialed 911 and the dispatcher responded, she heard a third shot. (Vol. 6 RT1068.) She heard a male voice yelling "help me, please help me." [2](Vol. 6 RT1049, 1068.) From her balcony, she saw someone lying in the street and a man running or walking fast down the street in the direction of her balcony away from the area where the victim had fallen down. (RT1050.) Ms. Hervey stated that she was about 40 feet from the man with the gun when she first saw him rapidly moving in the direction of her apartment but later stated that she may have been up to 100 feet from the man. (Vol. 6 RT1054, 1081.)

The man with the gun was looking over his shoulder toward the man laying in the street. The gun was in his left hand, which was held down at his side. Ms. Hervey was not able to identify the gun, but said that it was dark. (Vol. 6. RT1074-1075.) The man with the gun was wearing either a

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2. It is unclear from the transcript whether Ms. Hervey heard the voice between the second and third shots or after all the shots were fired.

dark sweater or sweatshirt and dark pants. (Vol. 6 RT1055-1056.) She described the man as dark complected, of medium build and 5'10"- 6' tall, in his twenties, with closely cut hair. (Vol. 6 RT1075.) She did not notice a beard or moustache on the man. (Vol. 6 RT1079). Ms. Hervey stated that the lighting conditions were good and she had "two minutes" to look at the man with the gun.(Vol. 6. RT1055-1056.) She identified appellant as the person she observed with the gun that night. (Vol. 6 RT1064.)

After speaking with the 911 dispatcher, Ms. Hervey went downstairs to a guard shack across her street. When she got there she saw a security guard coming from the opposite direction toward the man on the ground. (Vol. 6 RT1070.)

The guard, LaCourier Davis, bent over the man and pulled on his arm. (Vol. 6 RT1074.) The guard observed a bullet hole in the man's chest. He identified a photo of Alex Dunbar as the wounded man. (Vol. 6 RT1020-1021.) He went back to the guard shack and called 911. (Vol. 6 RT1021.) When the police arrived they took Mr. Davis into custody, believing that he was involved in the shooting. (Vol. 6 RT1025.)

Los Angeles Police Detective William Cox recovered three spent .380 caliber cartridges at the Alvern Street shooting scene. He booked them into evidence under the number DR95-1416227. (Vol. 6 RT1298-1299.)

Ms. Hervey was interviewed by the police in April of 1995 and again on September 3, 1997. During the September, 1997 interview, the police detectives showed her a photo lineup and asked her whether she recognized any of the people in the photos. (Vol. 6 RT1087.) Ms. Hervey looked at the photos for the first time up to 10 minutes before stating that the person in photo #3 "kind of looked like the guy" who she saw over two years ago with the gun in his hand. (Vol. 6 RT1089-90.) She then looked at the photos a second time for another extended period of time. (Vol 6 RT1090.) Ms. Hervey stated that no particular feature of appellant's face stood out in her mind but was a combination of all the features that allowed her to identify appellant as the person she saw with the gun over two years prior. (Vol 6 RT1102-1105.) During the trial, Ms. Hervey identified appellant as the man she saw running with the gun on the night of the shooting. (Vol. 6 RT1064.)

ATTEMPTED MURDER OF MIGUEL CORTEZ COUNTS IV- VI (AUGUST 16, 1996)

Miguel Cortez testified at trial that on August 16, 1996 he was working as a gate guard at the Arena and Paradise nightclubs. As part of his duties he carried with him a firearm handgun, a 9mm Baretta. (Vol 7 RT1130-1132.) He was the only person guarding the gate of the nightclubs

that night but there was another guard on duty on the premises. (Vol. 7 RT1134.)

At approximately 1:00 a.m., Mr. Cortez was standing outside of the club when a man came up behind him, grabbed him and shot him four times. Mr. Cortez was shot twice in the left side, once in his left cheek and once in his elbow. (Vol. 7 RT1136.1137.) He also believed that he was shot a fifth time but the bullet struck his belt and did not enter his body. (RT1151.)

Mr. Cortez indicated testified that after he was shot and had fallen face down to the ground, the shooter came up from behind him and took Mr. Cortez's weapon, stating, "I took your shit." (Vol. 7 RT1138.) Mr. Cortez didn't see anyone else accompanying the shooter. When the shooter left, Mr. Cortez called for help on his portable radio.

During the assault, Cortez had been able to get a look at the shooter's face. (Vol. 7 RT1135-1136.) He described the man to the police as dark complected, with a short Afro hair style, six feet, one inch tall, 190 pounds and was wearing a brown jacket and a gold earring. (RT1133-1136, 1164.)

Mr. Cortez testified that he underwent four surgeries for his injuries and was hospitalized for several weeks. (Vol. 7 RT1139-1140.) He suffered

permanent injury due to his wound, having stomach and hand problems. At the time of his testimony, he had not returned to work. (Vol. 7 RT1140.)

Nine spent casings and three spent rounds of ammunition were found at the scene of the shooting. (Vol.7 RT1291.) These items were booked into evidence by Los Angeles Police Officer Thomas Holzer under number DR96-0629580. (Vol. 7 RT1292.) The case was investigated and the police spoke to Mr. Cortez at the hospital but the investigators ran out of leads (Vol. 7 RT1195.) The police did determine that the serial number of Mr. Cortez's Baretta was L12526Z and that the gun had been properly registered. (Vol. 7 RT1196.) On January 21, 1997, this gun was recovered from the Inglewood Police Department by the Los Angeles Police and booked into evidence under number DR96-0629580. (Vol. 7 RT1197.)

Approximately a year after the shooting, Los Angeles Police Detective Chevolek met with Mr. Cortez and showed him a six-pack photo array. Mr. Cortez picked the photos in position "3" and indicated that "#3 looked like the one that shot me." (Vol. 7 RT1141-1144.) Appellant was the person depicted in position "3." (RT1198-1199.)

Mr. Cortez indicated that at the time that he viewed the photos array he was 90% sure of his identification. He also had an opportunity to view appellant at the preliminary hearing and stated that at that time he was

95%-100% certain of his identification. At trial, Mr. Cortez testified that he was "almost 100%" sure that appellant was the individual who shot him. (Vol. 7 RT1145-1146.) At trial, he identified appellant in court. (Vol. 7 RT 1135-1136.)

Recovery of Gun on Glasgow Street

On September 20, 1996, Los Angeles Police Officer Julian Pere and his partner Paul Williams responded to the 9700 block of Glasgow. (Vol. 8 RT1320.) At the scene he noticed ten to fifteen "Moneyside Hustler" gang members standing in front of an apartment building. One person was standing apart from the rest of the group; a black male approximately 6 feet tall with a medium brown complection. (Vol. 8 RT1321.) He was wearing a clear plastic jacket.[3]

The man refused a command from the police to stand still . Officer Pere ordered him to stop, but the man dropped his jacket and a handgun, fled from Officer Pere and scaled a fence and disappeared. (Vol. 8 RT1321-1323.) Officer Pere recovered the handgun and gave to it Officer Darren Hill, also of the Los Angeles Police Department, who had also responded to the scene. (Vol. 7 RT1114.) The hand gun, a fully loaded .380 caliber Baretta, serial number F18983Y, was booked into evidence under

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3. Officer Pere originally described this individual as being 5 feet seven inches tall and 120 pounds. (Vol. 10, RT1501.)

number 96-1435191. (Vol. 7 RT1115-1116.)

Firearms examiner Anthony Paul performed tests on this weapon He compared the nine cartridges found at the scene of the Cortez shooting to test fires from said weapon and concluded that all nine cartridges were fired from the .380 caliber Baretta. (Vol. 7. RT1277-82.)[4] In November of 1996, firearms examiner Starr Sachs performed an additional test on this weapon, comparing the three expended cartridges recovered from the scene of the Dunbar shooting to test fired cartridges from the weapon in question. Ms. Sachs concluded that all three cartridges were fired from the .380 caliber Baretta. (Vol. 7 RT1125-1226.)

Glenn Johnson, who was at the time of his testimony serving a five year prison term for robbery, testified that he met appellant, a few years before, through a mutual friend, Ameer Fountano. (Vol. 7.RT1220-1221.) He stated that he "never got personal" with appellant and didn't know whether appellant was a gang member. Johnson stated that he recalled having a taped conversation with Detective Cade but denied telling Detective Cade that appellant was a member of the Moneyside Hustler gang. He denied telling Detective Cade that appellant was a Van Ness

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4. Mr. Paul testified that the testing was done in August, 1996. However the gun was not recovered until September 20, 1996, (RT1277.)

Gangster Blood gang member. (Vol. 7 RT1221-1223.)

Johnson admitted to being with several members of the Moneyside Hustlers gang at the 9700 block of Glasgow in Los Angeles on September 20, 1996. He indicated that shots were fired at that time and the police responded to the scene. The witness stated that he did not remember if appellant was there at the time. The witness hostilely denied telling Detectives Cade and Cox that appellant was present when the shots were fired or that appellant dropped the gun that was fired at the scene. (Vol. 7 RT1224-1226.)

Johnson further denied that he ever saw appellant driving a white Jeep Cherokee. While the witness admitted that he told this to the police, he now said that he had lied. Johnson also claimed that he didn't remember telling Detective Cade that appellant admitted to killing a man because the man wouldn't give him his car nor does he remember telling the police that appellant was trigger-happy. The witness also denied telling Detective Cade that appellant showed him the .380 caliber handgun that the police recovered on Glasgow Street, although he later insinuated that he might have told this to the police but that it was a lie. (Vol. 7 RT1228-1231.)

Johnson eventually admitted that he had two or three interviews with Detective Cade. (Vol. 7 RT1239.) However, he testified that he told

Detective Cade a lot of lies because Detective Cade seemed focused upon appellant and the witness wanted to get himself out of a bad situation in that he had been arrested for spousal abuse and a gun violation. (Vol. 7 RT1235, 1246.) He further stated he never told Detective Cade that appellant told him not to get caught with the .380 handgun because it had murders on it, nor does he recall telling him that appellant always had this gun on him or that appellant yelled "fuck you" to the police. (Vol. 7 RT1240.)

Leonard Washington was also a member of the Moneyside Hustler gang. At the time of his testimony he was in custody on a bank robbery conviction. He has known appellant for the past four years and identified him by the name of "Jaye." He testified that appellant was a member of the Van Ness Gangster gang. (Vol. 8 RT1331-1333.)

Appellant told Washington that a gun used in an unrelated crime in which Washington was involved was obtained by appellant in a shooting. Appellant stated that he had to "gun someone down to get it." The gun was a 9mm Baretta. The police later showed Mr. Washington a photo of the gun and he identified it as being the gun that was used in his unrelated crime. Appellant told Mr. Washington that he had killed the man whom he shot for the gun. (Vol. 8 RT1334-1336.)

Detective Cade testified that he had several conversations with Glenn Johnson. Detective Cade didn't remember the exact date of the first interview but he remembered getting a call from a fellow police officer that a person that they had detained on Glasgow on September 20, 1996, knew something about the Dunbar murder. (Vol. 8 RT1375-1376.) As a result, Detective Cade tape recorded an interview with Glen Johnson. The interview took place at the Pacific Station of the Los Angeles Police Department and its purpose was to get information about the murder of Richard Dunbar. (Vol. 8 RT1376-1377.)

At the time of this first interview, Johnson was not in custody. He stated that a person named "Jason" had shot Mr. Dunbar but didn't elaborate as to the identity of "Jason." (Vol. 8 RT1377.) Detective Cade told Johnson that the police were willing to pay for information. Although Johnson appeared interested in this offer, no money was ever exchanged. After the interview, Johnson was transported by the police to his mother's house on Glasgow. (Vol. 8 RT1378.)

Detective Cade conducted a second interview with Johnson, which was also tape recorded. Once again, Mr. Johnson was not in custody at the time. During this interview, Johnson stated that he received a gun from "Jason" who told him that "there were murders on it." Johnson took the gun

from "Jason" because he needed a gun to do a retaliation shooting for the shooting of a "homie" in Fontana. (Vol. 8 RT1378-1379.)

Detective Cade testified that Johnson told him that he never really took possession of the gun, which he described as a .380 caliber automatic handgun, but rather gave it back to "Jason." Johnson did not tell Detective Cade who "Jason" was but the detective already knew that it was appellant, having obtained this information from a Moneyside Hustler. (Vol.8 RT1380.)

At some point in the conversation, Johnson told Detective Cade that he was sitting in a car with appellant and the Fountano brothers when the subject of the Dunbar shooting was raised. Appellant stated that the victim wouldn't cooperate so he "had to smoke him." According to Johnson, appellant stated that the shooting took placed at La Tijera and Avert at the West Palm Apartments. (Vol. 8 RT1381-1382.) Johnson also told Detective Cade that appellant was "trigger happy" and would "shoot you in a minute." (Vol. 8 RT1382.)

Detective Cade also testified that Johnson told him about the September 20, 1996, incident at the 9700 block of Glasgow. He said he was with other gang members, including appellant, "shooting off guns" when the gang unit (CRASH) responded. The police ordered appellant to stop but

he fled the scene dropping the .380 caliber handgun that appellant had briefly given Johnson. (Vol. 8 RT1382-1383.)

Johnson eventually told Detective Cade that the "Jason" he referred to was really named "Jaye" and was in fact the appellant and that Jaye drove a red mustang. (Vol. 8 RT1383.) At some point in one of their later conversations, Johnson told Detective Cade that appellant also drove a white Cherokee. (Vol. 8 RT1383.)

Detective Cade testified that he was aware that appellant was a member of the Van Ness Gangsters who are based between 54th St and Van Ness and Arlington. (Vol. 8 RT1385.) Detective Cade also stated that he had a total of four interviews with Johnson, three of them being tape recorded. Johnson was never in custody during any of these interviews. Detective Cade didn't think that he was on probation, either. After the final interview he gave Johnson one hundred dollars. (Vol. 8 RT1386-1387.)

Detective Cade testified that he had no role in offering Johnson any leniency on any criminal case. He recalled that Johnson had received a five year sentence on a robbery in Orange County. (Vol. 8 RT1386-1387.) Detective Cade then identified Exhibit P-37 as the gun that was used to kill Mr. Dunbar stating that he had shown a photo of this gun to Johnson who stated that this was the gun that appellant dropped on Glasgow. He also

showed Frank Lewis a photo of the gun and he appeared to recognize it. (Vol. 8 RT1389-1391.)

Detective Cade testified that he had also spoken to Leonard Washington who told him that he did a drive-by shooting in Inglewood with a gun that they got from "Jaye" and that the gun was recovered by the Inglewood Police. When Washington told appellant they lost the gun, appellant stated "No big deal, I smoked a security guard to get it." (Vol. 8 RT1392-1393.)

DEFENSE CASE

Dr. Scott Frazier, an expert on eyewitness identification testified for appellant. (Vol. 9 RT1496-1498.)

Dr. Frazier testified that he went to the scene of the Dunbar shooting on both August 23rd and August 26th , 1999 between 8:30 pm and 10:30 p.m. (Vol. 9 RT1502.) Dr. Frazier testified that the lunar conditions on these days were approximately the same as on the night of the crime. (Vol. 9 RT1503-1505.) Dr. Frazier measured the distance from Ms. Hervey's balcony to where Mr. Dunbar's body fell and found it to be 300 feet. (Vol. 9 RT1505.) The distance from the balcony to the middle of the alley where Ms. Hervey last saw the shooter was 99 feet, 3 inches. (Vol. 9 RT1506-1508.)

Dr. Frazier testified that the greater the distance between two people, the more unlikely an accurate identification of one by the other. For example, he stated that even with good lighting what one can identify of a human face from 100 feet is roughly the same as what one can identify of a 2 inch human face from 20 feet. (Vol. 9 RT1513.) Dr. Frazier further indicated that when the distance between two individuals is more than 80 feet, recognition of even well-known individuals drops to almost nil and for previously unknown faces, recognition drops off greatly after 50 feet. (Vol. 9 RT1514-1515.) These basic principles were summarized in a chart that Dr. Frazier presented to the jury entitled "Observation Distance and Person Recognition-Visual Reality." (Vol. 9 RT1517.)

Dr. Frazier also indicated that there is a distortion in identification when the person being observed is in motion in relation to the observer. He testified that this effect would be present in a situation where an observer was watching another person moving rapidly and turning his head, creating what is referred to as "kinetic distortion." (Vol. 9 RT1519-1521.) In addition, Dr. Frazier testified about studies showing that when the subject to be identified is carrying a weapon, the observer's attention will be occupied with the weapon and not on the features of the person carrying it, a phenomenon known as weapon focus. Therefore, a person moving and

carrying a weapon would be especially difficult to identify. (Vol. 9 RT1522-1524.)

Dr. Frazier also testified that over a period of time, memory decays, making it difficult to recall an observed person's features. (Vol. 9 RT1529-1531.) In addition, the witness indicated that the failure to accurately recognize facial hair, as was the situation in this case, also reduces the reliability of the identification. (Vol. 9 RT1528.) Further, the longer that a person looks at a photo array of suspects, the less reliable the identification and the more likely that the person viewing the array is going to select the person that looks most like the person they originally observed. (Vol. 9 RT1532-34.) Further, the more often the observer is shown an photo or image of a person, the more sure he becomes of his identification of a photo as the image of a person he observed at a past time. (Vol. 9 RT1536-1538.) Dr. Frazier indicated that this is particularly true in this case, in which Ms. Hervey not only twice saw the photo array containing appellant's photos for a long period of time, but also observed appellant at the preliminary hearing before identifying him at trial.(Vol. 9 RT1536-1538.) Further, Dr. Frazier testified that there is no direct correlation between confidence in the correctness of an identification and its accuracy. (Vol. 9 RT1538-1539.)

PENALTY PHASE

PEOPLE'S CASE

"OTHER CRIME" EVIDENCE

The prosecution called Los Angeles Police Officer Christopher Jordan who testified that on September 4, 1994, he saw a green Honda run a stop sign. Officer Jordan gave chase in his marked police cruiser. (Vol. 12 RT1883-1885.) The Honda picked up speed in an attempt to elude the officer. Officer Jordan activated his overhead light but the Honda did not stop. Officer Jordan testified that the chase resulted in several near accidents. (Vol. 12 RT1886-1888.).

At some point, the Honda stopped and its driver jumped out. Officer Jordan gave chase and apprehended the driver. While Officer Jordan was unable to identify appellant as the person he apprehended, he testified that a criminal case arising out of the chase was filed against appellant and Officer Jordan was able to identify him during a court proceeding in that case. (Vol. 12 RT1889-1890.)

Lisa LaPierre testified that on July 11, 1994, she was a student at the University of Southern California. She testified that she went to the House of Blues with Samantha Holcomb at 1:45 a.m. (Vol. 12 RT1892-1893.) She

remembered that she left the House of Blues to go to Jerry's Deli and was talking to a friend on her on a cell phone. She recalled nothing else until she woke up in a hospital days later. She was hospitalized for nine months and suffered permanent paralysis from the shoulders down and is not able to breathe on her own. (Vol. 12 RT1895-1896.)

The only evidence linking appellant to the shooting of Ms. LaPierre was the testimony of the man who shot her. Frank Lewis testified that on July 11, 1994, he went to a party with appellant, whom he had known for four years. (Vol. 12 RT1901-1902.) At the time, Lewis was a gang member. He had consumed marijuana prior to the party and was drinking at the party. (Vol. 12 RT1902.) At some point, Lewis left the party with appellant because appellant indicated that appellant wanted to rob somebody. The two left the party in appellant's Mustang with appellant driving because Lewis, 14 years old at the time, was too short to drive. Lewis testified that he carried a gun to the party but left it there because appellant said he had a gun they could use. (Vol. 12 RT1903-1905.)

The two cruised around for awhile before stopping at a nightclub. Lewis testified that appellant told him to rob someone there. Lewis went up to a man, showed him the gun and took the man's wallet. (Vol. 12 RT1905.) Lewis re-entered the Mustang and gave appellant back his gun,

while appellant drove off looking for some else to rob. (Vol. 12 RT1906.)

Appellant then followed a BMW. When the BMW stopped in a parking garage, Lewis exited the car and approached the driver of the BMW. The driver produced a can of mace, whereupon Lewis ran back to appellant's car without committing a robbery. Upon learning of this, appellant became angry and slapped Lewis. Lewis testified that he was "hurt in his heart" and felt ashamed because he had a gun but did not finish the robbery. (Vol. 12 RT1906-1907.)

Lewis then testified that he and appellant spotted a person sitting in a red car. Appellant told him to steal that person's cell phone. Instead, Lewis approached the red car and shot the occupant without taking the phone. Lewis returned to appellant's car and was asked by appellant about the phone. Lewis told appellant that he did not take the phone and appellant told him to go back and get it. Lewis refused, saying that he just shot someone. (Vol. 12 RT1907-1910.) Lewis admitted that appellant never told him to shoot Ms. LaPierre and that he did so to impress his "homies"and not feel like a "punk." (Vol. 12 RT1923-1925.)

Upon returning to the party, Lewis told a girl and Bryant Allen, a fellow gang member, that he thought that he had killed someone. After some additional drinking he left the party with Bryant Allen and four

females, as appellant had already left. (Vol. 12 RT1910-1912.) Lewis testified that the next day he saw a television news story about the shooting. (Vol. 12 RT1914.)

Lewis was first questioned by the police about the LaPierre shooting when he was in the California Youth Authority. He was not at all forthcoming about his role in the shooting and changed his story many times. He did not admit his complicity until the police told him that they found his prints on Ms. LaPierre's car window. (Vol. 12 RT1921-1922.) Lewis was eventually convicted of the attempted murder of Ms. LaPierre and received four years in the Youth Authority. (Vol. 12 RT1922.) His criminal record also included a stabbing of a fellow gang member and an assault on a fellow inmate in the California Youth Authority. (Vol. 12 RT1916, 1919.)

Leonard Washington testified that he was currently being incarcerated due to a series of bank robberies that he committed. He indicated that three of these were committed with appellant. He testified that on December 17, 1996, he, Ibn Jones and appellant robbed a Topa Savings Bank . Washington stated that the three employed a stolen car to do these robberies and appellant decided which banks to rob. (Vol. 12 RT1933-1935.) All three went into the bank. Jones had a gun and the

witness pretended that he had one. Appellant was also armed with a handgun. According to a witness at the scene, the handguns were brandished at bank employees. No one got hurt and they fled the bank with money. (Vol. 12 RT1936-1937, 1977-1978.)

After splitting up the money at appellant's apartment, the three proceeded to a Great Western Bank at a supermarket where Washington and Jones went into the bank and committed the robbery. One of the participants in this robbery brandished a handgun. The proceeds from this robbery was $6000.00, twice as much as was stolen from the Topa Savings Bank. (Vol. 12 RT1938-1939, 2032.)

Washington further testified that he also participated in a robbery in Long Beach. Appellant was involved in this robbery but did not enter the bank. The witness and two other individuals entered the bank armed with a .38 caliber revolver. Appellant was at the scene in another car. However, appellant left the scene when he saw the police and the witness was apprehended. Washington testified that he remains angry with appellant for leaving the scene of the crime. (Vol. 12 RT1939-1942.) Washington entered into a plea bargain with the District Attorney and was sentenced to four and one-half years in prison and received two "strikes" on his record. (Vol. 12 RT1948-1951, 1953.) No evidence, other than Washington's

testimony, was presented to show appellant was involved in these robberies.

Detective Ronald Cade of the Los Angeles Police Department testified that he was given a backpack from Mark Campbell of the Inglewood Police.(Exhibit 17.) This backpack was recovered from a white Jeep Cherokee on Glasgow Street. (Vol. 12 RT1958.) Detective Cade testified that inside of the backpack were photos and notebooks, including a photo of appellant with a gun. In the notebooks were rap lyrics which contained lyrics about cop killings and offensive lyrics about women. (Vol. 12 RT1961-1962.) The witness admitted that such lyrics were not unique to appellant but were part of a musical genre called "gangsta rap."(Vol. 12 RT1968.)

"VICTIM IMPACT" EVIDENCE

Damon Dunbar was Richard Dunbar's brother. He testified that he was a year younger than his brother, who was 33 years old at the time of his death. (Vol. 12 RT1985.) The witness and the victim were very close and the witness identified a poster board (Exhibit 51) containing photos taken at Damon's wedding and various other photos of the decedent as an adult, including some photos taken of him modeling. (Vol. 12 RT1986-1988.)

Damon Dunbar testified that at the time of Richard's death, his brother was an actor and a model, who had acted in several television shows and had several modeling jobs. (Vol. 12 RT1987.) The witness stated that this was something that his brother had always wanted to do and that the victim's career was beginning to pick up. (Vol.12 RT1988-1989.

Mr. Dunbar testified that he learned of his brother's death from his mother who called him, in a hysterical state, at 4:00 am the night of the shooting. After Mr. Dunbar calmed his mother down, she told him that his brother had been killed. (Vol. 12 RT1989.) The witness stated that his life has changed since his brother's death as they were very close and would spend a lot of time with one another. Further, Mr. Dunbar and his wife, Sandra, testified that he has two children, 14 and 4 years old, who had been affected by the victim's death. (Vol. 12 RT1990, 1994.)

Richard Dunbar's mother, Heather Dunbar identified several photos (Exhibit 53) of Richard Dunbar depicting him as a child. (Vol. 12 RT1998-1999.) He was one of four children. (Vol. 12 RT2004.) She testified that she had a very close relationship with her son and described events from his youth, such as when he was in the Cub Scouts and a family vacation. (Vol. 12 RT1998-1999.) Mrs. Dunbar indicated that her son would call her at least once a week and recalls that once when Richard was

driving along the Pacific Highway he called her just to talk. (Vol. 12 RT1999-2000.)

Mrs. Dunbar stated that Richard was very proud of his modeling career and would give all of his modeling trophies to her. He was very proud of his car, paying over eighteen hundred dollars for a set of rims. (Vol. 12 RT2000.)

Mrs. Dunbar testified that she learned of her son's death through a phone call from her daughter, Christina. She testified that her son's death has affected her tremendously, that she doesn't enjoy life very much anymore and that holidays and birthdays mean nothing to her as one of her "sheep" is missing. (Vol. 12 RT2002.)

Christina Dunbar, the victim's sister, testified that she received a phone call the night of the shooting and responded to the scene where she identified her brother's body. She was charged with the responsibility with notifying the rest of the family. (Vol. 12 RT2006.) After the shooting, she went on television to urge people to report any information that they might have concerning the crime. (Vol. 12 RT2009.)

She testified that she was Richard's older sister and had a good relationship with him. She and Richard were the only members of the family living in California at the time of his death. (Vol. 12 RT2007.)

She stated that Richard had a lot of friends. She identified Exhibit 54 as a blow up of a memorial prepared by Richard's friends for his funeral consisting of a poem written by them with a photo of Richard Dunbar superimposed over it. (Vol. 12 RT2007-2008.) Ms. Dunbar testified that after her brother's death she left California. His death affected her tremendously. Her brother was just snatched out of her life. She tries to enjoy day to day life but she doesn't make plans anymore because she doesn't know when she might be killed, herself. (Vol. 12 RT2008-2009.) In response to a question from the prosecutor, she stated that she will never really come to terms with the fact that she will never see her brother again, that it is a "day to day thing." (Vol. 12 RT2010.)

Mr. Dunbar's younger brother, Marc, also testified. He indicated that as the victim was seven years older than him, they never spent much time together when they were children. However, he feels badly that now that they are adults he will never get to know his older brother (Vol. 12 RT1911-1912.)

The prosecution's last witness was Richard Dunbar, father of the victim. He testified that the victim was his first born son and it was a family tradition that the father and the first born son are very close. (Vol. 13 RT2036.) Mr. Dunbar, a minister, testified that there has been a hole in

his heart since the death of his son, whom he strongly supported in his acting and modeling career. (Vol. 13 RT2037-2038.)

PRIOR CONVICTIONS

The parties stipulated that appellant was convicted of a Penal Code 1203.5 violation in 1997 and received probation. They also stipulated that appellant was convicted of a Vehicle Code 2800.2 and 10851 violation on November 19, 1995, and received a probationary sentence. The judge informed the jury that these stipulations pertained to the prior conviction sentencing factor. (Vol. 13 RT2164-2165.)

APPELLANT'S CASE

Dr. Richard Romanov was a clinical and forensic psychologist with a Ph.D. in clinical and cognitive psychology from the University of Illinois. He ~~has~~ worked for the Los Angeles County Department of Mental Health doing forensic examinations of individuals with serious psychiatric illnesses who committed various crimes. (Vol. 13 RT2040.) Dr Romanov was also a member of Superior Court panels of psychologists and psychiatrists in Los Angeles and Orange Counties. In these professional capacities he had done approximately 750 psychological evaluations in

criminal cases, from minor crimes to the most serious. (Vol. 13 RT2041.)

Dr. Romanoff also had a private practice where he treated patients with substance abuse and psychiatric problems. He also lectured and wrote on topics concerning psychiatric problems in legal settings At the time of his testimony, he was the co-chair of the California Psychologists Ethics Committee. (Vol. 13 RT2041-2042.) He had been qualified as an expert in superior court for both the prosecution and defense, although he testified for the defense approximately 90% of the time. (Vol. 13 RT2042.)

Dr. Romanoff testified as to various aspects of child development. He stated that many elements of personality are genetic. However, he also stated that what happens to a child up to the age of five years old is also very important to the development of that person's personality. The capacity for empathy, attachment, the development of social skills and other personality traits are primarily developed during that window of personality growth. While the child's environment can effect changes to his personality after this time, this first five years are critical to the development of the child's ultimate personality. (Vol.13 RT2043-2044.)

Dr. Romanoff testified that during this early period of child development, a very important aspect of personality development is "modeling", which is learning by the example of the other people in the

child's life. (Vol. 13 RT2046.) This includes the development of skills such as anger management. If a child watches his parents engaging in violence, the child will learn violent behavior from this model. This is not a function of teaching as much as it is of observation of the way people around the child act. If the child observes his parents acting with violence towards each other, he will be more likely to be affected by this than by what other people say about violent behavior. In addition, a child that who is brought up in a fearful, stressful and anxiety producing environment will more likely become become a fearful, stressed and anxious child. It will also have debilitating, profound and life-long effects on his learning. Even being held by an anxious, fearful person, may create anxiety in the child, as the child senses discomfort in others. All of these environmental factors will interact with genetics to create a personality. (Vol. 13 RT2046-2047.)

Dr. Romanoff reviewed appellant's police , work, school and probation records as well as summaries of other psychological and social evaluations. He also interviewed appellant for ten and one-half hours. He also administered intelligence and behavioral tests to appellant and spoke with appellant's mother and aunt. (Vol. 13 RT2047-2048.)

Dr. Romanoff indicated that in a legal setting people sometime have a motivation to distort the truth, therefore it is important to choose tests that

will minimize any attempt at distortion. To this end, Dr. Romanoff chose the WAIS test, the WRAT III test and the MMPI-II. (Vol. 13 RT2049-2050.)

Dr. Romanoff testified that appellant's cognitive assessment indicated that appellant is very bright in many ways. He has good intellectual abilities and no organic impairment. He understands the nature of society's rules and regulations and could have gone far in a college environment. Appellant was able to read above the high school level and speak at the high school level. His math skills were at seventh grade level but this was likely the result of dropping out of school so early. Dr. Romanoff concluded that appellant had sufficient cognitive skills to be successful. (Vol. 13 RT2050-2051.)

Dr. Romanoff then discussed appellant's MMPI-II testing. He indicated that there is a pathology scale and a validity scale in the test. He indicated that even though appellant tended to exaggerate his own psyschopathology, he did not do this so much so as to invalidate the results. (Vol. 13 RT2052-2053.) The results of the testing showed no evidence of serious psychopathology, (Axis I), such as manic depression, schizophrenia or adjustment disorder. (Vol. 13 RT2055.)

Based on review of the submitted material and the testing

performed, Dr. Romanoff diagnosed appellant suffering from anti-social personality disorder. (Vol. 13 RT2056.) This disorder is predominantly characterized as a disorder that affects a person's ability to take into accounts the rights and feelings of others. Those that suffer from this disorder pursue immediate gratification at the expense of others. They lie, manipulate and cheat, lacking intimacy in social relationships. (Vol. 13 RT2059.)

The additional manifestations of this disorder are a high addiction potential and a tendency to engage in extreme behavior with a concomitant difficult to cease that behavior. Further, appellant suffers from a lot of anger which he discharges abruptly and then "moves on." He feels underappreciated and that people do not respect him. He tends to get resentful and enter into conflicts with supervisors and superiors. (Vol. 13 RT2056-2057.) Dr. Romanoff testified that appellant was acutely depressed with aspects of long tern depression. (RT2057-2058.)

Dr. Romanoff believed that there was very strong evidence that appellant had an attachment disorder in early childhood and there is a very strong correlation between the quality of attachment to parents early in life and the development of an anti-social personality disorder. The quality of attachment between parent and child during the first three years of life has

a huge influence over the child's personality. Studies have been done indicating that infants would literally die of not being held by the parent. (Vol. 13 RT2061-2063.)

The history that Dr. Romanoff relied upon in making his evaluation revealed that appellant had "much less than optimal attachment" with his parents. While appellant lived with his father and mother at birth, his father, Bernard, Sr., worked as a traveling piano player and was not home much of the time. When the father was at home, he was verbally and physically abusive. Appellant's mother reported that she suffered substantial physical abuse at the hands of appellant's father Appellant's father did not like crying babies, so he would stuff cotton in appellant's mouth and tape it shut. (Vol. 13 RT2063-2065.)

Further, there was a very hostile relationship between appellant's mother and father and as an infant appellant "soak(ed) up" the environment of this relationship, in that appellant was aware of the tension in the house. Further, appellant's mother suffered from a long term major depression that existed at least from appellant's birth. She had no energy, would not smile or pay attention to appellant and had other symptoms of an acute mental illness, such as not eating. This lack of attention to appellant would have negatively effected the infant appellant. Studies have shown

that the presence of a smiling face to close to them is very important for an infant's proper social development. Appellant did not have this close, smiling face. (Vol. 13 RT2065-2066.)

In addition, as appellant was growing up, family moved every few months, his father going from job to job. Therefore, no one in the family, including appellant, was able to establish other healthy social relationships. Because of her illness, appellant's mother was essentially unavailable for months at a time. Appellant did develop a limited attachment to his father but his father was a difficult person to attach to and committed suicide when appellant was eight years old. There was a lot of evidence to suggest that appellant "went downhill" after the death of his father, since whatever attachment he had with his father was better than no attachment at all. (Vol. 13 RT2066-2067.)

Further, when appellant was four years old , he had a two year old brother that died. Appellant's mother believed that this child may have died as a result of child abuse by his father. Dr. Romanoff indicated that appellant could very well have understood what happened, and it made him even more fearful. Dr. Romanoff stated that a constant exposure to fear will affect everything about a person's personality.(Vol 13 RT2071-2072.)

Appellant started bed wetting after they moved to Milwaukee,

between the third and fifth grade. Dr. Romanoff attributed this to the abuse in his life. His father was very angry about the bed wetting and was abusive toward appellant. (Vol. 13 RT2075-2076.)

Appellant informed Dr. Romanoff that he could not attach to anyone because "nobody was around enough" This lack of attachment during his younger years created profound consequences in the adult appellant regarding his inability to develop empathy with others and created an ongoing attachment disorder. (Vol. 13 RT2067.) Dr. Romanoff testified that development of attachment later on in life can ameliorate attachment and personality disorder to some extent but there was no indication that appellant had the opportunity to develop this sort of attachment. Some people with attachment disorder develop anti-social personality disorder and some do not. (Vol. 13 RT2102-2103.) He stated that it is impossible to predict which people can rise above their personal problems and those who cannot. (Vol. 13 RT2077.)

Dr. Romanoff stated that people like appellant with attachment disorder feel pain and loneliness and a sense of isolation from the world. These feelings may get dulled because of their constant presence, but they are still present. (Vol. 13 RT2077-2078.) Appellant became a difficult person to be around, with few intimacy skills. He became a difficult person

with whom to become intimate. As he grew up, he found it harder to find people who were willing to stay with him. (Vol. 13 RT2068-2069.) Further, he developed a lack of empathy. Certain people with the attachment problems that appellant developed can't get into a healthy social group because they focus on their own desires. The empathy that allows a person to temper his own natural impulses for selfish and anti-social behaviors is missing. (Vol. 13 RT2072.)

Dr. Romanoff then explained the beginning of appellant's involvement with gangs in terms of his personality disorders and his mother's depression. At the age of eight, appellant and his mother were living in Milwaukee. His mother and father were separated at the time. His father committed suicide, leaving a suicide note blaming appellant's mother for his death. Appellant's mother spiraled into a deep depression and appellant was effectively left alone on the streets. He was scared and alone living in a gang infested neighborhood. Not being sophisticated as to gang culture, appellant inadvertently wore the wrong color clothes on the street and was robbed. Appellant took to the gang culture partially for protection and partly for pleasure and gratification. This gang ethos became part of his immediate gratification orientation. (Vol. 13 RT2069-2070.)

Dr. Romanoff testified that appellant had a job as a phlebotomist for four years prior to his arrest in 1994. He lost his job due to his arrest. Appellant felt unfairly accused and lost everything that he worked for at his job. Because he was unable to deal with the adversity due to his basic personality instability, his drinking problem, which had begun over a dozen years before, got worse. (Vol. 13 RT2074.)

Dr. Romanoff stated that his current diagnosis of appellant was anti-personality disorder with alcohol abuse. He stated that appellant's gang involvement was not surprising considering this diagnosis and appellant's background. (Vol. 13 RT2102-2103.) In response to a question by appellant's counsel as to whether appellant can feel love, Dr. Romanoff stated that appellant has difficulty staying with anyone for any significant period of time. Appellant does not have full access to his emotions because of his disorder. His lack of empathy, this lack of being able to understand how other people feel, affects his ability to love. Appellant has a limited ability to love but it is shallow and not resilient. He did father a daughter and spent some time with her. He is not an ideal father but he is better than no father at all. Dr. Romanoff also testified that appellant did have some sort of connection to his father. Appellant took on his father's stage name of "Jaye" which is a "wonderful" example of the attachment process. (Vol.

13 RT2079-2080) Appellant has a living brother and sister but Dr. Romanoff has not talked to them. (Vol. 13 RT2106-2107.)

Barbara Nelson testified that appellant was born on June 23, 1969. She had met appellant's father Bernard, Sr. in Batesville, Mississippi in 1968. Bernard, Sr. was a musician who sang and played the organ. She was pregnant when she married him. (Vol. 13 RT2114-2115.) When first married, the couple lived with Barbara's family. It was only after their marriage that Barbara discovered that her husband used illegal drugs, marijuana and probably cocaine. (Vol. 13 RT2115-2116.)

Mrs. Nelson testified that appellant's father was abusive to him from the outset. If appellant cried, his father would stuff cotton in his mouth. He would also hang appellant up by his feet and push his head into the bath. Mrs. Nelson indicated that she would try to stop her husband from committing this abuse. She also stated that her husband would hit her for no reason and choke her until she passed out. When her husband abused appellant, she would jump on Bernard Sr's back to make him stop. He would hit her with whatever was available and at times render her unconscious. When she woke up she would find her baby, appellant, lying on the bed with his eyes rolling. She really did not know what do to about the abuse. (Vol. 13 RT2117-2118.)

Mrs. Nelson indicated that her father used to talk to her husband about the abusive situation, Bernard, Sr. stated that he would stop. The police were never called because they would not have done anything to help. Even her own family suggested to Mrs. Nelson that maybe she wasn't treating her abusive husband right. She stated that in those days in Mississippi once you had a baby divorce was out of the question. (Vol. 13 RT2118-2119.)

Mrs. Nelson testified that her husband was very demanding. If there wasn't enough to eat or he didn't get sex from her, he would get upset. He'd hold appellant by the feet and threaten to drop him when Mrs. Nelson's family came to investigate her complaints of abuse. At times, Mrs. Nelson's family would intercede physically and Bernard, Sr. would stop the abuse for awhile. (Vol. 13 RT2121-2122.)

Mrs. Nelson testified that when appellant was two years old, she, Bernard Sr. and appellant moved to British Honduras. She indicated that the abuse increased tenfold, with her husband hitting appellant for just about everything; not being toilet trained, not eating neatly, etc. At times, Bernard, Sr. would choke her unconscious and when she awoke, appellant would be naked and tied to the bed. (Vol. 13 RT2122-2124.)

Mrs. Nelson stated that she stayed in British Honduras for a year but

then told her husband that her father was sick and she had to go home. She was pregnant with her son, James, at the time. James was born in September, 1972 . Soon thereafter, she moved to Milwaukee. She lived with her two sons and was separated from her husband for two years.(Vol. 13 RT2124.) Mrs. Nelson lived in Milwaukee with appellant from 1972 to 1976. (Vol. 13 RT2153-2154.)

At that point, Bernard, Sr. arrived in Milwaukee, promising Mrs. Nelson that he had changed and that he loved them all and wanted them to be a family again. The family then moved to Roswell, New Mexico. They stayed there for about a year. Mrs. Nelson testified that her husband treated her well at first but then he lost his job and began beating his family again. She would go to her husband's manager and ask him to intervene. The manager would discuss the matter with her husband but her husband would continue to beat her, choking her, kicking her and striking her in the stomach. On one occasion she had to go to the hospital with a ruptured appendix and had to have surgery. (Vol. 13 RT2125-2127.)

When Mrs. Nelson was in the hospital, her husband came to visit her with James. James had a handprint on his face and James' eye appeared to be injured. James was light skinned and Bernard, Sr. always maintained that he was not his son. While Mrs. Nelson was still in the hospital she

discovered that James had died of a blood clot to the brain. Her husband's manager told her than James had fallen. Up until a few days before she testified she never told anyone about the handprint that she saw on James' face. (Vol. 13 RT2127-2130.)

Mrs. Nelson stated that after James died she went into a depression because she could not protect her own children. Mrs. Nelson stated that she didn't want to go the hospital for her condition because her own mother had depression and her hospital visits had produced a bad result. (Vol. 13 RT2130-2131.) At one point, Mrs. Nelson took appellant and his brother Brian to Cedars Hospital for their drinking problem. The psychiatrists there told Mrs. Nelson to take medication for her depression but she was afraid that the medication would turn her into a "zombie' as it did her mother. (Vol. 13 RT2131.)

She testified that after James died her depression was so bad at times that she would go months without speaking and was too depressed to interact with appellant. She left new Mexico and returned to Milwaukee where her sister lived. Her husband came to Milwaukee and stayed with her. He was using what she believed to be PCP and cocaine at the time. Her third son, Brian, was born in April , 1977. She worked after her son was born and her husband did not. However she was afraid to leave the

children with her husband so she hired a babysitter. (Vol. 13 RT2133-2135.) One day, the babysitter came to her Mrs. Nelson's place of employment screaming that Mrs. Nelson's husband was stuffing cotton into Brian's mouth. At that point, Mrs. Nelson knew that she couldn't live with her husband anymore and obtained a restraining order and filed for a divorce. However, her husband came back to the apartment and started hitting her, so she called the police and threatened to jump out of the window if they did not do something. The police took Mr. Nelson away and then transported Mrs. Nelson to the hospital.(RT2135-2136.)

Soon thereafter, Mr. Nelson went to Mrs. Nelson's sister's house and broke out a window. The police were called but refused to take action. Then, on Christmas, 1978 Mr. Nelson brought a gun to her sister's house and threatened to kill everyone inside. The police were called again. A month later, Mr. Nelson committed suicide. He left a note on a mirror stating "Take it all bitch. You picked a fine time to leave me, Lucille." (Vol. 13 RT2136-2137.)

After her husband's suicide, Mrs. Nelson moved to Los Angeles to live with her sister Eunice. She met Richard McCullen in 1980 and married him the same year. He became abusive so Mrs. Nelson left him. She and her children moved to 67th Street in Los Angeles when appellant

was thirteen. Other kids would jump him and take his clothes and money do he couldn't get to school. Mrs. Nelson was employed at Cedars Sinai Hospital at the time, working to take care of her children. She was very guilty and depressed about her dead son, James, how things were going for the rest of her family. She thought if she bought her children things it would make up for what had happened to them. Instead she further withdrew into herself, as did appellant. She really didn't know what was going on in her son's life. (Vol. 13 RT2139-2140.)

Mrs. Nelson testified that she sent appellant back to Mississippi to finish high school. He was there for two years and then returned to Los Angeles. When appellant was 19 year old his mother sent him to phlebotomy school. At the time, Mrs. Nelson was back with Mr. McCullen and they had a daughter Ascia, who is now 13 years old. Appellant would move in and out of Mrs. Nelson's house after he graduated phlebotomy school. (Vol. 13 RT2140-2142.)

Mrs. Nelson testified that appellant has a daughter, Ania, who was born in 1995. Appellant would babysit her everyday while Ania's mother went to work. Her son, Brian, is currently incarcerated for robbery in Missouri. Mrs. Nelson testified that she loves appellant very much and is very sorry that she could not protect him or her other children because of

her depression. (Vol. 13 RT2143-2144.)

Eunice Edwards also testified. She is Barbara Nelson's sister, being three years younger than Barbara and one of ten children When Barbara married, she and her husband, Bernard Sr. lived in a trailer on the same property as the rest of the Nelson family. Mrs. Edwards recalls how Bernard would hit appellant. Her family would often hear Barbara screaming and run over the trailer to find Bernard holding appellant by the feet and threatening to drop him. This would happen several times a week. However, as Bernard, Sr. was a fairly likeable person, Barbara's family felt it must be Barbara that was doing something wrong. No one in town had even heard of psychologists and there was no help available. (Vol. 13 RT2145-2148.) Mrs. Edwards terrified that when appellant and his mother moved to Los Angeles, she because close with appellant. He lived with her for awhile. When Mrs. Edwards got divorced, appellant convinced her to take phlebotomy classes at Cedars Sinai, and appellant actually trained her to do her job. They worked together on bone marrow and blood drives. She stated the she loved appellant and begged the jury to give him a chance. (Vol. 13 RT2151-2153.)

Tiffany Edwards also testified. She is appellant's first cousin and was twenty years old at the time of her testimony. She stated that she

practically grew up with him and that he was like a big brother to her, being her oldest male cousin. (Vol. 13 RT2157) She related that she got pregnant when she was fifteen. Appellant urged her to stay in school and offered to watch her new born daughter so she could graduate. He brought her food when she was pregnant and made sure she was caring for herself properly. He would laugh and joke with her and when she dropped out of college, he urged her to go back. She stated that her daughter and appellant grew very close. (RT2157-2161.) Appellant's half-sister, Ascia, also testified stating that appellant would tell her to stay in school and urge her to behave. (Vol. 13 RT2162.)

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE FOR CONVICTION AS TO COUNT 8 (ATTEMPTED MURDER OF "JOHN DOE"), HENCE, APPELLANT'S CONVICTION ON THIS COUNT VIOLATED HIS RIGHT TO DUE PROCESS OF THE LAW, TO A FAIR TRIAL AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Procedural and Factual Summary

Pursuant to Count 8 of the information, the jury convicted appellant of the willful, premeditated attempted murder of "John Doe", the alleged operator of a green Jeep vehicle. It was charged that this crime took place

immediately prior to the attempted murder of police officers Boccanfuso and Coleman on May 7, 1997.

As discussed above in the Statement of Facts, the evidence that there was an attempted murder of "John Doe" was as follows. Officer Boccanfuso testified that on May 7, 1997, he and his partner, Officer Coleman, were in their cruiser following a Chevrolet Monte Carlo when Officer Buccanfuso observed appellant leave the front passenger seat and climb onto the Monte Carlo's front passenger seat window sill. He testified that appellant's upper torso was exposed and that appellant was gripping a pistol with both hands. As the Monte Carlo turned a corner, appellant turned the gun toward the police car and fired a number of shots. Buccanfuso testified that before firing at the police cruiser, appellant had his pistol directed at green Jeep but no shots were fired at the Jeep. (Vol. 5 RT769-771, 807-808.) On cross-examination , Buccanfuso admitted that it was a "possibility" that some of the shots fired could have been in the direction of the Jeep. (Vol. 5 RT834.)

Officer Coleman testified that as he saw the Jeep come through an intersection appellant appeared in the window sill of the Monte Carlo with a gun in his hand. When Officer Coleman first saw the handgun, it "appeared" pointed at someone in the Jeep but all the shots were fired at

the police cruiser. (Vol. 5 RT884-888.)

B. Discussion of Legal Standards

1. General Law of Sufficiency of Evidence

A criminal defendant's state and federal rights to due process of law, a fair trial, and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 636, 100 S.Ct. 2382; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) This rule follows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the

existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, when the sufficiency of evidence of a given count is challenged on appeal, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence, that is evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could find that the defendant is guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701,758.) In support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence, including reasonable inferences based upon the evidence but excluding inferences based upon speculation and conjecture, is presumed. (*People v. Tran* (1996) 47 Cal.App. 4th 759, 771-772.)

The reviewing court similarly inquires whether a " reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Memro* (1985) 38 Cal.3d 658, 694-695 [quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576].) The evidence supporting the conviction must be substantial in that it "reasonably inspires confidence" (*People v Basset* (1968) 69 Cal.2d 122, 139; *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of

solid value." (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Bolden* (2002) 29 Cal.4th 515, 533.) Mere speculation cannot support a conviction. (*People v. Marshall, supra,* 15 Cal.4th at p. 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not ... limit its review to the evidence favorable to the respondent." (*People v. Johnson, supra,* 26 Cal.3d at p. 577 [internal quotations omitted].) Instead, it "must resolve the issue in light of the whole record - i.e., the entire picture of the defendant put before the jury - and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (Ibid.); see *Jackson v. Virginia, supra,* 443 U.S. at p. 319 ["all of the evidence is to be considered in the light most favorable to the prosecution"].) Finally, the rules governing the review of the sufficiency of evidence apply to challenges against a special circumstance finding. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496-497; *People v. Green, supra,* 27 Cal.3d at p. 55.)

When the reviewing court determines that no reasonable trier of fact could have found the defendant guilty, it must afford the appellant relief. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.)

2. General Law of Attempt

As a general proposition, the inchoate crime of attempt has two elements; the intent to commit a crime and a direct but ineffectual act toward its commission. (*People v. Carpenter* (1997) 15 Cal 4th 312, 387.) Stated otherwise, the act "must not be mere preparation but must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances." (*Ibid.* citing to *People v Memro* (1985) 38 Cal.3d 658, 698.) This ineffectual act must "reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation." (*People v. Miller* (1935) 2 Cal.2d 527,530.)

Regarding the element of intent specifically pertaining to the crime of attempted murder, the mental state required for attempted murder differs from that required for murder itself in that murder does not require the intent to kill. Implied malice--a conscious disregard for life--suffices. (*People v. Smith* (2005) 37 Cal.4th 733, 739; *People v. Lasko* (2000) 23 Cal.4th 101,107, *People v. Bland* (2002) 28 Cal.4th 313,327.) However, the crime of attempted murder requires the specific intent to kill along with the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v Lee* (2003) 31 Cal.4th 613, 623; see *People v.*

Swain (1996) 12 Cal.4th 593, 604-605.)

Therefore, in order for a defendant to be convicted of an attempted murder the prosecution had to prove he acted with specific intent to kill that particular victim. (*People v. Bland, supra,* 28 Cal.4th at p. 331.)

Intent to unlawfully kill and express malice are, in essence, "one and the same." (*People v. Saille* (1991) 54 Cal.3d 1103,1114.) To be guilty of attempted murder of an individual , defendant had to harbor express malice toward that victim. (*People v. Swain, supra,* 12 Cal.4th at pp. 604-605.) Express malice requires a showing that the assailant "either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur. [Citation.] " (*People v. Davenport* (1985) 41 Cal.3d 247, 262, quoting *People v. Velasquez* (1980) 26 Cal.3d 425, 434.)

C. There Was Insufficient Evidence to Prove the Specific Intent to Commit Attempted Murder

In the instant case, there was insufficient evidence presented to the jury to prove that appellant had the specific intent to kill the occupant of the Jeep. There was no evidence presented that the appellant specifically wanted to kill the individual inside of the Jeep, nor that he was engaged in carrying out that intent by merely pointing the gun at this vehicle.

There are two ways of proving intent. The first is direct evidence from a defendant's own words; that he harbored the intent to kill. The second is circumstantial evidence; the intent being derived from all the circumstances of the attempt, including the putative killer's actions and words. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946; *People v. Viscotti* (1992) 2 Cal.4th 1, 56.)

In the instant case, there was no direct evidence as to intent. Even assuming that defendant was the individual that pointed the gun at the Jeep, there was no evidence that he made any direct statements to anyone that he intended to kill the occupant. Further, there was insufficient circumstantial evidence that defendant specifically intend to kill, rather than threaten, scare or otherwise intimidate the occupant of the Jeep.

There was no evidence as to any planning, preparation, conspiracy, or motivation that would indicate that appellant intended to commit murder. This case is a far cry from the cases in which the courts have upheld a conviction of attempted murder, based upon the surrounding circumstances of the crime.

In *People v Ramos* (2004) 121 Cal App. 4th 1194, Ramos and his fellow gang members armed themselves before attending a party. They parked around the corner to hide their identities in the event anything

happened at the party. The court held that both of these circumstances "demonstrated planning and a preconceived willingness to take immediate lethal action should the need arise." Additionally, a gang expert testified gang members are expected to shoot anyone who showed disrespect to a fellow gang member. Consistent with this planning activity and the expert gang testimony, Ramos ran to the front yard when he heard one of his companions had been involved in a fight. At this time Ramos pulled out a gun and pointed it at a carload of rival gang members. According to Ramos's own statement, he pulled the trigger of the weapon but it failed to fire.

The court held that a reasonable trier of fact properly could conclude Ramos harbored the intent to kill and that the killings were willful deliberate and premeditated. "There was evidence of planning and motive and the manner of the attempted murder, firing numerous rounds at an occupied vehicle, showed the shooting was purposeful. Thus, there was sufficient evidence to support the finding the attempted murders committed by Ramos were willful, deliberate and premeditated." (*People v. Ramos, supra,* 121 Cal. App.4th at p. 1208; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1127.)

Similarly, in *People v Gonzalez* (2005) 126 Cal.App.4th 1539, the

state's expert testimony provided circumstantial evidence that defendant was ordered by the Mexican Mafia to kill the intended victim. In addition, the state presented evidence of defendant's unprovoked attack that rendered the unarmed victim defenseless as appellant repeatedly stabbed him with a shank. Further, the locations of the stab wounds were in the area of the chest and heart. In addition, a witness testified that defendant stabbed the victim at least a dozen times in the space of 30 to 45 seconds and that defendant suffered multiple puncture wounds to his left side on the front and back. The court held that the above evidence was not only sufficient to prove intent to commit murder but also that the murder was premeditated, deliberate and willful. (*People v. Gonzalez, supra,* 126 Cal. App.1550,1553.)

In *People v. Lashey, supra,* 1 Cal.App.4th 938, viewing the evidence in the light most favorable to the judgment, the court of appeal held there was sufficient evidence from which the trial court could find that defendant harbored the requisite intent necessary to support his conviction for attempted murder. Prior to the actual incident, defendant had threatened the victim with serious bodily harm. In addition, there was evidence that defendant carefully aimed a .22 caliber rifle at defendant before he fired it, severely wounding the victim. The court held that act of firing a .22 caliber

rifle toward the victim at a range and in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill under the circumstances presented. (See *People v. Jackson* (1989) 49 Cal.3d 1170, 1201; *People v. Bloyd* (1987) 43 Cal.3d 333, 348; *People v. Wells* (1988) 199 Cal.App.3d 535, 541.)

In the instant case, there was none of the evidence such as was seen in the above line of cases. There was no substantial evidence that appellant knew this "John Doe" prior to the night of May 7, 1997, that the appellant engaged in any planning, whatsoever, or that there was any motivation for murder. The alleged victim suffered no wounds of any kind that would indicate an intent to kill. Further, there was no evidence that the gun was ever pointed directly at a person or persons inside of the vehicle. The evidence indicated that at best the gun "appeared" to be pointed "toward" the Jeep. Further, while one of the officer's speculated that there was a "possibility" that shots might have been directed toward the Jeep, neither officer testified that this was indeed the case, both testifying instead that the shots were fired in the direction of their cruiser .

D. There was Insufficient Evidence to Sustain a Jury Finding that the Attempted Murder was Deliberate and Premeditated

In addition to being convicted of attempted murder, appellant was

convicted of the additional enhancement of the murder being premeditated and deliberate, enhancing the sentence on count 8 to life in prison pursuant to Penal Code section 654 (a).

> If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in section 189 he person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact. (Penal Code section 654(a).)

In context of first-degree murder prosecution, "premeditated" means "considered beforehand," and "deliberate" means formed or arrived at or determined upon as result of careful thought and weighing of considerations for and against proposed course of action. (*People v. Mayfield* (1997) 14 Cal.4th 668; *People v. Koontz* (2002) 27 Cal.4th 104.) Express requirement for conviction for first-degree murder of concurrence of deliberation and premeditation excludes those homicides which are

result of mere unconsidered or rash impulse hastily executed. (*People v. Lunafelix* (1985) 168 Cal.App.3d 97.)

As stated in *People v. Villegas* (2001) 92 Cal.App.4th 1217,1224;

> [T]he test on appeal is whether a rational trier of fact could have found premeditation and deliberation beyond a reasonable doubt based upon the evidence presented. The three categories of evidence for a reviewing court to consider with respect to premeditation and deliberation are: (1) prior planning activity; (2) motive; and (3) the manner of killing. The process of premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly....' [Citations.]" *People v. Villegas* (2001) 92 CalApp.4th 1217,1224

Otherwise stated, in determining whether there was deliberation and premeditation as required for first-degree murder, the court looks at: evidence of defendant's planning activity prior to homicide, motive to kill, as gleaned from prior relationship or conduct with victim, and manner of killing, from which it may be inferred that defendant had a preconceived design to kill. (*People v. Wharton* (1991) 53 Cal.3d 522.)

The cases which this Court has held that the evidence presented was sufficient to support a conviction of deliberate and premeditated murder have all involved significantly more evidence than was presented in this case. In *People v. Hughes* the evidence showed that defendant brought a knife to the victim's apartment, robbed and sexually assaulted her was

motivated to kill the victim to eliminate her as witness to those crimes, and stabbed the victim 11 times over a period of time Blood trail evidence indicated a struggle throughout victim's apartment, and the victim died from subsequent strangulation. Based upon the above legal standards for deliberation and premeditation, this evidence was held to be sufficient to uphold a conviction for deliberate, premeditated murder. (*People v. Hughes* (2002) 27 Cal.4th 287, 371.) In *People v. Koontz,* this Court held that evidence of planning, motive, and manner of killing indicative of deliberate intent to kill was sufficient to support the defendant's conviction of first-degree premeditated and deliberate murder when the evidence showed that the defendant armed himself with two concealed and loaded handguns, argued with the victim in the apartment they shared, pursued the victim to another apartment and persisted in the argument, demanded the victim's car keys, shot the victim in the abdomen, and took active steps to prevent a witness from summoning medical care, without which the victim was certain to die. (*People v. Koontz, supra,* 27 Cal.4th 1041, 1081.)

In contrast to the above cases, and others like them, in the instant case there was no evidence of planning motive, surrounding circumstances of the alleged crime or prior relationship that indicated a premeditated attempt to kill "John Doe." The only evidence was that appellant pointed a

gun in the general direction of a moving car and possibly could have direct a shot or shots toward that vehicle. Instead of direct or circumstantial evidence , all that the jury had was speculation and conjecture as the willful premeditation of the shooter.

Regarding the element of premeditation, this Court in *People v. Anderson* (1968) 70 Cal 2nd 15, discussed in depth situations in which there was insufficient evidence of the intent and/or premeditation to sustain convictions of crimes requiring these elements.

As stated in *Anderson;*

> The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing-what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' (citation omitted); (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2). (*People v. Anderson, supra,* 70 Cal.2d at p. 26.)

In *Anderson,* the defendant was convicted of premeditated murder of a ten year old girl. Evidence placed the defendant alone with the victimin the house that defendant shared with the victim, her mother, andtwo siblings The police arrived at the premises in response to a safety check on the victim and found her body, with her torn and bloodstained dress ripped from her. There was blood in almost every room of the house and defendant was discovered to be very intoxicated. Over sixty knife wounds were found on the person of the victim.

The *Anderson* Court held that this evidence was insufficient to sustain the elements of premeditation and reduced the conviction to second degree murder, stating that there was insufficient evidence that defendant premeditated the killing and the fact that the killing was brutal did not constitute such evidence. (*People v. Anderson supra,* 70 Cal.2d at pp.30 -35.)

Similarly, in *People v. Craig* (1957) 49 Cal.2nd 313, this Court reduced a verdict of first degree murder to second degree murder on the ground that the evidence was insufficient to show that the killing was either premeditated or was committed in the course of an attempted rape. In *Craig*, the defendant told someone the morning of the murder that he would "like to have a little loving." On the evening of the murder the threatened a woman at a bar when she refused to dance with him.

The murder victim was found the next morning under a car at a service station. She was only half-dressed with her clothes in disarray so that the front part of her body was exposed. She was in a supine position, with her legs spread apart. She had suffered multiple contusions. Later that day, defendant told someone that he had "beat up" a woman and when he hit them "they stayed hit." (*People v. Craig, supra,* 49 Cal.2nd at 315.) This Court held that this evidence did not demonstrate either intent to rape or premeditation. (*Ibid.*)

The evidence of premeditation that was held to be insufficient in *Anderson* and *Craig* was clearly more convincing that the evidence presented in this case as to appellant's premeditation in Count 8. Therefore, the judgement as to Count 8 should be reversed by this Court.

E. Conclusion

Appellant's right to due process of law, a fair trial, and reliable guilt and penalty determinations were violated because criminal sanctions were imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *People v. Johnson , supra,* 26 Cal.3d at p.576; *Jackson v. Virginia, supra,* 443 U.S. 307.)

The judgment of guilt on count 8 should be reversed. In addition, as

the jury used this improper conviction to ultimately reach a verdict of death, the death judgment should be reversed and the case remanded for a new penalty trial because there is a reasonable possibility that the jurors would have recommended life imprisonment without the possibility of parole absent the invalid attempted murder conviction *People v. Roberts* (1992) 2 Cal.4th 271, 327; *Clemons v. Mississippi* (1990) 494 U.S.738, 751.) The evidence of appellant's alleged attempted murder on this unidentified "John Doe," while insufficient for a conviction served to prejudice the jury by presenting otherwise inadmissible evidence of a violent act to the jury. (See Argument VIII of AOB, *infra.*)

II. INSUFFICIENT EVIDENCE WAS PRESENTED FOR CONVICTION AS TO COUNT 2 (ROBBERY) AND COUNT 3 (ATTEMPTED CARJACKING); HENCE APPELLANT'S CONVICTION ON THOSE COUNTS, AND THE TRUE FINDING OF THE SPECIAL CIRCUMSTANCE BASED UPON THOSE COUNTS, VIOLATED HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Procedural and Factual Summary

Pursuant to Counts 2 and 3 of the information, respectively, the jury convicted appellant of the robbery and attempted carjacking of Richard Dunbar, pursuant to Penal Code sections 211 and 215. In addition, the jury found true the special circumstance that the murder of Richard Dunbar, as

charged in count 1, was committed while appellant was engaged in the commission or attempted commission of robbery or attempted carjacking pursuant to Penal Code section 190.2, subd. (a) (17).

As discussed above in the Statement of Facts, the evidence as to the alleged robbery and attempted carjacking was as follows. Mauricio James was Mr. Dunbar's roommate. He testified that he last saw Mr. Dunbar alive at 9:45 pm. on April 5, 1995. Mr. Dunbar left the house with his keys, money and identification. Mr James said Mr. Dunbar never carried a wallet. Mr. James indicated that he and Mr. Dunbar knew Raynard Scott who lived on Alvern Street, where the victim's body was found. Mr. James went to the crime scene and identified Mr. Dunbar and his car. He further testified that he never got a set of keys from the police that night. (Vol. 6 RT1040-1046)

Christina Dunbar, the decedent's sister, was called by a friend and responded to the scene of the crime. She identified her brother's body and his car. The police never gave her the keys to the car, and she did not see them at the scene. (Vol. 6 RT908-912.) Detective Cox, of the Los Angeles Police Department testified that he did not find any car keys at the scene. (Vol. 7 RT1301)

Christie Hervey, the "eyewitness" to the crime, indicated that she

heard three shots and immediately thereafter saw a person she later identified as appellant running from the scene. There is no evidence that the person who ran from the scene made any attempt to take the car, as Ms. Hervey saw the shooter flee the scene immediately after hearing the shots. (Vol. 6 RT1047-1050.)

B. There was Insufficient Evidence to Sustain a Conviction of Robbery or Attempted Carjacking

Appellant respectfully adopts, as if more fully stated herein, his discussion of the general law of sufficiency of evidence and attempt as presented in Argument I, section B. The specific discussion of the law of robbery and carjacking follows.

Robbery is defined as the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Penal Code Sec. 211.) However, "A conviction of robbery cannot be sustained absent sufficient evidence that the defendant conceived his intent to steal either before committing the act of force against the victim, or during the commission of that act. If the intent arose only after the use of force against the victim, the taking at most constitutes a theft." (*People v. Morris*, *supra*, 46 Cal.3d at p.19, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5; *People v. Green, supra,* 27 Cal3d at pp. 52-54.)

Carjacking is the "felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (Penal Code section 215.)

The crime of carjacking is similar to that of robbery in that it involves the taking of property from the immediate presence of the victim by the use of force or fear. The Legislature intended to treat carjackings like robberies except for two exceptions: (1) carjackings require an intent to either permanently or temporarily deprive the owner of the property whereas robbery always requires an intent to permanently deprive, and (2) carjackings only involve vehicles whereas robberies may involve any type of property. (*People v. Vargas* (2002) 96 Cal.App.4th 456.)

Regarding count 2 , there is nothing more than a "mere modicum" of evidence that an essential element of a robbery took place; that is the taking of property. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319.) There were no eyewitnesses to the crime, there were no admissions by appellant and no property belonging to Mr. Dunbar was recovered from appellant

The only evidence that any property may have been taken was the fact that the police were not able to find Mr. Dunbar's car keys at the crime scene. However, the facts that the police were not able to find the keys, may well be more of a reflection on the quality of the investigation than a state of sufficiency of evidence to uphold the conviction of this court.

As stated above, under federal due process standards, a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320.) At the very most, that is all that the jury had from the state of the evidence in this case. In fact, as money was left on the person of the victim (RT908-912), it is more likely than not that no robbery occurred at all and that the killing was a result of some other motivation or occurrence.

While this Court must review the entire record in the light most favorable to the judgment, the evidence considered n favor of the conviction must be of "solid value" the type from which a reasonable trier of fact could find that appellant was guilty of the robbery beyond a reasonable doubt. (See *People v. Welch*, supra, 20 Cal.4th at p. 758.) Such evidence does not exist as to Count 2. Instead, the conviction on Count 2 is based upon speculation and conjecture as to what might have happened to

Mr. Dunbar.

Regarding Count 3, the attempted carjacking count, the question is whether there was a direct but ineffectual act toward its commission. (*People v. Carpenter* (1997) 15 Cal 4th 312, 387.) This issue hinges upon whether there was sufficient solid, credible evidence to convince the jury, beyond a reasonable doubt, that appellant had the intent to take possession of Mr. Dunbar's vehicle and attempted to do so. Again, other than the fact that the police were unable to find the keys to the vehicle, there is no evidence as to either the intent of the perpetrator nor that any direct but ineffectual act taken to effectuate said attempt.

In fact, common sense would dictate that it was far more likely than not that there was no intent or attempt to take the vehicle, as the victim was incapacitated and nothing prevented the assailant from taking the victim's car.

Appellant's right to due process of law, a fair trial, and reliable guilt and penalty determinations were violated as criminal sanctions were imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17.) Therefore, the judgment of conviction as to counts 2 and 3 of the information should be reversed. As these two counts formed the predicate felonies for the only

special circumstance charged, the special circumstance finding should be reversed as well and the judgment of death vacated. (*People v. Morris*, *supra,* 46 Cal.3d at pp. 21-23.)

C. Regardless of Whether there was Sufficient Evidence to Sustain the Robbery or Carjacking Convictions, There was Insufficient Evidence to Sustain the True Finding on the Special Circumstance

A special circumstance exists if a murder was committed while the defendant was engaged in the commission of or attempted commission of a robbery or carjacking in violation of Penal Code sections 211 and 215 respectively. (Penal Code section 190.2 subd. (a)(17)). Under the special circumstances statute, "[a] murder is not committed (during a robbery or carjacking) within the meaning of the statute unless the accused has 'killed ... in order to. advance an independent felonious purpose, ...' [Citations.] A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder ....' " (*People v. Morris, supra,* 46 Cal.3d. at p. 21 [quoting *People v. Green. supra,* 27 Cal.3d at pp. 60- 61] ; cf. *People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

What is required for a true finding of a felony murder special circumstance is proof beyond a reasonable doubt that the defendant intended to commit the felony at the time he killed the victim and that the killing and the felony were part of one continuous transaction. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1141; *People v. Hayes* (1990) 52 Cal.3d 577, 631-632.)

There was no proof before the jury that the shooter had any independent felonious purpose to either rob Mr. Dunbar or to steal his car. As stated above, since neither his car nor any money was taken from Mr. Dunbar's, it is more likely that there was no independent felonious purpose. There was no solid, satisfying evidence that the shooter's intent was to rob or carjack when he approached Mr. Dunbar. The true finding was based upon conjecture and speculation as to what might have been in the mind of the shooter.

Appellant's right to due process of law, a fair trial, and reliable guilt and penalty determinations were violated as criminal sanctions were imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *People v. Johnson* , *supra,* 26 Cal.3d at p.576; *Jackson v. Virginia, supra,* 443 U.S. 307.)

III. THERE WAS INSUFFICIENT EVIDENCE FOR CONVICTION AS TO COUNT 1 (MURDER OF RICHARD DUNBAR), HENCE, APPELLANT'S CONVICTION ON THIS COUNT VIOLATED HIS RIGHT TO DUE PROCESS OF THE LAW, TO A FAIR TRIAL AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual Discussion

Christine Hervey was only eyewitness to the Dunbar shooting. At trial she testified that on April 5, 1995, between 10:30 and 10:45 p.m., she was entering her apartment when she heard two shots. (Vol. 6 RT1047.) She proceeded to her balcony, overlooking Alvern Street. From her balcony, she saw a man with a gun running down the street away from where another man lay fallen on the street. (Vol. 6 RT1050.)

Ms. Hervey testified she was able to observe the man for "two minutes." However, she also testified that as he was moving toward her, he kept looking back in the direction of the fallen man. In addition, she testified that the man turned up a nearby alley and disappeared from her view. (Vol. 6 RT1078-1080.) She also stated that she was about 40 feet away from the man when he reached the alley. (Vol. 6 RT1054-1055.) On cross-examination she admitted that it was more like one hundred feet (Vol. 6 RT1081.) Defense witness, Scott Frazier, who actually measured the

distance from Ms. Hervey's balcony to the alley, testified that it was just under one hundred feet. (Vol. 6 RT1506-1508.) Ms. Hervey also testified that the man she saw was of medium build, between 5' 10" and 6' tall. (Vol. 6 RT1075.)

It was not until September, 1997, over two years after making the initial crime scene observation, that Ms. Hervey was asked to make a photographic identification of the suspect in the Dunbar killing. (Vol. 6 RT1059-1060.) Ms. Hervey testified that she was shown a photo array by the police which she looked at for ten minutes before picking out the photo of appellant and stating that this photo "kind of looked like" the man she saw over two years before. (Vol. 6 RT1062, 1090.) After looking at the photo array a second time for yet another ten minutes, she stated to the police that she "believed" that appellant's photo represented the person she saw running. (Vol. 6 RT062; 1102-1103.) However, it was not until she actually saw appellant at the preliminary hearing that she was able to make a "positive" identification This was not surprising, under the circumstances; appellant was the only black man at that hearing, just as he was the only black man at counsel table during the trial. (Vol. 6 RT1063, 1093.)

As stated in the Statement of Facts, on September 20, 1996, Los Angeles Police Officer Julian Pere and his partner Paul Williams

responded to the 9700 block of Glasgow. (Vol. 8 RT1320.) At the scene he noticed ten to fifteen "Moneyside Hustler" gang members standing in front of an apartment building. One person was standing apart from the rest of the group; a black male originally described by Officer Pere as being 5'7" tall and approximately 120 pounds. (Vol. 8 RT1321, Vol. 9 RT1590.)

Officer Pere ordered this individual to stand still but the man refused to do so. Instead, he dropped his jacket and a handgun, a 380 caliber Beretta, fled from Officer Pere, scaled a fence and disappeared. (Vol. 8 RT1321-1323.) Officer Pere recovered the handgun. Firearms examiner Starr Sachs compared test fired cartridges from the Beretta recovered from the Glascow Street incident to three shell casings found at the scene of the Dunbart shooting and testified at appellant's trial that the casings from the Dunbar scene had been fired by that gun. (Vol. 7 RT1125-1226.)

In an attempt to prove appellant was the individual that killed Mr. Dunbar, the prosecution called Glenn Johnson to testify. Johnson admitted to being with several members of the Moneyside Hustlers gang at the 9700 block of Glascow in Los Angeles on September 20, 1996. He indicated that shots were fired at that time and the police responded to the scene. However, he also testified that he did not remember if appellant was there at the time. Johnson denied that appellant was present when the shots were

fired or that appellant dropped the gun that was fired at the scene. (Vol. 7 RT1224-1226.) He also denied telling the police that appellant told him he killed a man in an abortive carjacking. (Vol. 7 RT1230.)

Johnson also testified that he lied to Detective Cade when he made statements to him indicating that appellant dropped the gun and that appellant made incriminating statements to him regarding the shooting. (Vol.7 RT1228 et seq.) Johnson lied to Detective Cade so that Detective Cade would "get him out of hot water" as to domestic violence and weapons charges pending against him. Johnson testified that he indeed got help from Detective Cade and only served 21 days in jail on these charges.[5] (Vol. 7 RT1246-1247.)

In order to discredit their own witness, the prosecution called Detective Cade who stated that he had spoken to Glenn Johnson on four different occasions for the express purpose of obtaining information about appellant. Detective Cade informed Johnson that there was "a reward for the killing of Richard Dunbar."(Vol. 8 RT1378.) Prior to the interviews, Cade had already decided that appellant was a suspect. (Vol. 8 RT1398.) He offered to pay Johnson for information about the crime and eventually did

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5. Johnson also testified that he had received five years for a robbery "out of Orange County. (Vol. 7 RT1221.) However, the record does not indicate when this robbery was committed or when the conviction took place.

pay him for information about the Dunbar shooting. (Vol. 8 RT1386.) Over these four interviews, Johnson told different versions of the events in question During the first interview, Johnson allegedly told Cade that a person named "Jason" killed Mr. Dunbar. (Vol. 8 RT1378.) At the second interview, Johnson was telling Cade that this "Jason" actually gave Johnson the gun that was used in the Dunbar killing. Johnson also provided details to Detective Cade as to "Jason's" inculpatory statements regarding the Dunbar shooting. (Vol. 8 RT1379-1381.)

According to Cade, at some point Johnson added to his story, stating that he believed that "Jason" was "trigger happy" and further stated that it was "Jason" who had dropped the Dunbar murder weapon on Glasgow Street. (Vol. 8 RT1382-1383.) Cade further testified that in yet another interview Johnson told him that "Jason' was really named "Jaye" and was appellant. (Vol. 8 RT1383.)

B. Discussion of the Law

As stated in Argument I, when the sufficiency of evidence of a given count is challenged on appeal, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence, that is evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could find that the

defendant is guilty beyond a reasonable doubt. (*People v. Welch*, *supra,* 20 Cal.4th at p. 758.) The evidence supporting the conviction must be substantial in that it "reasonably inspires confidence." (*People v Basset*, *supra,* 69 Cal.2d at p.139; *People v. Morris*, *supra,* 46 Cal.3d at p.19) and is "credible and of solid value." (*People v. Green*, *supra,* 27 Cal.3d at p. 55; *People v. Bolden*, *supra,* 29 Cal.4th at p.533.)

The United States Supreme Court has stated that the identification of strangers "is proverbially untrustworthy." (*United States v. Wade* (1967) 388 U.S. 218, 228.) As stated in *Wade,* "the annals of criminal law are rife with instances of mistaken identification." (*Ibid.*) In *Wade*, the Court further stated "the dangers for the suspect are particularly grave when the witnesses opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest. " (*Id* at pp 228-229.)

Wade was cited prominently in this Court's decision in *People v. McDonald* (1984) 37 Cal.3d 351 which echoed the concern of the High Court as to the perils of eyewitnesses identification. *McDonald* cited to several federal cases to support this Court's lack of confidence in eyewitness identification of strangers. This Court cited to *Jackson v. Fogg* (2nd Cir 1978) 589 F.2d 108, where the federal court vacated a first degree murder conviction in party because the four identification witnesses had

only a brief opportunity to observe the shooter under stressful conditions. (*McDonald, supra,* 37 Cal.3d at p. 363.) This Court continued to quote *Jackson* which stated "Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence." (*McDonald, supra,* at 363 quoting *Jackson v Fogg, supra,* 589 F2d at p. 112.)

McDonald also cited to *Jackson v. Fogg* (2nd Cir 1978) 589 F.2d 108 which stated "[t]here is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement...[T]his danger is inherent in every identification of this kind..." (*McDonald, supra,* 37 Cal.3d at pp. 363-364.)

Numerous studies have demonstrated the unreliability of eyewitness identification, as have the growing number of cases in which defendants convicted on the basis of eyewitness testimony were later discovered to be innocent through DNA evidence. (See, e.g. Cutler & Penrod, Mistaken Identification: The Eyewitness, Psychology and the Law (1995) Scheck, et al., Actual Innocence (2000).)

Further, the finality and severity of the death penalty requires that evidence employed to impose this ultimate penalty must be extremely reliable. (US. Const., 5th, 8th and 14th Amends; see, e.g. *Gardiner v. Florida* (l977) 430 U.S. 349.)

The only type of evidence that is perhaps more unreliable is that of persons involved in the criminal element who exchange statements to the police implicating others in crimes for a for a better deal for themselves. As stated by the Ninth Circuit Court of Appeal: "Never has it been more true than now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is... to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony...in return for reduced incarceration." (*Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir 2001) 243 F.3d 1109,1123.)

Bowie proceeded to state::

> .....because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far

as to create corroboration for their lies by recruiting others into the plot..."(*Bowie* at 1123-1124.)

C. Application of the Law to the Facts of the Instant Case

The evidence presented that appellant killed Mr. Dunbar was neither reasonable, credible nor of solid value, nor does it inspire anything but incredulity. The "identification" of appellant by Ms. Hervey was unbelievable. Mr. Dunbar's body was indisputably determined to be 300 feet from Ms. Hervey's balcony. (Vol. 9 RT1505.) Before proceeding to her balcony to make her observations, Ms. Hervey heard shots and made a call to 911. (Vol. 7 RT1049.) Upon arriving at her balcony vantage point, the first thing she observed was a security guard walking toward the victim and stopping at the body. (Vol. 7 RT1069-1070.) This security guard had heard the shots but by the time he arrived at the body, the shooter had departed. (Vol. 7 RT1017-1021.) It was only after she saw the security guard that Ms. Hervey made her initial observation of the man with the gun at night from one hundred feet away, with the subject moving very rapidly from the scene. Ms. Hervey testified that the individual in question moved toward her rapidly and fled the scene by turning down a nearby alley.

Given this, and the other abovementioned testimony, it was simply impossible for Ms. Hervey to have observed the shooter for more than a few seconds. By the time Ms. Hervey saw the shooter, she had made a call to

911 giving the shooter ample time to have fled the shooting scene and had been moving toward her at a fast pace. Therefore, he had covered a large part of the 300 foot distance that had separated him from Ms. Hervey before she even observed him. As the alley that he turned down was 100 feet from her balcony and as there was no testimony that the shooter ever slowed his rapid pace, she could not have observed appellant from more than a few seconds, if at all, before he could not longer be seen. This is borne out by the fact that Ms. Hervey testified that she could not even say with certainty whether the individual had a mustache or beard. (Vol. 7 RT1079-1080.) Further, Ms. Hervey testified that this individual was relatively tall with a medium build, whereas Officer Pere stated that the person who dropped the gun on Glasgow Street was no more that 5' 7" with a slight build.

Not only does the evidence belie that Ms. Hervey had adequate time to observe the shooter, the entire identification process belies the credibility of her evidence. It was over two years before she had the opportunity to view a photo lineup containing appellant's photo. She initially looked at this photo lineup for ten minutes before she was able to state that appellant's photo "kind of looked like" the man she saw running away from the shooting scene over two years before. The police had her look at the photo array for *another* ten minutes until she finally stated that she "believed" that

appellant was the man she saw running.

Therefore, Ms. Hervey could not have actually observed the individual in question for more than a few seconds while he was moving rapidly at night from no less a distance than one hundred feet Two years later, it took her ten minutes of staring at the photo until she was able make even the most tentative statement that appellant "kind of looked like" the shooter even though after her brief observation of the shooter at the scene she was not even sure whether the man wore a beard or not. It took yet another ten minutes, in the presence of police officers who obviously believed that appellant was the shooter, before she convinced herself that she "believed" that appellant was the man Even so, she was not "sure" of anything until she actually saw appellant in custody, at the counsel table, at both the preliminary hearing and at trial, a identification that was so suggestive as to be completely worthless because appellant was the only black man present and she had already seen his photograph on several occasions.

Appellant's trial expert, Dr. Scott Frazier, made it clear that this entire observation and identification process was unreliable and unlikely to produce an accurate identification of the suspect.

The only other evidence that implicated appellant were the

testimony of Detective Cade as to the statements he took from Glenn Johnson. Johnson was a violent gang member, a robber and domestic abuser, who was facing a prison sentence at the time of his statements to Cade Johnson told several different versions of the "facts" until he hit upon the final version which Cade was willing to pay for, both with money and a sweetheart deal. This is exact sort of testimony that the Ninth Circuit condemned in *Bowie* as being unworthy of belief. It was made even more unbelievable by Johnson's subsequent retraction of it at trial.

The unreliable identification of Ms. Hervey is made no more credible by the equally incredible evidence from Detective Cade. Two times zero still equals zero, especially in light of the fact that Officer Pere originally identified the man who dropped the gun to be much shorter and slighter than appellant. The evidence presented to the jury as to Count I was not the type of reasonable, credible and solid evidence that would establish the type of reliability in the verdict required by both this Court and the United States Supreme Court. Appellant's right to due process of law, a fair trial, and reliable guilt and penalty determinations were violated because criminal sanctions were imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17.)

The judgment on Count I, and therefore the death judgment, should be reversed.

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE CONTENTS OF A PAPER ALLEGEDLY SETTING FORTH A FABRICATED ALIBI FOR APPELLANT. THE ERROR VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL, RIGHT TO A FAIR AND RELIABLE DETERMINATION OF GUILT, RIGHT TO HAVE EVERY ELEMENT OF THE CHARGE PROVEN BEYOND A REASONABLE DOUBT AND RIGHT TO DUE PROCESS AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Pertinent Facts

During the guilt phase of the trial, outside of the presence of the jury, appellant's counsel announced to the court that he had been informed by the prosecutor that the prosecution wished to admit into evidence the contents of a "backpack that Mr. Nelson had or owned at one point in time." (Vol. 8 RT1359.) After a discussion of the contents of the backpack, the court excluded from evidence in the guilt phase all items in the backpack except for a statement that appeared to set forth an fabricated exculpatory story for appellant as to the attempted murders of the two police officers and "John Doe." Counsel objected to the admission of that statement because it was not in appellant's handwriting but the court overruled that objection. (Vol. 8 RT1361.)

Immediately thereafter, Inglewood Police Detective Mark Campbell testified in the presence of the jury. The prosecutor showed him a photo of a white Jeep Cherokee, marked People's Exhibit 16, and asked if the car in the photo was the one he impounded on July 1, 1997. At first, Detective Campbell indicated that the car in the photo was not the car he impounded, but only similar to it. However, upon prodding from the prosecutor, Detective Campbell eventually testified that the car in the photo "could be" the car he impounded on 6921 Glasgow Street. (Vol. 8 RT1363.)

Detective Campbell further testified that he obtained the Jeep from "a young lady by the name of Cher." After the Jeep was impounded, Detective Campbell went to Orange Coast Jeep Eagle and found that the person who purchased the Jeep was "Terry James" who lived at 1 North Venice Boulevard. The detective then testified that he knew a Robert Cross who lived at that address and that Mr. Cross said that Terry James was really "Bernard" who said used the address of 1 North Venice Boulevard to purchase said vehicle. (Vol. 8 RT1364.)

Detective Campbell then testified that after impounding the vehicle in question he located the backpack in the rear of the Jeep. Inside of the backpack, the detective recovered a piece of paper, whose contents he read for the jury. (Vol. 8 RT1365.)

The contents of the piece of paper were set forth, verbatim, on the record. (Vol. 8 RT1365-1367.) The verbatim content of this paper, later marked as People's Exhibit 34, is as follows:

"Statements for Jaye Bernard Nelson. (Court)

"May 22, 1997, Thursday [sic]

"Anthony (Tone) : Jaye came over the house on Monday, May 5th, and asked if he could spend a couple of nights at the house because he was sleeping in cars, and said he knew some people that needed some car service. You told Jaye that he could stay there, but he needed to get his act together.

" Jaye spent the night Monday. Tuesday he helped with cars all day, and his friend Perry stopped by to get an oil change at 1:00 p.m., but you and Jaye were busy with another car. So Jaye told him to try back that night or tomorrow morning. Perry said okay and left. Jaye was wearing gray sweat pants and a white t-shirt. The t-shirt was dirty from working on cars.

"Tuesday night May 6, Jaye left on foot going to the store at about 10:40 p.m. with the same sweat pants and dirty t-shirt. The next time you saw Jaye was about 30-40 minutes about 11:15 to 11:20 p.m. getting out of a blue compact-sized car with one male individual, the driver, the same car that had come by for an oil change earlier.

"You, Kendall noticed cuts and abrasions on Jaye arms as he approached the house. You and Kendall told him to go to the back room and lay down, and he did. The next time you saw him he was in his underclothes." (Vol. 8 RT1365-1367.)

B. Discussion of the Law

A defendant's own statements that he fabricated a evidence is relevant to show consciousness of guilt. (*People v Kaurish* (1990) 52 Cal.648, 682; see *People v. Kimble* (1988) 44 Cal.3d 480, 496.) Where a material fact is established by the evidence and it is shown that defendant's testimony as to that fact is wilfully untrue, this circumstance not only furnishes a ground for disbelieving his or her other testimony, but also tends to show consciousness of guilt. (*People v Amador* (1970) 8 Cal.App.3d 788,791.)

The above rationale can also apply to evidence fabricated by a third person on behalf of a defendant. However, if a third person makes an effort to procure false or fabricated evidence, before evidence of the third party's effort to so can be admitted at trial, it must be proven that the defendant authorized the actions of the third party. (*People v. Caruso* (1959) 174 Cal. App. 2d 624, 640-641; *People v. Perez* (1959) 169 Cal.App.2d 473, 477-478; CALJIC 2.05.) This is consistent with underlying principle that a

defendant's knowledge of his own guilt, therefore his guilt itself, can be inferred from certain actions that defendant himself has taken to divert suspicion from himself and on to other known or unknown parties. (See *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1842-43.)

Consciousness of guilt is obviously a form of circumstantial evidence. As such, upon consent of counsel, the trial court instructed the jury according to CALJIC 2.01, which reads as follows.

> [E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable (CALJIC 2.01; Vol. 2 CT285.)

Further, authentication of a writing is required before secondary evidence of its content may be received in evidence. (California Evidence Code section 1401.) In this context "authentication" is defined as the

introduction of evidence sufficient to sustain a finding that it is the writing that the proponent evidence claims it is or establishment of such facts by any other means provided by law. (*McAllister v. George* (1977) 73 Cal.App.3d 258.)

C. Application of the Law to the Facts

There was absolutely no proof produced, let alone the above standard required by CALJIC 2.01, that appellant had anything to do with inducing the statement in question. The trial court should never have allowed People's Exhibit 34 to be read to the jury, as there was no evidentiary foundation that appellant somehow was party to the fabrication of this statement. As stated by trial counsel, there was no evidence that the statement was in appellant's handwriting. In fact, Detective Campbell testified the statement in question did not appear to be in the same handwriting as another document actually written by appellant. (Vol 8 RT1369.) Therefore, there was no proof that appellant wrote the statement.

Further, there was no evidence that appellant had any role in writing this statement. No evidence was presented as to the identity of the statement's author, let alone the author's connection to appellant. All that can be discerned from the contents of the statement is that it was addressed by the author to someone named "Anthony" or "Tone" and recounted the

interactions of "Anthony" or "Tone" and another person, Kendall, with appellant on May 6, 1997. The reference to "court" in the first line suggested that the document summarized anticipated testimony. However, nowhere in the statement was there an indication that appellant directed the unknown intended recipient of the statement to lie for him, and no evidence was presented, beyond the fact that it controverted the eyewitness testimony of the police officer who arrested appellant, that it was not true.

Further, as appellant was arrested on May 7, 1997, and this statement was dated May 22, 1997, it was impossible for appellant to have placed it in his backpack, or to have had possession of it at any time. There was no evidence who placed this statement in the backpack, under what circumstances it was placed, or why it was placed there at all. The backpack was not seized until the Jeep was impounded on July 1, 1997, almost six weeks after the statement was allegedly written and nearly two months after appellant's arrest. Detective Mark Campbell, who obtained the Jeep, had no knowledge of where it was, or who was in possession of it before July 1, the date on which he received it from a woman he identified only as "Cher" and nearly two months after appellant's arrest. He had no knowledge even that the Jeep that he received had any connection to appellant, whatsoever. It is impossible to determine that appellant had an association with the

statement or any role in its making. All that can be proven was that an unknown party, who may or may not have had a relationship with appellant, wrote a statement for two potential alibi witnesses. Under these factual circumstances, the prosecutor's attempt to imply that appellant had attempted to manufacture an alibi with the statement in question was based on nothing but speculation.

Put in terms of the requirement of authentication, this statement never should have been admitted before the jury because the prosecutor made no attempt to authenticate it according to the requirements of Evidence Code section 1401. The court committed reversible error in not requiring authentication of this document by any witness, and instead relying on the prosecutor's representation as to the authenticity of the document. (*Continental Baking v. Katz* (1968) 68 Cal.2d 512.)

As there was no proof, direct or circumstantial, that appellant authorized, encouraged or solicited this statement, the statement itself was irrelevant. Further, it was highly prejudicial to appellant's case because it gave the jury the impression that appellant was capable of subverting the criminal justice system from within his jail cell, and that he had attempted to create an alibi out of a consciousness of guilt.

Further compounding the court's error in admitting this statement

was its failure to give the appropriate "consciousness of guilt instruction."

When testimony is admitted from which an inference of a consciousness of guilt may be drawn, the court has a *sua sponte* duty to instruct on the proper method to analyze the testimony. (*People v Edwards* (1992) 8 Cal.App. 4th 1092, 1103-1104 ; *People v. Atwood* (1963) 223 Cal.App. 2d 316, 334.) The appropriate consciousness of guilt instruction, in this case CALJIC 2.05, is a correct statement of the law and instructs the jury "If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt , and its weight and significance, if any, are for you to decide." (CALJIC 2.05.)

This instruction would have given the jury proper guidance as to the jury as to the significance of such evidence and set forth the conditions under which such evidence could even be considered by the jury. Therefore, even if the contents of this statement was admissible, the failure of the court to give this instruction was reversible error. (*People v. Atwood* (1963) 223 Cal.App. 2d 316, 334.)

The statement in question created an atmosphere of undue prejudice

toward appellant. In doing so, it violated appellant's right to a fair trial, to due process of law, to a fair and reliable determination of guilt, to have every element of the charge proven beyond a reasonable doubt, and to due process and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their state analogues. (*Estelle v. McGuire* (1991) 502 U.S.62; *In re Winship* (1970) 397 U.S. 358.)

As the court's error is of constitutional magnitude, the prejudicial effect of the error must be measured against the standard of *Chapman v. California* (1967) 386 U.S 18, 24, where reversal is required unless the error was harmless beyond a reasonable doubt. Creating the image of an appellant who could bully people into fabricating false alibis for him could only have had the effect of prejudicing the jury against appellant. The state cannot prove this error harmless beyond a reasonable doubt.

Even under *People v. Watson* (1956) 46 Cal.2d 818, 836, the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached.

V. THE COURT'S ERROR IN FAILING TO INSTRUCT THE JURY ON LESSER RELATED OFFENSES TO COUNTS VI, VII AND VIII VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL AND RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the discussion of the jury instructions, the prosecution informed that court that defense counsel was going to be asking for instructions on lesser offenses regarding Counts VI, VII and VIII , the attempted murder of the two police officers and "John Doe,", respectively. (Vol. 9 RT1447-1448.) The trial court inquired of defense counsel as to what lessers instructions he wished to ask for, informing trial counsel "[k]eep in mind the case law now. The case law is very clear. We are not talking about and lesser related. No lesser related. It is only lesser included, necessarily lesser included." (Vol. 9 RT1448.) Trial counsel then requested an instruction on Penal Code section 245 (a) (assault with a deadly weapon.) The trial court stated that he would not give this instruction because assault with a deadly weapon was not a necessarily lesser included offense of attempted murder and unless the prosecution agreed to such an instruction the law was clear that the court could not give the instruction. (Vol. 9 RT1449.)[6]

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6. The prosecutor would later agree to the instruction of the lesser related section 245 (a) (1) offense for Count VIII only, and the court gave that instruction. (Vol.

Defense counsel then made a request for an instruction on negligent discharge of a firearm. The court also rejected this instruction, stating this such an charge was also a lesser related, rather than a lesser included, offense. The court also indicated that the "new rule" applied to the instant case even thought the charges "point back to 1997." (Vol. 9 RT1449-1450.)

In *People v. Birks* (1998) 19 Cal.4th 108, this Court held that the trial court has no duty under the California State Constitution to instruct on a lesser related offense solely upon the request of the defendant. In overruling *People v. Geiger* (1984) 35 Cal.3d 510, the *Birks* Court held that for such an instruction to be given both the prosecution and defense must agree that the instruction be given.

This Court in *Geiger* held that the rationale behind the trial court's giving instructions on lesser included offenses should be extended to lesser related offenses. Regarding instruction of lesser related offenses, this Court cited to *People v. St. Martin* (1970) 1 Cal.3d 524, 533 which stated;

> The requirement of instructions on lesser included offenses is based on the elementary principle that the court should instruct the jury on every material question. [Citation.] The state has no interest in a defendant obtaining an acquittal where he is innocent of the primary offense charged but guilty of a necessarily included offense. Nor has the state any legitimate interest in obtaining a conviction of the offense

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11 RT1737.)

charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense. Likewise, a defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth' (*People v. Geiger, supra,* 35 Cal.3d at 520.)

This Court then stated;

Considerations similar to those which led this court to conclude that instructions on lesser included offenses are required by due process appear in decisions of other jurisdictions holding that instructions on uncharged related offenses must also be given if it would be fundamentally unfair to deny the defendant the right to have the court or jury consider the 'third option' of convicting the defendant of the related offense. The importance of this option was explained by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Whitaker* (D.C. 1971) 447 F.2d 314,321 'The defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right. If the proof at trial would support a jury finding of guilt on a lesser included offense in accordance with the usual criteria, then doubt as to whether the prosecutor could rightfully have requested such a charge should not bar the charge being given at the request of the defense. This gives no unfair option to the defense over the prosecution. In most cases the prosecution can foresee whether the proof is likely to develop strongly favoring a verdict on a lesser included offense, in which event the indictment should so charge, which is the prosecutor's option. If the evidence is such that a jury can rationally - and is likely - to choose the lesser offense, then the interests of justice call for the defense to have the option of the lesser included offense - whether the prosecution chose to put it in the indictment or has the right later to request it or not. This recognizes 'the jury's central role in our jurisprudence.' (*Ibid.*)

This Court then cited to cases outside of this jurisdiction that have upheld defendant's right to have lesser related instructions given to the jury because they were "necessary to assure the fundamental fairness to which a criminal defendant is entitled." (*People v. Geiger, supra* 35 Cal.3d at 521-522; see *United States v. Pino* (10th Cir. 1979) 606 F.2d 908; *State v. Gopher* (1981) 633 P.2d 1195; *State v. Kupau* (1980) 63 Hawaii 1; *State v. Boyenger* (1973) 95 Idaho 396; *People v. Rivera* (1974) 186 Colo. 24; *People v. Chambliss* (1975) 395 Mich. 408.)

Fourteen years later, the *Birks* Court reiterated the rationale in compelling the giving of instructions for lesser included offenses where warranted. (*Birks, supra,* 19 Cal.4th at pp. 117-119.) However, it overruled the holding of the *Geiger* Court regarding instructing the jury on lesser related offenses without the consent of the prosecutor. The *Birks* Court reasoned that;

> [T]he historical development of the California rule for instructions on lesser necessarily included offenses is founded to a considerable extent on the rule's benefits and burdens to *both* parties, and its evenhanded application to each. We have consistently held that neither party need request such instructions, *and neither party can preclude them*, because *neither* party has a greater interest than the other in gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground, and *neither* party's "strategy, ignorance, or mistake[]" should open the way to such a verdict.(*Birks, supra,* 19 Cal.4th at p.127, italics in

original text.)

The Court proceeded to state;
Within the last three years, we have confirmed in particular that the *defendant*'s tactical objections cannot prevent the giving of instructions on lesser necessarily included offenses supported by the evidence. (citation omitted.) We suggested, among other things, that a contrary rule would be "unfair to the *prosecution*," because it would give the defendant unilateral power to force an all-or-nothing verdict when the trial evidence constituted less than conclusive proof of the stated charge and suggested the possibility of a lesser necessarily included offense. (citation omitted) (*Ibid.* italics in original text.)

Turning to lesser related offenses, the Court stated;

The *Geiger* rule, however, is calculated to produce just such an unfair one-way street where lesser related offenses are at issue. On the one hand, the defendant's right to notice of the charges limits the circumstances in which a jury, over the *defendant's* objection, may receive instructions on lesser offenses which are not necessarily included in those to which a plea was entered. On the other hand, if a lesser offense is related to the charge, as *Geiger* defines that term, *Geiger* gives the *defendant an absolute entitlement* to such instructions on request, regardless of notice or prejudice to the People, and even over their objection.
Given the parties' differing trial burdens and responsibilities, the consequent tactical imbalance is significant and inappropriate. As discussed in greater detail below, the prosecution, not the defendant, is the party traditionally responsible for determining the charges. When the prosecution discharges this responsibility by filing an accusatory pleading, it assumes the obligation to prove *beyond a reasonable doubt* all the elements, but only the elements, of the stated charge and any lesser offense necessarily included therein. (Citation omitted.) Unless the

> defendant agrees, the prosecution cannot obtain a conviction for any uncharged, nonincluded offense. Hence, the prosecution must focus all its resources and efforts on the stated charges. On the other hand, the defendant has no affirmative burden on any offense, charged or uncharged. The defense seeks only to persuade the jury by some means that the prosecution has failed to prove one or more elements of the stated offense beyond a reasonable doubt. (*Birks, supra*, 19 Cal.4th at pp.127-128 italics in original text.)

The Court then concluded;

> If the evidence presented by both parties convinces the prosecution (or the court) that not the stated charge, but only some lesser related offense, may have been established, and that the jury should therefore consider this option, the defendant may be able to block such consideration by raising notice objections, thus leaving complete acquittal as the only alternative to conviction as charged. On the other hand, if the prosecution *opposes* the jury's consideration of a lesser related offense which the prosecution did not charge, assumed no obligation to prove, and may thus have overlooked in presenting its case, the defendant, under *Geiger*, has the unqualified right to override the prosecution's objections. Regardless of prejudice to the prosecution, the defendant may insist that the jury be instructed on the lesser offense, thereby acquiring a third-option hedge against conviction of the charged offense. (*Birks*, *supra,* 19 Cal.4th at p.128.)

Therefore, the *Birks* Court's renunciation of *Geiger* was based upon the both the perception of unfairness to the prosecution and the prosecutor's historical prerogative in determining which charges to bring against a defendant.

Appellant recognizes that neither assault with a deadly weapon nor reckless discharge of a firearm are lesser included offenses of attempted murder, but rather lesser related offenses. However, appellant respectfully requests that this Court either reconsider its holding in *Birks* or distinguish said holding in that *Birks* was not a capital case and in instant case is such a case.

Appellant respectfully maintains the *Birks* Court's above stated concerns are not well-founded. The prosecution would not be put in a unfair position by allowing instructions as to lesser related offenses at the request of the defense. As in all cases, the prosecution had the first bite at the apple. It could have charged these lesser related offenses in the original charging document. California law clearly allows for the charging of separate crimes for the same offenses as long as conviction on these separate crimes does not result in multiple punishment for the same act. (Penal Code Section 654.) It is not as if the prosecution could not have foreseen the other lesser crimes for which appellant could have been charged for the May 7, 1997 incident. These alternative lesser crimes were of a very narrow category would have had to involve the discharge of a weapon at either the two police officers or "John Doe." There is nothing in California law that would have forbidden the prosecutor from charging all

possible related offense to the attempted murder. They simply decided not to do so for their own tactical reasons. Therefore "the prosecutor's power to decide whether to prosecute, and on what charges" remains totally unimpaired. (*Geiger, supra,* 35 Cal.3d at p. 520.)

Therefore, the *Birks* Court's statement that the *Geiger* rule created an "unfair one-way street where lesser related offenses are at issue" (*Birks* at p. 127) is inaccurate. The Court's concern was that defendant has an advantage in that the defendant can block the charging of a lesser included offense by claiming lack of notice but the prosecutor is bound by the defense decision to have the lesser related offense instructed. Again, what this line of logic ignored is that the prosecution could easily avoid this problem by including the lesser related offenses in the charging instrument. The Court further ignored the fact that *only* the prosecution has the right to decide what charges are to be filed and the defendant has no right to seek amendment to charges to included lesser related offenses

The premise that common sense and the California Constitution requires some sort of procedural equality regarding the relative protections of the government and a defendant simply is not born out by the infrastructure of American jurisprudence; the Bill of Rights of the United States Constitution. The purpose of the Bill of Rights was not to secure

equal procedural rights for the government in criminal trials. The wisdom of that most foundational document was its recognition that the government, due to its overwhelming resources and power, invariably holds the tactical high ground in a criminal prosecution. As such, it is able to bring to bear its enormous resources against a lone defendant. Therefore, it was recognized at the birth of this nation that to avoid the possible tyranny of such a government, various procedural safeguards, designed to counteract the government's power and collectively known as due process of law, must be created to protect the liberty and dignity of each and every individual. The list of these protections includes the most fundamental aspects of the criminal justice system and has gone unchallenged for over two hundred years. An analysis of them does not reveal the procedural "fairness" to the prosecution that this Court demanded in *Birks*. The fact that the burden of proof is beyond a reasonable doubt and that said burden falls upon the prosecution is not considered unfair to the government. The right of a defendant to remain silent in the face of the government's accusations is not considered unfair. Nor is a defendant's right to a unanimous verdict of guilt. Further, a defendant is allowed to appeal a judgment of guilt, while the government is precluded by the bar against double jeopardy from making any such appeal of an acquittal.

The founders of this nation were wise enough to realize that the government did not need their help to obtain a level playing ground at a criminal trial. The government's innate authority and power would assure their position. It was the individual that needed certain protections from the government to give the individual protection from the awesome power and possible abuse of that power by the government.

Therefore, not only not only wasn't the *Geiger* rule unfair to the prosecution in that the prosecution still retained the right to charge any crimes it wished, but the imposition of the entire "fairness" concept by the *Birks* Court runs counter to the entire theme of the Bill of Rights; the protection of the individual against the massive, intrusive and potentially corrupt practices of government. These protections are all in direct response to the desire of the framers of the Constitution to "limit and qualify" the powers of the government. (*Feldman v. U.S.* (1944) 322 U.S. 487; see also *Communist Party of the United States v. Subversive Activities Control Board* (1961) 367 U.S. 1 ; *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624.)

Therefore, the *Birks* Court's emphasis on the necessity of criminal procedures that are invariably balanced between the prosecution and defendant was misapplied. Instead of creating a procedure as to lesser

related offenses consistent with the limitation of governmental power, *Birks* actually served to deprive appellant of his right to have the jury instructed on a theory of his defense, a right guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. (*See Mathews v. United States* (1988) 485 U.S.58, 63.) The defense in this case was a lack of intent to kill, which would have reduced the attempted murder conviction to a lesser charge.

The United States Supreme Court has held that domestic rules of evidence or procedure may not be invoked to preclude a criminal defendant from establishing that he had been denied a fair trial. (See *Rock v. Arkansas* (1987) 483 U.S. 44; *Davis v. Alaska* (1974) 415 U.S. 308; *Washington v. Texas*, *supra* (1967) 388 U.S. 14, 19-23.) Because therefore, as the *Birks* rule against lesser related offenses instructions precluded appellant from presenting a legitimate defense, it also deprived appellant of a fair trial, and therefore violated his right to due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In addition, the instant case, unlike *Birks,* is a death penalty case. With respect to capital cases, the United States Supreme Court has held that "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case." (*Gilmore v. Taylor* (1995)

508 U.S. 333, 341; see also *Beck v Alabama, supra,* 447 U.S. at p.637; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) *Gilmore*, a non-capital case, involved possible instructional error and the High Court stated "outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error." (*Ibid.*)

Therefore, according to the United States Supreme Court, in a capital case, due to Eighth Amendment considerations, the danger of a jury misapplying state law is federal constitutional error. (See also *Beck v Alabama* (1980) 447 U.S. 625, and *Woodson v. North Carolina* (1976) 428 U.S. 280.) The law that was misapplied by trial court's adherence to *Birks* was the statutory sentencing scheme in California capital. cases. Penal Code section 190.3 (a) requires that the penalty jury "consider the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.2." Under this statute, the word "circumstances" does not mean merely the immediate temporal and spatial circumstances of the crime; rather it extends to that which surrounds materially, morally, or logically, the crime. (*People v. Smith* (2005) 35 Cal.4th 334,352.)

Therefore, the jury should have been allowed to consider whether or not the events of May 7, 1997, constituted an intentional desire to kill on

the part of appellant or something less legally and morally culpable. Having been deprived of the opportunity to find appellant guilty on a lesser charge, and being unwilling to acquit him all together, they were essentially compelled to consider appellant's's actions of May 7, 1997 as an intentional act designed to kill other human beings and therefore favoring a verdict of death.

The trial court's error in refusing to give the lesser related offense jury instructions, not only compels a reversal of the judgments in Counts VI, VII and VIII but mandates reversal of the death penalty. The court's error deprived appellant of his right to due process of law, a fair determination of guilty and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. As the court's error is of constitutional magnitude, the prejudicial effect of the error must be measured against the standard of *Chapman v . California, supra,* 386 U.S. at p. 18, where reversal is required unless the error was harmless beyond a reasonable doubt. Even under *People v. Watson, supra,* 46 Cal.2d at p.836 , the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached.

VI. THE $10,000 RESTITUTION FINE UNDER PENAL CODE SECTION 1202.4 WAS INCORRECTLY IMPOSED IN DISREGARD OF APPELLANT'S INABILITY TO PAY

A. Factual Basis of Claim

On April 29, 1999, the trial court ordered appellant to pay a $10,000 restitution fine pursuant to Penal Code section 1202.4 and Government Code section 13967 (a). (Vol 13 RT1865.) This was error because appellant is subject to a death sentence and has no reasonably discernable means of paying a fine of this magnitude.

B This Error Was Not Waived

The sentence in this case was not authorized by law, so it exceeded the jurisdiction of the trial court. (*People v. Neal* (1993)19 Cal.App.4th 1114,1120.) Because this error involves an unauthorized sentence that could not statutorily be imposed under any circumstance, the error was not waived. (*People v. Scott* (l994) 9 Cal.4th 331,354.)

C. The Trial Court Erred In Imposing This $10,000.00 Restitution Fine

Penal Code section 1204 (b) provides for the imposition by the trial court of a "restitution fine" of at least $200 but no more than $10,000 upon persons convicted of a felony. The trial court must impose these fines unless it finds compelling and extraordinary reasons not to do so and in

such a case must put its findings on the record. (Penal Code section 1204 (c).) This fine shall be paid directly into the State Restitution Fund (Penal Code Section 1202.4 (e).

However, if the court decides to set the fine beyond the minimum fine of $200.00 , the trial court is required to consider a defendant's financial ability to pay the fine.(PC 1202.4 (c); see *People v. Vieiera* (2005) 35 Cal.4th 264, 305,306.)

In the present case, appellant is on death row. As such, he is not permitted to engage in any prison labor to earn wages. (Penal Code section 2933 (a).) Prior to his conviction, appellant was in jail since his arrest in 1997. In addition, there is no indication any where on the record that appellant has any independent source of income or any assets which would afford him an ability to pay this fine. The fine $10,000.00 fine was simply imposed by the court without any additional comment. (Vol 15 RT2329-2330.) In short, appellant has no ability to pay this $10,000.00 fine and it is clear from the record that the court did not take this into account, as required by law.

Therefore, this Court should order that the restitution fine of $10,000.00 be reduced to the minimum fine of $200.00 due to appellant's inability to pay.

PENALTY PHASE

VII. BY COMMUNICATING TO THE JURY AN IMPROPER LEGAL STANDARD FOR THE WEIGHING PROCESS IN THE PENALTY PHASE, THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW, HIS RIGHT TO A FAIR DETERMINATION OF PENALTY, AND HIS RIGHT NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Summary of the Argument

During the oral voir dire of the prospective jurors in this case, the trial judge repeatedly asked them whether or not they could vote for the death penalty if the " bad outweighs the good" or words to that effect. As all of the prospective jurors were present each and every time the judge made this comment, the entire empaneled jury heard this comment from the judge over three dozen times. The judge's comments were *de facto* instructions to the jury.

These instructions to the jury, in the form of voir dire questions, were an improper statement of the California weighing standard for the determination of the death penalty. Not only did these instructions set a much lower standard for the jury to be able to find for death, but were unconstitutionally vague, and failed to furnish principled guidance between

death and a lesser penalty. As such appellant's rights to a fair penalty phase determination and due process of law and his right against cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

B. Factual Summary

The "Hovey" voir dire in this case was a group voir dire. The trial court brought all the prospective jurors who had filled out the questionnaires into the courtroom, filled the first twelve seats of the jury box and then replaced prospective jurors as they were excused either peremptorily or for cause. (RT 303 et seq.) Therefore , each non-excused juror heard the voir dire of the others.

At some point during its voir dire of the prospective jurors, the court asked dozens of individual prospective juror whether "if the bad outweighed the good" could they find for the death penalty. (RT342, 389, 433, 452, 458, 462, 464, 468, 473, 477, 481, 491, 500, 525, 526, 548, 552, 558, 569, 592-593, 595-596, 600, 613, 615, 629, 631, 638, 650, 659, 676, 684, 687, 697, 699, 711, 715, 718, 726.)

C. Legal Argument

Regarding the standards for the juror's imposition of the penalty in a death penalty case, Penal Code Section 190.3 reads in pertinent part

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

However, this Court has stated that the verbatim wording of the statute should not to be read it the jury. In *People v. Brown* (1985) 40 Cal.3d 512, 520, this Court held that penalty phase instructions phrased in the literal language of Penal Code section 190.3, given without further

explanation, were improper in that they might suggest to the jury that they, under a given set of circumstances, must impose the verdict of death. Further, the Court expressed a concern that a verbatim reading of the statute would imply to the jury that the imposition of sentence follows the rules of some sort of mechanical calculation of factors.(See also *People v. Burgener* (1986) 41 Cal.3d 505, 543.)

The jury instruction that ultimately evolved from *Brown* and its progeny was ultimately incorporated in CALJIC 8.88 which states in pertinent part as follows,

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or

enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death

instead of life without parole. (CALJIC 8.88)

This instruction was approved by this Court in *People v. Duncan* (1991) 53 Cal.3d 955, 978 and is used universally when instructing a penalty phase jury in California. (See also *People v. Davenport* (1995) 11 Cal.4th 1171, 1231.) Further, this Court has recently held that the words of CALJIC 8.88 "or words of similar breadth, are essential to avoid reducing the penalty decision to a mere mechanical calculation. (*People v. Perry* (2006) 38 Cal 4th 302, 320.)

This trial court did not follow this standard in voir dire. On dozens of occasions, at some point during its voir dire of the prospective jurors, the court asked the juror to the effect that "if the bad outweighed the good" could they find for the death penalty.

In essence, the trial court repeated the wrong standard of law for the finding of the death penalty dozens of times. As the jurors were all seated and present for the entire voir dire, all, including the jury eventually sworn, heard this improper standard from the court every time it was uttered.

This " bad outweigh the good" standard is unconstitutional for several reasons. First of all, it runs contrary to the California's own standards for the imposition of the death penalty and hence caused the arbitrary and capricious imposition of the death penalty in this case.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S.104, 112, 102 S.Ct. 869.) In so stating, the *Eddings* Court cited to *Gregg v. Georgia* (1976) 428 U.S. 153, 195) which held that the danger of an arbitrary and capricious death penalty could only be avoided "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." (*Eddings, Ibid.)*

Because the death penalty is unique "in both its severity and its finality" (*Gardner v. Florida* (1977) 430 U.S. 349, 357, the High Court has recognized an acute need for reliability in capital sentencing proceedings and that said sentencing process must meet the requirements of due process of law as guaranteed by the United States Constitution. (*Id* at p. 358; See *Lockett v. Ohio* (1978) 438 U.S. 586, 604, (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed")

The proper standard is that the aggravating circumstances must so substantially outweigh the mitigating circumstances that the death penalty is the only penalty warranted. While this is not a "beyond a reasonable doubt standard", it is certainly a higher standard than "bad outweighs the good." The use of this improper standard violated the above stated law in that it

made the sentencing process unreliable and arbitrary. Appellant's right to due process of law, a fair determination of penalty and right against cruel and unusual punishment was violated by the trial court's use of a clearly lower standard for the finding of the death penalty

Just as importantly, the word "good" in the context of the weighing standard is meaningless and hopelessly vague. This word never appears in either the death penalty statute nor any of the instructions and for very good reasons. The word "good" implies some positive act or behavior that a defendant performed through his own volition that would speak well for his character, hence ameliorate the punishment. While this type of evidence would indeed be mitigating evidence, it is clearly not the only type of mitigating evidence nor even the most prevalent. Mitigating evidence often takes the form of evidence of a defendant's deprived home life, abuse that he suffered, his addiction to alcohol and any number of other factors that in no way can be described as "good." In addition, there is often evidence from experts such as mental health professionals that explain to the jury how defendant's background created the person who committed the offenses that were the subject of the guilt phase. Again, there is nothing in such testimony that can be described as "good" within the normally accepted meaning of that word.

Such was the situation in this case. Appellant's penalty phase case consisted largely of horrific accounts of his childhood, the abuse he and his mother suffered, the feeling of abandonment and hopelessness experienced by appellant, the fact that he lost a brother to parental abuse, and his totally dysfunctional upbringing. In addition, the defense presented testimony from Dr. Richard Romanoff, a forensic psychologist, that appellant became psychopathic in large part because of this childhood history.

None of this is "good." Instead, it is tragic; but very relevant. However, on dozens of occasions, the jury heard the trial judge ask whether they could find for death if the "bad" outweighed the "good" Considering the facts of this case, this instruction insured the death verdict. The "bad" evidence was manifestly obvious. No reasonable juror could have concluded that the instant crimes were not very "bad" as was the evidence of the other violent crimes allegedly committed by appellant. The "good" was non-existent, not because there was no mitigating evidence, but because none of the mitigating evidence present could be considered "good" by those same reasonable jurors.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate punishment. (*Woodson v. North Carolina* (1976) 428 U.S., 280, 305, 96 S.Ct. 2978.) To this end, there is a federal

constitutional requirement that said sentence be individualized so that the penalty fit the offender. (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307, 110 S.Ct. 1078.) Accordingly, in *Richmond v. Lewis* (1992) 506 U.S. 40, 46-47, the High Court held a factor in aggravation is unconstitutionally vague if "it fails to furnish principled guidance between death and a lesser penalty." (See also *Maynard v. Cartwright* (1988) 486 U.S. 356, 361-364, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-433.) In addition, the Supreme Court also stated that in a "weighing state" such as California , it is constitutional error for a sentencer to give weight to a unconstitutionally vague aggravating factor. (*Richmond, Id.* at p. 46, see *Stringer v. Black* (1992) 563 U.S. 222, 229-232, 112 S.Ct. 1130.) Even though the *Richmond* case refers to vague aggravating factors, the legal principle is the same for a vague mitigating factor. The bottom line is that such factors fail to furnish the constitutionally required guidance for the choice between death and life In discharging the duty of imposing a proper sentencing in a capital matter, the sentencer is required to consider <u>all</u> mitigating and aggravating circumstances in the case. (*Williams v. Oklahoma* (1959) 358 U.S. 576, 585.).As the mitigating factors were equated with the vague term "good" no such consideration was possible.

As recently stated by the United States Supreme Court, "[o]ur cases

had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future. (*Abdul-Kabir v. Quarterman* (2007) 127 S.Ct. 1654, 1664.) The *Abdul- Kabir* Ciourt, at 1667, cited to *California v. Brown* (1987) 479 U.S. 538, 545 in holding all evidence of a defendant's background and character, even that does not necessarily reflect well on his character is admissible at the penalty stage as defendants with "emotional and mental problems may be less culpable that defendants who have no such excuse."

Due to the court's error, from the outset of the trial , this jury had been indoctrinated in an unconstitutional standard that both lowered the standard for returning a death verdict and created a standard for the penalty determination that was so vague as to the meaning of the word "good" that any verdict rendered by the jury was completely unreliable. In *Bollenbach v. United States* (1946) 326 U.S. 607, 612, the United States Supreme Court urged the trial courts to exercise great care in instructing the jury stating "The influence of the trial judge on the jury is necessarily and properly of great weight, ... and jurors are ever watchful of the words that

fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

The judge's word created constitutional error. As the court's error is of constitutional magnitude, the prejudicial effect of the error must be measured against the standard of *Chapman v . California, supra,* 386 U.S. at p. 24, where reversal is required unless the error was harmless beyond a reasonable doubt. Suggesting to the jury that mitigation consisted only in "good" things about appellant removed from the jury's purview much of the mitigating evidence presented in this case. The state cannot prove this error harmless beyond a reasonable doubt.

Even under *People v. Watson, supra,* 46 Cal.2d at p.836, the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached.

VIII. THE JURY'S RELIANCE UPON IMPROPERLY ADMITTED, NON-STATUTORY FACTORS IN AGGRAVATION DEPRIVED APPELLANT HIS RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW AND RELIABLE, NON-ARBITRARY DETERMINATION OF PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Procedural and Factual Summary

As indicated in the Statement of Facts, Frank Lewis testified that on July 11, 1994, he went to a party with appellant, whom he had known for four years. Lewis testified that he eventually left the party with appellant to hunt people to rob. Ultimately, the two came upon Lisa LaPierre sitting in her car. According to Lewis , appellant instructed him to approach Ms. LaPierre and steal her phone. Instead, Lewis shot her, paralyzing her for life. Lewis was fourteen years old at the time of this incident and testified that he was essentially under appellant's psychological control.

Ms. LaPierre also testified . However, she never saw who shot her nor could she, in any way, connect appellant to her shooting. Nor was there any other evidence connecting appellant to the LaPierre shooting.

In addition, as stated in the Statement of Facts, Leonard Washington testified that he, appellant and other individuals were involved in a series of bank robberies in which guns were employed. Once again, Washington's testimony was the only evidence presented that connected appellant to these

crimes.

B. Legal Discussion

Penal Code section 1111 provides, in pertinent part, that [a] conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (Penal Code section 1111.)

This Court has held that this provision of section 1111 applies to the a 190.3 (b) factor in aggravation in the penalty phase of a capital case and governs the proof. (*People v. Williams* (1997) 16 Cal.4th 153, 244; *People v. Williams* (1988) 45 Cal.3d 1268,1321.) As such, the testimony of an accomplice to a violent crime cannot, in and of itself, allow for the admission of that crime as an aggravating factor under section 190.3 (b)

Regarding the shooting of Lisa LaPierre, the only evidence that connected appellant to the crime was the testimony of the man who shot her, Frank Lewis. To be an "accomplice" within meaning of this section, one must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction. (*People v. Poindexter* (1958) 51 Cal.2d 142, 149.) A witness is liable to prosecution

within the meaning of accomplice testimony statute if he or she is a principal in the crime. (*People v. Hinton* (2006) 37 Cal.4th 839, 879.)

There is no doubt that Lewis was an accomplice to the LaPierre shooting. As Lewis's testimony was the only evidence as to appellant's involvement, "no conviction can be had." Put in the context of this case, the testimony of Lewis should never had been admitted before the jury because there was legally insufficient evidence.

The same can be said regarding the bank robberies. The only evidence that appellant was connected with these robberies was the testimony of an accomplice, Leonard Washington. Therefore, as with the testimony of Lewis, the testimony of Washington should never have been heard by the jury.

Therefore, the jury considered two improper aggravating factors in considering the penalty in that there was legally insufficient evidence for their admission. It was clear error to have allowed the testimony of these two witnesses.

Reliance on such unadjudicated criminal activity during the penalty phase deprived appellant of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection,

and a reliable and non-arbitrary penalty determination, in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

In California, aggravating factors play a specified role in the jury's penalty decision in that the jury decides the penalty by formally weighing aggravating and mitigating factors. (Penal Code section 190.3.) Therefore, California is a "weighing" state. Where the jury considers invalid aggravating factors in a weighing state and puts invalid factors on death's side of the scale, Eighth Amendment error has occurred. (*Sochor v. Florida* (1992) 504 U.S. 527, 532, [112 S.Ct. 2114].) Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 752, [110 S.Ct. 1441].)

These improperly considered aggravating factors could only have played a very significant factor in the determination of penalty. The entire incident involving Frank Lewis was devastatingly prejudicial. Not only did it lay criminal liability upon appellant for the tragic injury to a young woman, but it portrayed appellant as a exploiter of youth, a modern-day

Fagan with a gun, sending his young charge to do his violent criminal bidding. It portrayed appellant as a truly evil man. The testimony of Washington similarly portrayed appellant as a violent, avaricious criminal who would use others to do his bidding. The jury was told that they could consider it as a factor in aggravation. This improper consideration had a "substantial and injurious effect or influence" on the jury's verdict of death. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 113 S.Ct. 1712.). Therefore the death penalty should be reversed.

In addition, the improper admission of this testimony was prosecutorial misconduct. It must be assumed that the prosecutor knew of the law related above. However, it spite of this, the prosecutor called Frank Lewis and Leonard Washington to the stand knowing that without corroboration their testimony was essentially inadmissible and highly prejudicial to appellant. A prosecutor has a special duty commensurate with his unique power to assure that defendants receive fair trials. (*United States v. LePage* (9th Cir 2000) 231 F3d 488, 492.) It has been long held by the United States Supreme Court that "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) The prosecutor "is the

representative not of any party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*People v. Fierro* (1991) 1 Cal.4th 173, 208.)

In this case the prosecutor intentionally used an unfair tactic to convict appellant. In doing so, he violated appellant's right to a fair trial, right to due process of law, right to fundamental fairness and right to reliable determination of guilt under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution and their state analogues.

These errors were of constitutional magnitude as it violated appellant's right to a fair trial, due process of law and a reliable determination of penalty. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Based upon the highly inflammatory nature of the evidence, it cannot be shown that the errors were harmless beyond a reasonable doubt. The death judgment must be reversed.

Even under *People v Watson, supra,* 46 Cal.2d at p. 836, the error is manifest and extremely prejudicial. It is reasonably more probable that a

result more favorable to appellant would have been reached.

IX. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, REASONABLE DETERMINATION OF PENALTY AND FREEDOM OF EXPRESSION PURSUANT TO THE FIRST, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION

A. Factual and Procedural Summary

During the guilt phase of the trial, the prosecutor attempted to introduce into evidence the contents of the backpack found in the back of the white Jeep Cherokee (Exhibit 17), specifically, the sheets of rap lyrics allegedly written by appellant and contained in a red note book. (Exhibits 47 and 48; Vol. 8 RT1428.)

The prosecutor argued that the probative value of these lyrics outweighed the prejudicial impact because it demonstrated appellant's intent to shoot officers, commit a car jacking and his gang affiliation. (Vol. 8 RT1429-1430.) The court ultimately denied the prosecutor's request for admission of these lyrics but stated that they might be admissible in the penalty phase. (Vol. 8 RT1444-1446.)

During the penalty phase, the prosecutor proffered this same evidence for the jury's consideration in the penalty phase. The court

addressed defense counsel; "I did indicate that I thought it was more appropriate at the penalty phase? Do you want to address that issue? I am inclined to let it in. I think it does go to motivation under Evidence Code 352. Perhaps the prejudice outweighed the probative value at that time. I do not think that it does now." (Vol. 11 RT1869.)

Appellant's counsel objected to the admission stating that the evidence sought to be introduced was "nothing but lyrics, basically" and its admission would be very prejudicial to appellant. Counsel argued that the lyrics are simply an example of the field of music known as gangster rap and had no probative value, especially in that they were written years before the crimes . (Vol. 11 RT1869.)

The court overruled this objection, stating

> It seems to me it's relevant to the circumstances of the crime It goes to the state of mind, his attitude toward the police, his attitude toward crime, attitude toward carrying concealed weapons. Even if they were written in 1991, they were updated, and I think he was carrying them currently Having looked through the rap lyrics, you can certainly argue to the jury that they don't have the same import and you might have a better argument today because it is more common today even when it was updated Perhaps in '96 or '97 when they were seized. Weighing them under 352, I think that the probative value in the circumstances outweigh the prejudice. (Vol 11 RT1869-1870.)

The lyrics were admitted into evidence through the testimony of Detective

Ronald Cade and read verbatim as follows:

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I'm pullin so many hoes I give my crew some

Pistol whips any bitch that wanna act dumb

I got so much money its crazy

Any now the IRS wanna fade me

But I say fuck them cause I ain't the one to get played.

So make room for the youngsta

I stepped to one of the cops that tried to play

Put the nine to his head (bam) and rock a bye baby

They had a gang sweep just the other day

Cops rushed to the projects where I stay

Sheriffs on my ass cause I knew I tried to run

Hopped a few fences and tossed my gun

I just barely go far enough to toss my gun

Ran Up an alley way but they gave close chase

If it weren't for a fence I could've made my escape

All I could see were flash lights and night sticks

And then I heard gun shots

Then all of a sudden cops started to drop

No time to waste I scooped up a nine

I can take a hint. I guess it was time to get mine

It's the youngsta better known Young Floyd

Down for smokin' a nigger and his homeboys

That's how I came up. I used to be a hit man

Sent on a mission of death take your breathe and

Break the hell out cause a could give a fuck about

nuthin

But stick a nine in your mouth, punk

I told you it's nothing personal gee.

It's business I gets to go Rambo

Ski mask blacked out from head to toe

I pack and nine and a 45

To make sure nobody stays alive.

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I did a jack and came up with much keys

Got a crew now clockin' the big gees

Any static is out we didn't tolerate

Another nigga that out taken up space

I grew up broke amongst thieves and springstas

But I know I fina get mine

So make room for the youngster

B. Discussion of Law of Statutory Factors in Aggravation

Penal Code section 190.3 sets forth the procedure that a jury must use in reaching the penalty determination in a capital trial. This language, derived from the 1978 initiative made certain fundamental changes from the 1977 death penalty law, which it superceded. The most critical changed was described by this Court in *People v. Boyd* (1985) 38 Cal.3d 762, 773.

> The 1978 initiative, however, enacted a crucial change in the method by which the jury determines whether to impose the death penalty - a change which compels us to depart from our language in *Murtishaw*. Under the 1977 version of section 190.3 the jury must "consider, take into account and be guided by the aggravating and mitigating circumstances" enumerated in that section. The statute, however, provided no further guidance or limitation on the jury's sentencing discretion. In the absence of such a limitation, the jury was free, after considering the listed aggravating and mitigating

factors, to consider any other matter it thought relevant to the penalty determination. The 1978 initiative, by contrast, provided specifically that the jury "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances. If [it] determines that the mitigating circumstances outweigh the aggravating circumstances [it] shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (section 190.3, see discussion in *People v. Easley, supra,* 34 Cal.3d 858, 881-882.) By thus requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the initiative necessarily implied that matters not within the statutory list are not entitled to any weight in the penalty determination

The Court proceeded to state;

The change from a statute in which the listed aggravating and mitigating factors merely guide the jury's discretion to one in which they limit its discretion requires us to reconsider the question of what evidence is "relevant to aggravation, mitigation, and sentencing." (Section 190.3.) Relevant evidence "means evidence ... having any tendency in reason to prove or disprove any disputed fact *that is of consequence to the determination of the action.*" Evid. Code section 210; see *People v. Ortiz* (1979) 95 Cal.App.3d 926, 933 (Italics added.) Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors. Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation. (*Boyd, supra,* at p. 773.)

Therefore, evidence that does not apply to one of the listed

aggravating factors is inadmissible before the penalty jury. (*People v. Boyd, supra,* 38 Cal.3d at p.775, citing to *People v. Easley* (1983) 34 Cal.3d 858, 878.) This Court stated in *Boyd* that while a defendant is permitted under 190.3 (k) to introduce any evidence as to defendant's character or record or the circumstances of the crime as a basis for a sentence less than death, the prosecutor does not have a concomitant right to present evidence that defendant was of bad character unless it is specifically within the statutory scheme of 190.3. (*Id.* at p.775 see *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.) The Court pointed out that there was no requirement under the federal constitution that the prosecutor be allowed to present to the jury any evidence that may serve as a basis for the death penalty. (*Boyd* at p. 775 citing to *Zant v. Stephens* (1983) 462 U.S. 862, 978-879, fn. 17.)

C. Application of Law to the Facts of Instant Case

Under the above law as defined by this Court, the rap lyrics in question were inadmissible in the penalty phase and should have been excluded in that they were not relevant to any of the factors in aggravation listed in Penal Code section 190.3. This statutory provision permits the prosecution at the penalty phase of a capital case to introduce evidence of

"criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." However, the prosecution must be able to show some actual criminal activity to be allowed to introduce such evidence. (Section190.3; e.g. *People v. Hines* (l997) 15 Cal.4th 997, 1057; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187, *People v. Harris* (1981) 28 Cal.3d 935, 962-963; *People v. Benavides* (2005) 35 Cal.4th 69, 112.)

The fact that appellant possessed these lyrics constituted neither an act of violence, an implied threat of violence, nor any other criminal activity. As such, they were completely outside the statutory limitations placed upon such evidence. The admission of these lyrics went to appellant's character, not actions. They represented an attempt by the prosecutor to demonstrate to the jury that appellant was what he wrote about; a bad person who wouldn't flinch from killing police and fellow gang members and who mistreated women. In fact, the prosecutor made it clear to the jury through Detective Cade that nothing in any of the lyrics found in the backpack had anything positive to say about women, police or the general African-American community. (Vol 12 RT1970-1971.)

This Court made it clear that the 1978 death penalty statute, unlike its predecessor, barred the admission of evidence of defendant's character

unless it was in the form of a prior conviction or violent criminal activity. (*Boyd, supra,* at pp. 772-773.)

The only time that such character evidence is permitted before the jury is to rebut defense proffered evidence of defendant's good character. For example, in *People v. Clark* (1993) 5 Cal.4th 950,1032, where the defendant wore a cross every day of his trial and his mother testified at the penalty phase that he wore a cross on and off throughout his childhood, this Court held that the prosecution was entitled to rebut the inference that defendant was a religious person with testimony that he was not wearing a cross when arrested. In *People v. Raley* (1992) 2 Cal.4th 870, 912, this Court held that the admission of pornographic photos of women in bondage found in appellant's bedroom was no improper aggravation where the evidence was relevant to rebut appellant's claim that he had a respectful, kind and chivalrous attitude toward women.

The Ninth Circuit dealt with this issue in *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, overruled on other grounds by *Lambright v. Stewart* (9th Cir. 1999) 191 F.3d 1181. *Beam* made clear that no further detriment should incur to a capital defendant due to his personal life style and that aggravating factors that allowed such evidence in the penalty phase were unconstitutional under the Eighth and Fourteenth Amendments to the

United States Constitution. The court stated "Simply put, a state may not use the death penalty as a mechanism for enforcing societal norms regarding sexual activity." (*Id.* at pp.1308-1309.)

In *Delaware v. Dawson* (1992) 503 U.S. 159, the United States Supreme Court held that pursuant to the First Amendment to the United States Constitution, guaranteeing freedom of association and speech, evidence that defendant was a member of the Aryan Brotherhood was inadmissible in the penalty phase of a capital trial, because it was not, in and of itself, relevant to any aggravating factor because the evidence proved nothing more than Dawson's beliefs and associations. The High Court contrasted a situation like the one in *Dawson* , where defendant's association with the Aryan brotherhood had no relation to the circumstances of the offenses to cases such as *Barclay v. Florida* (1983) 463 U.S. 939, 942-944, where such affiliation was relevant to the motivations behind the capital crime (defendant's membership in Black Liberation Army and his desire to start a "racial war" relevant to motivations to murder of white hitchhiker.)

In the instant case, appellant's counsel made no claim that appellant lead a morally pure life style or that he was a basically non-violent individual who treated all with respect. Therefore, there was nothing to

rebut by any prosecutorial "character evidence." Assuming that these lyrics, written 6 years before the attempted murder of the police officers ever reflected appellant's actual beliefs, they were inadmissible in that they were at worst a reflection of appellant's beliefs, not a threat of violence or implied violence required by the statute. Further, defense counsel presented unchallenged evidence that these lyrics were simply an example of the musical genre known as gangster rap music and that high profile artists such as "Ice T" composed similar lyrics. Even Detective Cade admitted that these type of rap songs had become part of the popular culture and were played on music televison and the radio. (Vol 12 RT 1967-1968; Vol 13 RT2121.) In fact, defense counsel introduced as defense Exhibit "O" the lyrics to the Ice T album "Body Count." (Vol. 13 RT 2111-2112.)

In justification of the admission of these lyrics, the court held that they were "relevant to the circumstances of the crime. It goes to the state of mind, his (appellant's) attitude toward the police, his attitude toward the crime, attitude toward carrying weapons." (Vol. 12 RT1869-1870.) However, these lyrics had absolutely nothing to do with the crimes in question. Extending the trial court's rationale, any prior thoughts of violence would be admissible to show that defendant had propensity or desire to commit crime in general, hence, this crime in particular.

Regarding the meaning of "circumstances of the crime" as used in section 190.3 factor (a), this Court has held that this factor "does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime." (*People v. Blair* (2005) 36 Cal.4th 686, 749.)

However, there are no cases reported that would even suggest that the "circumstances of the offense" be extended to mere thoughts and opinions of a defendant that were memorialized years before the crimes for which he was convicted in the capital trial.

The reason for the absence of such precedent is obvious. If such remote thoughts, "attitude" and non-violent actions were considered to be circumstances of a capital offense then virtually all anti-social acts of a defendant could be said to fall into this aggravating factor. For example, under such an overly broad definition of circumstances of the case a defendant's general dislike and disrespect of women could be utilized as an aggravating circumstance to a rape murder or his general dislike of honest work could be admitted as aggravating evidence to a robbery-murder conviction. The reason why such evidence is inadmissible is that it is not admissible evidence of the circumstances of the crime, but rather, inadmissible evidence of a defendant general bad character.

In addition, most of the improperly admitted lyrics had nothing to do with any anti-police attitude. They involved abusing women, cheating the Internal Revenue Service, being a "hit man", shooting fellow gangsters and running a "crew" that committed drug related crimes. Even under the broadest possible definition of "circumstances of the offense", these lyrics are irrelevant and inadmissible.

The lyrics are nothing more than a ballad of a young gangster named Youngster told through the prism of "gangster rap." Whatever one may think of the social benefit or artistic quality of these lyrics, they no more logically reflect the personality or conduct of their author any more than Lady Macbeth reflects any murderous conduct on the part of William Shakespeare, or that the violence in a Stephen King work reflects any violence in the conduct of its author.

Where a state has provided for the imposition of a criminal punishment in the discretion of a jury, defendant's interest in the exercise of that discretion is not simply a matter of state procedural law. The defendant has a legitimate right under the United States Constitution to have the jury exercise its discretion according to the limitations of the state statute granting said discretion. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 345-346.) Therefore, when a state court deprives a defendant of the sentencing

procedure guarantee under state law, his "liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State", a violation of a defendant's right to due process of law. (*Ibid.*; see *Vitek v. Jones* (1980) 445 U.S. 480, 488-489.)

In the instant case, the improper ruling of the trial court deprived appellant of his right to be sentenced according to the California statutory scheme embodied in Penal Code section 190.3. The prejudice was manifest. The admission of this inadmissable and prejudicial material painted a picture of appellant as an individual who, for a long time before the capital offense, held and expressed attitudes of violence against virtually everyone. This violated appellant right to due process of law, a fair trial and a reliable determination of the penalty pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In addition, the admission of appellant's thoughts committed to paper was a violation of his First Amendment right to free expression. The United States Supreme Court in *Zant v. Stephens*, *supra,* 462 U.S. at p. 885 stated that an aggravating circumstance is invalid if "it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected"

Appellant's right to express his ideas is clearly protected under the First Amendment. The only thing that these lyrics represented were

appellant's free expression. As indicated above, said expression of thought had nothing to do with the circumstances of any offense of which appellant was convicted. Therefore, the admission of this prejudicial evidence violated appellant's rights to free expression and speech under the First Amendment of the United States Constitution. (See *Delaware v. Dawson, supra,* 503 U.S. at pp. 163-165.)

As the court's error is of constitutional magnitude, the prejudicial effect of the error must be measured against the standard of *Chapman v. California, supra,* 386 U.S. at p. 18, where reversal is required unless the error was harmless beyond a reasonable doubt. Even under *People v. Watson, supra,* 46 Cal.2d at p.836 , the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached.

Therefore, the judgment of death must be reversed.

X. THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO PRESENT "VICTIM IMPACT" EVIDENCE THAT FAR EXCEEDED THE LIMITS SET BY THIS COURT, THEREBY DENYING APPELLANT THE RIGHT TO A RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Summary of the Argument

In the penalty phase of a capital trial, the prosecutor is allowed to present to the jury evidence concerning the character of the victim and the effect of the victim's death upon her family, friends and society. However, there are limits to this evidence. This Court has held that the emotional impact of this evidence may not hold sway over reason and must not divert the jury from its task; to determine a defendant's penalty based upon a rational evaluation of the evidence and law.

The trial court allowed the prosecutor to exceed those limits. By allowing before the jury graphic and emotionally charged evidence about the victim, the court deprived appellant of his right to a fail and reliable determination of penalty under the Eighth and Fourteenth Amendments to the Constitution.

B. Factual and Procedural Summary

At the outset of the penalty phase, defense counsel raised an

objection to the admission to some of the "victim impact" evidence proffered by the prosecution. Specifically, counsel indicated to the court that the prosecutor had shown him an exhibit entitled "Our Weekend with Alex Dunbar." (Exhibit 54.) The district attorney indicated that the Exhibit was a poem that a friend wrote to the Dunbar family and that the prosecution imposed a picture of Mr. Dunbar on it. The exhibit would be introduced through the testimony of Mr. Dunbar's mother Defense counsel pointed out to the court that the person who wrote this poem would not be at trial to testify and objected on these grounds . The court overruled the objection stating that it was not a valid objection. (Vol 12 RT1872-1873.) Defense counsel also objected to one of two photo boards that the prosecutor proffered. The board objected to contained photos of Mr. Dunbar as a child. (Exhibit 53.) Counsel argued that this photo board was unduly prejudicial, in that the jury could understand from the other photographs of Mr. Dunbar what he was like in life. The board consisted of five photos of Mr. Dunbar as a child with a photo in the center of Mr. Dunbar as he was prior to his death. (Vol. 12 RT1873.) The trial court overruled this objection, stating that the photo board was not prejudicial stating " I understand that any picture I suppose has the ability to cause a response. I don't see those as being anything that particularly pulls at the

somebody's heart strings" (Vol. 12 RT1874.) In addition, the prosecutor had an envelope of other photos of the decedent but promised "not to overdo it." (Vol.12 RT1874.) Further, the prosecutor indicated to the judge that he had photos of Lisa LaPierre that he wished to introduce. The court indicated that "I told you I would let you have one of those." The prosecutor indicated to the court that she submitted the photo she chose to defense counsel. (Exhibit 46.) Appellant's counsel objected to the admission of this photo and the court overruled the objection stating that the prosecutor had not "gone overboard." (Vo. 12 RT1874-1875.) Ms. LaPierre would later testify that this was a photo taken of her a few years before she was shot. (Vol. 12 RT1894.)

At trial, the prosecutor introduced the photo board (Exhibit 53) through Mr. Dunbar's mother. She identified the photos as photos of the decedent when he was in first grade and in his cub scout uniform, on an outing to the zoo, while on vacation with his family and when he went to camp as a child. (Vol. 12 RT1996-1999.) Exhibit 54 was also identified by Mr. Dunbar's mother as photo of decedent superimposed over a written version of the eulogy given by a friend at the funeral. (Vol. 12 RT 2008.) The eulogy stated in part "rarely in life do you meet such a person" It also recounted an April 1st meeting with him and stated that the decedent was

"happily full of life" and that he talked about his dreams and about "relationships, goals, life and love."

C. There are Constitutional Limits to the Nature of Victim Impact Evidence that the State May Present at the Penalty of a Capital Trial

In *Payne v. Tennessee* (1991) 501 U.S.808, 827, the United States Supreme Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 824.) In doing do the High Court limited this evidence to only a "quick glimpse" of the life of the victim during the penalty phase of a capital trial without running afoul of the Eighth Amendment. (*Id.* at p. 822.)

Several of the concurring opinions in *Payne* emphasized the role that the Due Process Clause plays in limiting victim impact evidence. (*Payne v. Tennessee, supra,* 501 U.S. at p. 581(conc. opn. Of O'Connor, J.) [noting that, where "a witnesses testimony or a prosecutor's remark so infects the sentencing proceeding as to render in fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth

Amendment"] *id.* at p. 836 (conc. opn. of Souter, J.) ["Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation"].)

A few months later, in *People v. Edwards* (1991) 54 Cal.3d. 787, this Court reacted to the *Payne* decision. In *Edwards*, this Court held that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*People v. Edwards, supra*, 54 Cal.3d at p. 836.)

However, *Edwards* did place limitations upon this sort of evidence. The Court recognized the *Payne* admonition that this sort of evidence may be "so unduly prejudicial that it renders the trial fundamentally unfair" that it violates the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) Therefore, this Court limited its holding stating such evidence "only encompasses evidence that logically shows the harm caused by the defendant. We do not now explore the outer reaches of evidence admissible as a circumstance of the crime and do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*." (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.)

This Court continued:

> Our holding does not mean there are no limits on emotional evidence and argument. In *People v Haskett*, [citation] we cautioned 'Nevertheless, the jury must face its obligations soberly and rationally, and should not be given the impression that emotion may reign over reason.'[Citation] In each case, therefore, the trial court must strike a careful balance between the probative and prejudicial. [citations] On one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury away from its proper role or invites an irrational or purely subjective response should be curtailed. (*People v. Edwards*, supra, 54 Cal.3d at p.836.)

In *People v. Howard* (1992) 1 Cal.4th 1132, 1191, this Court confirmed that there are two related yet separate tests for the admission of this sort of evidence; one using a state standard and the other a federal constitutional standard. Under state law the argument and evidence presented to the jury under the "victim impact" rationale should not be so inflammatory so as to "divert the jury's attention from its proper role." *(People v. Edwards, supra*, 54 Cal.3d, *supra,* at pp. 835-836.) Under the federal test, the argument and evidence must not be "so unduly prejudicial that it render(ed) the trial fundamentally unfair." *(Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

The Court has also set forth some more specific limitations under

which the prosecutor must operate in the use of "victim impact" evidence. In *People v Thomas* (1992) 2 Cal.4th 489, 536 the prosecutor is instructed that exhortations for sympathy and concern for the victim's family be "brief." This Court also restated that to be legally appropriate, prosecutorial comments must not be so inflammatory to invite an irrational or purely subjective response from the jury. (*Ibid.*)

In *People v. Taylor* (2001) 26 Cal.4th 1155, this Court held that victim impact evidence must not be "so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*Id.* at p. 1172.) In doing so, this Court cited to one of its oldest death penalty decisions, *People v. Love* (1960) 53 Cal.2d 843, 854-857, where this Court held the prosecutor exceeded the limits of proper evidence and comment.

In *Love,* the defendant objected to a photo of the victim in the hospital taken immediately following her death and to a tape of the victim's final moments, replete with the painful groans of a dying person in extreme pain. The doctor that attended to her already testified as to the fact that this pain was as extreme as a human being could suffer.

The Court held the photo and the tape to be the type of evidence that serves primarily to inflame the passions of the jury and should have been

excluded. The Court indicated that the trial judge should have considered that there are less inflammatory ways to present evidence of the victim's suffering and because the doctor had already testified as to her pain, "there was no need to show the jurors the expression on her face or to fill the court room with her groans." (*People v. Love, supra,* 53 Cal.2d at p. 857.)

Further, this Court has advised trial courts that "victim impact and character evidence may become unfairly prejudicial through sheer volume." (*People v. Robinson* (2005) 37 Cal.4th 592, 652 quoting *Salazar v. State* (Tex. Crim. App. 2002) 90 S.W. 3d 330,336.)

D. By Allowing the Admission of Improper Victim Impact Evidence the Trial Court Deprived Appellant of his Right to a Reliable Determination of Penalty.

1. Admission of Exhibits 53 and 54 Violated the Limitations on Victim Impact Evidence Set By this Court

The evidence admitted over appellant's objection clearly exceeded the above discussed limits on victim impact evidence. The photos of Mr. Dunbar as a child (Exhibit 53) were calculated to divert the jury from its proper role in reaching a rational decision on the penalty. These photos had nothing to do with who Mr. Dunbar was as a human being. Instead, they were calculated to inflame the juror's passions, depicting various stages of his childhood that would involve the most emotional response possible from

the jury.

The same argument applies to Exhibit 54, Mr. Dunbar's eulogy imposed over a photo of him. This sort of presentation was again calculated to appeal to the jury's emotions and deflect them from, making a rational, measured decision as to the fate of appellant.

The presentation of this type of pictorial childhood history does nothing to aid the jury in reaching a rational decision on this most weighty of all tasks in the law. The fact that Mr. Dunbar had a childhood which contained trips to the zoo, the Cub Scouts and a family vacation says nothing about the person he was when he died. The prejudice to appellant lies in the impression imparted to the jury that the *child* in those photos was the one who was actually killed. The jury was compelled to contemplate the death of an ultimately doomed little boy who never knew that he would never grow up to live out his natural life.

2. The Photo of Lisa LaPierre Similarly Violated the Limitations of Victim Impact Evidence Set by this Court

Lisa LaPierre testified before the jury about being shot and the disabilities she suffered as a result of her injuries. (Vol 12 RT1892 et seq.) As part of her testimony she identified a photo of herself taken prior to said

injuries. (Exhibit 46.)

Ms. LaPierre suffered devastating injuries. Her testimony revealed that she could no longer take care of herself and her life was extremely limited since her injuries. She testified that she could she could not move herself from her shoulders down and could not even breathe by herself. (Viol 12 RT1895-1896.)

The admission of the photograph of Ms. LaPierre in happier and healthier times exacerbated the already highly emotionally charged testimony of Ms. LaPierre. It encouraged the jury to allow their emotions to gain ascendance over their logic and judge appellant's fate on a purely emotional basis. It is simply impossible to view this photo and compare it to the current condition of Ms. LaPierre without invoking the deepest passions in the jury. For this reason, this Court has indicated that the trial court should discourage the use of such photos that are used only to invoke sympathy for a victim. (*People v. Frank* (1990) 51 Cal.3d 718, 734; *People v. Hovey* (1988) 44 Cal 3d 543, 576.)

The admission of this evidence rendered the entire penalty phase unfair, thereby violating appellant's right to due process, fundamental fairness, fair trial and a reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution. (*Payne v. Tennessee, supra,* 501 U.S .at p. 825.) Further, the admission of this evidence violated state law in that the evidence presented to the jury was so inflammatory that it diverted the jury's attention from its proper role. *(People v. Edwards, supra,* 54 Cal.3d, *supra,* at pp. 835-836.)

These errors were of constitutional magnitude as it violated appellant's right to a fair trial, due process of law and a reliable determination of penalty. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Based upon the highly inflammatory nature of the evidence, it cannot be shown that the errors were harmless beyond a reasonable doubt. The death judgment must be reversed.

Even under *People v Watson, supra,* 46 Cal.2d at p. 836, the error is manifest and extremely prejudicial. It is reasonably more probable that a result more favorable to appellant would have been reached.

XI. APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, TO CONFRONT WITNESSES, AND TO A RELIABLE AND NON-ARBITRARY PENALTY DETERMINATION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S IMPROPER ADMISSION OF HEARSAY TESTIMONY IN THE PENALTY PHASE

The hearsay provisions in the Evidence Code apply in full force to the penalty phase, and unless there is a particular hearsay exception applicable, hearsay is inadmissible in the penalty phase. According to this Court:

> [T]he 1978 death penalty law, like each of its predecessors providing for a penalty phase, does not adopt any rules of evidence peculiar thereto, but simply allows the generally applicable evidentiary rules to govern. Second, as we held in *Purvis* and *Hamilton* if evidence is inadmissible at the guilt phase, it is also inadmissible at the penalty phase. *People v. Purvis* (1959) 52 Cal.2d 871, 883; *People v. Hamilton* (1963) 60 Cal.2d 105, 128-131; *People v. Ray* (l996) 13 Cal.4th 313, 376.)

Exhibit 54 amounted to testimony from a friend of Mr. Dunbar as to what it was like to know the decedent. (Argument X, *supra.*) It was a written version of a spoken eulogy given at Mr. Dunbar's funeral. It was obviously admitted for the truth of the matter asserted in it and as such it was hearsay. Further, it came in under no applicable statutory exception to the hearsay rule.

While the prosecutor has a right to present victim impact evidence in a form limited by law, he or she is not entitled to shield that evidence from scrutiny by denying appellant the right to confront and cross-examine witnesses who deliver such testimony. Therefore, the trial court's holding that appellant's counsel's objection was not valid was incorrect.

These hearsay statements fell into no recognized exception to the hearsay rule As such, their admission violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process of law, right to confront witnesses, right to a fair trial, and his right to a reliable determination of penalty.

As the court's error is of constitutional magnitude, the prejudicial effect of the error must be measured against the standard of *Chapman v. California, supra,* 386 U.S. at p. 24, where reversal is required unless the error was harmless beyond a reasonable doubt. The improperly admitted evidence presented a highly sympathetic and emotional portrait of Mr. Dunbar, clearly designed to impact the jury. However, it was impossible for appellant to refute this emotionalism as it was the product of an unknown declarant, unavailable for cross-examination. If this evidence was sufficiently important in the to present it in such a fashion, it's rebuttal must be just as important. There is nothing in the law that shields "victim-

impact" evidence from the same type of scrutiny has any other type of evidence in a criminal trial. Even under *People v Watson, supra,* 46 Cal.2d at p. 836, the error is manifest and extremely prejudicial

XII. THIS COURT'S DECISION IN PEOPLE V. EDWARDS MISCONSTRUED THE TERM "CIRCUMSTANCES OF THE OFFENSE" VIS A VIS PENAL CODE SECTION 190.3 (A) AND ITS HOLDING SHOULD BE RECONSIDERED

A. Legal Argument

If the United States and California Constitutions do not ban or limit victim impact evidence, California's death penalty statute does.

During the penalty phase of a capital trial, the prosecution may only present evidence of statutorily listed factors, and a finder of fact may consider only evidence that falls within the ambit of one of the listed factors. (See *People v. Boyd, supra,* 38 Cal.3d at p. 775 [concluding that "evidence irrelevant to a listed factor [in §190.] is inadmissible"].) As Justice Kennard has noted, section 190.3, subdivision (a) "does not - expressly list the specific harm caused by the crime, the victim's personal characteristics, or the emotional impact of the capital crimes on the victim's

family." (*People v. Fierro* (1991) 1 Cal 4th 173, 259 (cone. & dis. opn. of J. Kennard.)

Accordingly, Mr. Nelson respectfully requests that this Court revisit the meaning of the term "circumstances of the crime," as used in Penal Code section 190.3, subdivision (a), and conclude that victim impact evidence is a "circumstance of the crime" only when it relates to characteristics of the victim that the defendant knew or reasonably should have known prior to committing the offense.

In *People v. Edwards* (1991) 54 Cal.3d 787, this Court concluded that victim impact evidence is admissible under Penal Code section 190.3, subdivision (a), as one of the "circumstances of the 'crime." (*Id.* at p. 835.) In arriving at the interpretation of the "ordinary import of the language used" in the statute, the Court looked to the dictionary definition of "circumstances" found in the Oxford English Dictionary: "That which surrounds materially, morally, or logically." (*Id.* at 833.) Appellant contends that this definition (1) conflicts with that of the more specific statutory factors, (2) renders other statutory factors superfluous and (3) is inconsistent with the Supreme Court's definition of the term "circumstances of the crime."

When interpreting a statute, courts generally look first to the plain-meaning of the statute's terms. Where no plain meaning exists because there are multiple possible interpretations, courts may apply established canons of statutory interpretation to determine the statutes meaning. (See *Mejia v. Reed* (2003) 31 Cal 4th 657, 663 [holding that where "the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction"]; see also 2A Sutherland, Statutes And Statutory Construction (Singer 6th ed. 2000 rev.) section 45.13 (hereafter Sutherland).) Because several divergent definitions of "circumstances" exist, this Court should have concluded that the phrase has no plain meaning. (See *People v. Fierro*, *supra,* 1 Cal.4th at p. 262 (conc. & dis. opn. of Kennard, J.) [noting, inter alia, that Black's Law Dictionary (6th ed. 1990) and the Fourth Circuit Court of Appeals give more narrow definitions of the term "circumstances."]

In the absence of a plain meaning, the Court should have applied established rules to determine which of the competing definitions was correct. The rule of *noscitur a sociis* instructs that terms grouped together should be given meaning similar in nature and scope. (See Sutherland, § 47.16; see also *Harris v. Capital Growth Investors Inc.* (1991) 52 Cal.3d

1142, 1160 [noting that the rationale behind the related ejusdem generis canon is that "'if the [writer] had intended the general words to be used in their unrestricted sense, [he or she] would not have mentioned the particular things or classes of things which would in that event become mere surplusage'" quoting *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1506].) As Justice Kennard stated in *People v. Fierro, supra,* 1 Cal.4th at p. 263 (conc. & dis. pn);

> To say that the "circumstances of the crime" includes everything that surrounds the crime "materially, morally or logically," is to say that this one factor includes everything that is morally or logically relevant to an assessment of the crime, or, in other words, every fact or circumstance having any legitimate relevance to the penalty determination.

Because this broad definition encompasses other separately enumerated factors in section 190.3, such as the presence or absence of prior felony convictions and whether the defendant acted under the substantial domination of another person, it should not have been adopted. (See Pen. Code, § 190.3, subds. (c), (g).)

The broad interpretation accepted in *Edwards* should be abandoned for the additional reason that it is in conflict with the United States Supreme Court's interpretation of the term "circumstances of the crime."

The United Sates Supreme Court rejected the argument that the "'emotional trauma suffered by the family and personal characteristics of the victims ... should be considered a 'circumstance' of the crime." (*Booth v. Maryland* (1987) 482 U.S. 492 503-504.) The Supreme Court left open the possibility that victim impact testimony could be admissible if it "relate[d] directly to the circumstances of the crime." (*Id.* at 507, fn. 10.) In *South Carolina v. Gathers* (1989) 490 U.S. 805 the Court concluded that a fact not known to the defendant "[could] not be said to relate directly to the circumstances of the crime." (*Id.* at p. 812.) Inasmuch as *Payne v. Tennessee* (1991) 501 U.S.808 did not provide an alternative definition of "circumstances of the crime," the definitions used in both Booth and Gathers were not overruled.

In both its *Booth* and *Gathers* opinions, the Supreme Court held that victim impact evidence was usually not a circumstance of the crime. This Court should have adopted a similar definition. (See *People v. Fierro, supra*, 1 Cal.4th at p. 259 (conc. & dis. opn. of Kennard, J.) [noting that the Supreme Court's definition of a term "is persuasive on what the words are commonly understood to mean in the context of a capital sentencing scheme"].)

Because the definition of circumstances of the crime" adopted by

this Court is overbroad, inconsistent with the other provisions of Penal Code section 1903, and in conflict with the Supreme Court's construction of that term, appellant requests that this Court adopt a definition that encompasses only "those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced. . . at the guilt phase." (*People v. Fierro*, *supra*, 1 Cal.4th at p. 264 (conc. & dis. opn. of Kennard, J.).) Alternatively, this Court should, like the courts of many other jurisdictions, carefully limit victim impact testimony

A survey of this Court's post-*Edwards* decisions reveals the various factors it considers when analyzing contested victim impact evidence. These factors - the length of the victim impact evidence testimony, its emotional tenor, its inflammatory potential relative to other properly admitted evidence in aggravation, and whether it is materially, morally, or logically related to the crime - guide this Court in determining whether there has been a constitutional violation. Nevertheless, in the 15 years since *Edwards*, this Court has not explicitly adopted these, or any, factors as determinative.

The introduction of victim impact evidence is now commonplace at

the penalty phase of capital trials in California. The Court has addressed its admissibility in dozens of cases. (See e.g. *People v. Brown* (2004) 33 Cal.4th 382,397 [listing recent cases].) However, the Court has offered only a few concrete examples of the type of victim impact evidence that would violate Edwards. (See *People v. Harris, supra*, 37 Cal.4th at p. 352 [holding that trial court erred in allowing victim impact testimony describing an incident during the victim's funeral attributable to an intervening actor]; *People v. Prince* (2007) 40 Cal.4th 1179 [playing a long video for the jury about the victim's life would probably be error].) As a result, trial courts lack guidance in determining the permissible quantity, scope and content of this evidence.

Courts in other jurisdictions have imposed restrictions on the introduction of victim impact evidence in order to ensure that a capital defendant's trial is fundamentally fair. This Court has endorsed the approach taken by same of these courts. In *People v. Robinson, supra*, 37 Cal.4th 592 at p. 652, the Court repeated a warning about the length of victim impact evidence that had been issued by the Texas Court of Criminal Appeals: "... [W]e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.'" (*Id.*, quoting *Salazar v. State, supra*, 90 S.W.3d at p. 336, italics in original.) The Court also

observed that an undue amount of victim impact evidence '" [e]ven if not technically cumulative. . . can result in unfair prejudice.'" (*Ibid.* quoting *Salazar v. State, supra*, 90 S.W.3d at p. 363.) In *Robinson*, this Court also cited the Oklahoma Court of Criminal Appeals' discussion of the risk that the disquieting nature of victim impact evidence will undermine the fairness of the penalty verdict. (*People v. Robinson, supra*, 37 Cal.4th at p. 652.) The Oklahoma appellate court observed that the more the sentencer "is exposed to the emotional aspects of a victim's death, the less likely [its] verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." (*Ibid.*, quoting *Cargle v. State* (Okla. Crim. App. 1996) 909 P .2d 806, &30, revd. on other grounds in *Coddington v. State* (Okla. Crim. App. 2006) 142 P.3d 437,542.)

The New Jersey Supreme Court, following *Payne*, held that "the State can offer the jury a quick glimpse. of the victim's life and the impact of the loss on the victim's surviving family members." (*State v. Muhammad* (1996) 678 A.2d 164, 175 [construing NJ. Stat. Ann., §20:11-3c(6) (1995)].) This limitation, the court explained, would prevent the

sentencer from "becom[ing] overwhelmed and confused by [the amount of] victim impact evidence." (Ibid.) It cautioned that even allowing more than one witness to testify ordinarily posed an unacceptable risk:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the [sentencer] against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the [sentencer] with a glimpse of each victim's uniqueness as a human being and to help the [sentencer] make an informed assessment of the defendant's moral culpability and blameworthiness. (*Id.* at p. 180.)

In describing the proper boundaries for the content of the testimony, the New Jersey Supreme Court concluded that victim impact evidence "can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests." (*State v. Muhammad, supra*, 678 A.2d at .p. 180.) The court directed, however, that "testimony should be factual, not emotional, and should be free of inflammatory comments or references." (*Ibid.*) As a final safeguard to ensure a fair trial when the prosecution seeks to introduce victim impact evidence, the court ruled that its admission "requires a balancing of the probative value of the proffered evidence against the risk that its admission

may pose the danger of undue prejudice or confusion to the jury." (*Id.* at p. 176.)

Other state and federal courts have joined Texas, Oklahoma, and New Jersey in limiting the amount and type of victim impact evidence that may be admitted under *Payne*. These states share the view that victim impact evidence must be brief.and narrowly focused. (See, e.g., *State v. Taylor* (La. 1996) 669 So. 2d 364, 370 [allowing prosecutor to introduce some evidence regarding the individuality of the victim and the effect of the crime on the victim's survivors, but warning that extensive victim impact evidence can violate the defendant's Due Process rights]; *State v. Clark* (N.M. 1999) 990 P.2d 793, 808 [holding that "victim impact evidence, brief and narrowly presented, is admissible" in capital cases, construing N.M. Stat. Ann., section 31-20A-l (c), 31-20A-2(b) (Michie 1979)].) The *Taylor* court explained:

> [S]ome evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense. or to the character and propensities of the offender. To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the

> evidence bears on the murderer's character traits and moral culpability. . . ." (*State v. Taylor, supra*, 669 So.2d at p. 370, quoting *State v. Bernard* (La.1992) 608 So. 2d 966, 972.)

The court continued:

> [I]ntroduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the arbitrary influence of factors on the. . . sentencing decision. (Ibid.)

Florida flatly excludes testimony about bereavement trauma, limiting evidence to "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." (*Windom v. State* (Fla. 1995) 656 So.2d 432, 438, quoting Fla. Stat. ch. 921.141 (1993).) Tennessee, while permitting some testimony about the survivors' loss, instructs trial courts that "evidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice. . ." (*State v. Nesbit* (Tenn 1998) 978 S.W.2d 872, 891 [construing Tenn. Code. Ann., §39-13-2-4(c) (1997)]; see also

State v. McKinney (Tenn. 2002) 74 S.W.3d 291,309 [same].) Georgia maintains similar limitations. (See *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842 [Georgia court approves statements that did not "provide a 'detailed narration of. . . emotional and economic sufferings of the victim's family,'" quoting *Livingston v. State* (Ga. 1994) 444 S.E.2d 748, 759 (dis. opn. of Benham, J.)], construing Ga. Code Ann., §17-10-1.2 (1993) [specifying six topics of testimony that can be admitted as victim impact evidence].) The defendant's knowledge of the victim's family circumstances is pertinent in evaluating the probative value of the testimony. (*State v. Nesbit, supra*, 978 S.W.2d at pp. 892-893.) Similarly, the trial court must take care to prevent prosecutorial argument that invites an emotional response to the evidence. (*Id.* at pp. 891-892; see also *State v. McKinney, supra*, 74 S.W.3d at p. 309; *State v. Muhammad, supra*, 678 A.2d at p. 180 [argument should be "strictly limited" to contents of testimony].)

Another option for a bright-line rule to avoid the problems that rendered the verdict in this case unlawful would be the one proposed by Justice Kennard in her separate opinion in *People v. Fierro*:

> As used in section 190.3, "circumstances of the crime" should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase. *(People v. Fierro, supra*, 1 Cal. 4th 173, 264 (conc. & dis. opn. of Kennard, J.)

Such facts would relate directly to the defendant's culpability, and they would be true circumstances of the offense, i.e., of the defendant's actual conduct. (Cf. *State v. Nesbit, supra*, 978 S.W.2d 872,892-893 [defendant's knowledge of the victim's family circumstances is pertinent in weighing probative value of the testimony about effect on family].)

This Court should take this opportunity to impose concrete limitations on its victim impact jurisprudence. Under the Eighth Amendment, "the severity of [a death] sentence mandates careful scrutiny in the [post trial] review of any colorable claim of error." (*Zant v. Stephens, supra*, 462 U.S. 862 at p. 885; see also *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Payne v. Tennessee, supra*, 501 U.S. at p. 837 (conc. opn. of Souter, J.) [when victim impact evidence is introduced, "'this Court and the other courts of the state and federal systems will perform the duty to search for constitutional error with painstaking care,' an

obligation never more exacting than it is in a capital case," quoting *Burger v. Kemp* (1987) 483 U.S. 776, 785].)

B. The Improper Admission Of Victim Impact Evidence Was Not Harmless Beyond A Reasonable Doubt

Constitutional errors that infringe fundamental rights but are not viewed as affecting the structural integrity of the trial are subject to th~ stringent harmless error standard of *Chapman v. California, supra*, 386 U.S. at p. 24. (See also *Arizona v. Fulminante* (1991) 499 U.S. 279,308-310.) The error in this case cannot not be deemed hannless beyond a reasonable doubt.

C. Appellant Is Entitled To A New Penalty Phase, Because The Trial Court Imposed Death Under The Mistaken. Belief That Admission And Consideration Of Victim Impact Evidence Was Mandatory

The trial court in this case committed reversible error when he applied the incorrect legal standard in determining the admissibility and weight of the victim impact evidence presented below.

The Supreme Court in *Payne* held only that victim impact evidence was not per se inadmissible, and that states could therefore choose to allow

it during the sentencing phase of capital trial. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825 [noting that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant"].) Justice O'Connor's concurring opinion in Payne emphasizes that the ruling did not mandate its admission: "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted." (fd. at p. 831 (conc. opn. of O'Connor, J.).)

Prior to the Supreme Court's ruling in *Payne*, this Court, following Booth, had ordered the exclusion of victim impact evidence from the penalty phase of a capital trial. (See *People v. Gordon, supra*, 50 Cal.3d at pp.1266-1267.) In *Gordon*, this Court correctly held that victim impact evidence, in addition to violating the defendant's Eighth Amendment rights, did not fall within any statutory aggravating factor defined in Penal Code section 190.3. (*Ibid.* "[T]he effect of the crime on the victim's family is not relevant to any material circumstance[of the crime].) After *Payne*, this Court overruled *Gordon* in *People v. Edwards,*

supra, 54 Cal.3d at p. 835. Purportedly following Payne's interpretation of victim impact testimony as "evidence of the specific harm caused by the defendant" (see *Payne v. Tennessee, supra*, 501 U.S. at p. 825), this Court held that victim impact evidence may be admitted as a "circumstance of the crime" under Penal Code section 190.3, subdivision(a). (*People v. Edwards, supra*, 54 Cal.3d at p 835.) Importantly, in *Edwards*, this Court went only so far as to rule that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant." (*Ibid.*) Neither this Court nor the Supreme Court has ever mandated the admission or consideration of victim impact evidence in any capital case.

Where, as here, a trial court fails to exercise discretion because it does not understand that it has discretion, its failure is an abuse of discretion. (See, e.g., *People v. Bigelow* (1984) 37 Cal.3d 731, 743 [court's failure to exercise discretion because it erroneously believed it had no discretion was "itself serious error"]; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion ofthe trial court. . . such discretion can only truly be exercised if

there is no misconception by the trial court as to the legal bases for its action"]; *People v. Davis* (1984) 161 Cal.App.3d 796, 802 [court abused its discretion where it was "misguided as to the appropriate legal standard to guide the exercise of discretion"].)

Moreover, the trial court's error has prejudiced appellant. Because the judge was under the mistaken belief that he was required to admit victim impact evidence, this Court cannot say with confidence that the court would have admitted as much - or any - victim impact evidence had he realized that he had discretion not to do so. Reversal of appellant's death sentence is required because this was error of constitutional dimension and cannot be considered harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this

Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing: and to the contrary this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most

deserving of death on Penal Code §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. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the state will kill dominates the entire process of applying the penalty of death.

XIII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death, the death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized in *People v. Edelbacher* (1989) 47 Cal.3dc 983,1023;

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a

> 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.(*Zant v. Stephens, supra,* 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on

November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances, some with multiple subparts[7] delineating those murders and murderers deemed most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons

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7. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow, and is now thirty-two.

eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal. 4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-58, 575.) These broad categories are joined by so many other categories of special circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty*

Scheme: Requiem for Furman?, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[8] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

Regarding the specific special circumstance of felony murder present in the instant case, the California Penal Code (section 189) defines first degree murder quite broadly, as all murder perpetrated by certain means (e.g., poison, explosives); "any other kind of willful, deliberate, and premeditated killing "; and felony murder-that is, any killing, whether

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8. The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra,* 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder, and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim, or, even more unlikely, advised the victim, in advance of the lethal assault, of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

intentional or not, committed in the course of any of the statutorily specified felonies.

As construed by this Court in *People v. Anderson* (1987) 43 Cal.3d 1104, the felony-murder special circumstance, like the felony murder rule itself, does not contain an intent element for the actual killer. Thus, this special circumstance permits an accidental or unintentional killing to form the basis for a death sentence, despite the United States Supreme Court's repeated emphasis that an evaluation of the accused's mental state is "critical" to a determination of his suitability for the death penalty. (See e.g. *Enmund v. Florida* (l982) 458 U.S. 782, 800 [the appropriateness of the death penalty depends on the accused's culpability.] American criminal law has long considered a defendant's intention-and therefore his moral guilt- to be critical\ to the degree of his culpability. It should follow from the High Court's concern that special care would be taken in administering the California death penalty scheme to ensure that genuine narrowing criteria apply to felony-murder offenses, and that death eligibility would be limited to the most reprehensible murders and the most blameworthy felony murders.

But in fact, the death penalty scheme as applied to felony murder sweeps in a broad and arbitrary fashion. While all willful, deliberate and

premeditated killings are first degree murder under the California statute, not all such killings are subject to the death penalty. On the other hand, any perpetrator of a felony murder, by virtue of even an unintended killing, may be sentenced to die. Such a sorting cannot be other than arbitrary and capricious, in violation of the Eighth Amendment.

This Court routinely rejects challenges to the statute's lack of any meaningful narrowing, and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, n. 14.; See *People v. Beames* (2007) 40 Cal 4th 907, 933-934.) The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by

seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and prevailing international law.

XIV. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead,

the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion," or because three weeks after the crime defendant sought to conceal evidence,[9] or threatened witnesses after his arrest,[10] or disposed of the victim's body in a manner that precluded its recovery.[11]

The purpose of § 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime,

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9. *People v.* Nicolaus (1991) 54 Cal.3d 558, 581-582 (hatred of religion); People *v. Walker* (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

10. *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S.Ct. 498.

11. *People v. Bittaker* 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35(1989), *cert. den.*, 496 U.S. 931 (1990).

even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds,[12] or because the defendant killed with a single execution-style wound.[13]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[14] or because the defendant killed the victim without any motive at all.[15]

12.See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, 28. (cont.)No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

13. See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

14 . See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

15. See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

c. Because the defendant killed the victim in cold blood[16] or because the defendant killed the victim during a savage frenzy.[17]

d. Because the defendant engaged in a cover-up to conceal his crime,[18] or because the defendant did not engage in a cover-up and so must have been proud of it.[19]

e. Because the defendant made the victim endure the terror of anticipating a violent death[20] or because the defendant killed instantly without any warning.[21]

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16. .See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

17. See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

18 See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

19. See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

20.See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

21. See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

f. Because the victim had children,[22] or because the victim had not yet had a chance to have children.[23]

g. Because the victim struggled prior to death,[24] or because the victim did not struggle.[25]

h. Because the defendant had a prior relationship with the victim,[26] or because the victim was a complete stranger to the defendant.[27]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of

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22. See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

24.See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

24.See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

25.See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

26.See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same).

27. e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[28]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[29]

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28. e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

29. e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[30]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[31]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[32]

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30. e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

31. e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

32. e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, § 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420.])

XV. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING, AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME; IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). A defendant, like appellant, convicted of felony-murder is automatically eligible for death, and freighted with a potential aggravating circumstance to be weighed on death's side of the scale. Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate

penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral," and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

A. Beyond a Reasonable Doubt Is the Appropriate Burden of Proof for Factors Relied on to Impose a Death Sentence, for Finding that Aggravating Factors Outweigh Mitigating Factors, and for Finding that Death Is the Appropriate Sentence.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[33] Only

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33. Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2) (a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[34] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) California 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.

This Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not

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(Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).) Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

34. Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

"susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) The moral basis of a decision to impose death, however, does not mean that a decision of such magnitude should be made without rationality or conviction. Nor is it true that the penalty phase determinations mandated by section 190.3 do not involve fact finding.

Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC 8.88.) Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors. These determinations are essential elements of a death-worthy crime.

The fact that under the Eighth Amendment, "death is different"

cannot be used as a justification for permitting states to relax procedural protections provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. (*Ring v. Arizona* (2002) 536 U.S. 584, 609.) 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"].) In *Monge*, the U.S. Supreme Court expressly found the *Santosky* statement of the rationale for the burden of proof beyond a reasonable doubt requirement[35] applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. (*Bullington v. Missouri* (1981) 451 U.S 435, 441 [quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424; *Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U.S. Supreme Court held that a state may not impose a sentence greater than that

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35. "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." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [internal citations omitted].)

authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.*, at 478.) This decision seemed to confirm that as a matter of due process under the Fourteenth Amendment the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to its consideration of whether death is the appropriate punishment.

Under California's capital sentencing scheme, the "trier of fact" may not impose a death sentence unless it finds (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) In *Ring v. Arizona, supra*, 536 U.S. 584, the High Court held that the Sixth and Fourteenth Amendment's guarantees of a jury trial means that such determinations must be made by a jury, and must be made beyond a reasonable doubt.

Before *Ring* was decided, this Court rejected the application of *Apprendi* to the penalty phase of a capital trial. In so doing, the Court relied in large part on *Walton v. Arizona* (1990) 497 U.S. 639, and its conclusion that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453 [*Walton* "compels rejection of defendant's instant claim

[that he was entitled to a finding beyond a reasonable doubt of the applicability of a particular section 190.3 sentencing factor.]")

In *Ochoa*, this Court stated that a finding of first degree murder in Arizona was the "functional equivalent" of a finding of first degree murder with a section 190.2 special circumstance in California: "both events narrowed the possible range of sentences to death or life imprisonment . . . a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence." *(People v. Ochoa, supra*, at 454; See also, *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14.)

This contention was specifically rejected by the high court in *Ring*, which (1) overruled *Walton* to the extent *Walton* allowed a sentencing judge, sitting without a jury to make factual findings necessary for imposition of a death sentence, and (2) held *Apprendi* fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial: "Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a

greater offense'. . . .". (*Ring, supra,* 536 U.S. at p. 609, quoting *Apprendi*, 530 U.S. at 494, n. 19 (2000).)

In light of *Ring*, this Court's holdings, made in reliance on *Walton*, that there is no need for any jury determination of the presence of an aggravating factor, or that such factors outweigh mitigating factors, because the jury's role as factfinder is complete upon the finding of a special circumstance, are no longer tenable. California's statute requires that the jury find one or more aggravating factors, and that these factors outweigh mitigating factors, before it can decide whether or not to impose death. These findings exposed appellant to a greater punishment than that authorized by the special circumstances finding alone. Capital defendants, no less than non-capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. (See *Ring v. Arizona, supra,* 536 U.S. at p. 609.)

In *People v. Snow* (2003) 30 Cal.4th 43,126,fn 32., this Court stated that *Aprendi v. New Jersey* (2000) 530 U.S. 466, which held that a jury

must find beyond unanimously and beyond a reasonable doubt any fact that increases the maximum sentence possible for a defendant, does not affect California's death penalty process, because once a special circumstance has been found beyond a reasonable doubt the defendant is death eligible and jury findings as to aggravating circumstances do not expose a defendant to a higher maximum penalty.

However, a careful look at California's death penalty procedures shows that essential steps in the death-eligibility process take place during the penalty phase of a capital trial and these steps are subject to the mandates of *Ring*.

California utilizes a bifurcated process in which the jury first determines guilt or innocence of first-degree murder and whether or not alleged "special circumstances" are true. If a defendant is found guilty and at least one special circumstance is found to be true, a "penalty phase" proceeding is held, wherein new witnesses may be called and new evidence presented by the prosecution and defense to establish the presence or absence of specified "aggravating circumstances," as well as any mitigating circumstances. The jurors are instructed that they are to weigh aggravating versus mitigating circumstances and that they may impose death only if they find that the former substantially outweigh the latter. If aggravating

circumstances do not outweigh mitigating circumstances, the jury must impose life without possibility of parole, or "LWOP." Even if aggravating circumstances do outweigh mitigating circumstances, the jury has the discretion to exercise mercy and impose LWOP instead of death. (See sections 190-190.9; CALJIC Nos. 8.84-8.88; *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I),* (1985) 40 Cal.3d 512, 541.)

In California, the penalty for first-degree murder is 25 years to life unless at least one of a statutorily enumerated list of "special circumstances" is found. This special finding is made during the guilt phase by the jury, unanimously and beyond reasonable doubt. Prior to *Ring*, this Court held that "there is no right under the Sixth or Eighth Amendments to the United States Constitution to have a jury determine the existence of all of the elements of a special circumstance." (*People v. Odle* (1988) 45 Cal.3d 286, 311.) However, in *People v. Prieto,* the Court acknowledged the error of that holding. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.)

Only if a special circumstance is found does the trial proceed to the penalty phase where the jury hears additional evidence and argument from the prosecution and defense and determines whether the penalty will be LWOP or death.

California's scheme in the eligibility phase is directly parallel to Arizona's as recognized by *Ring*. (Compare Ariz. Rev. Stat. Ann. § 13-703(E) & (F) to Cal. Pen. Code §§ 190.2 & 190.3.) The Arizona statute, like section 190.3, lists the specific circumstances which can be considered as aggravating or mitigating the offense. (Ariz. Rev. Stat. Ann. § 13-703(F).) Some of these are similar to some of the special circumstances found in California's section 190.2 (compare § 190.2(3) with Ariz. Rev. Stat. Ann. § 13-703(F)(8); and § 190.2(2) with Ariz. Rev. Stat. Ann. § 13-703(F)(1); and § 190.2(7) with Ariz. Rev. Stat. Ann. § 13-703(F)(10); others, however, are equivalent to section 190.3's aggravating circumstances. (Compare § 190.3, subds.(c)), (a), (i), (h), (g), & (k), with Ariz. Rev. Stat. Ann. §§ 13-703(F)(2), (F)(6),(9)&(3), (F)(5)&(9), (G)(1), (2), and 13-703(G), respectively.)

Like a first-degree murder conviction under the Arizona statutory scheme invalidated by this Court in *Ring*, a jury verdict of guilt with a finding of one or more special circumstances in California, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. at pp. 602-605.) In California, death is the maximum penalty for *all* murder convictions. (See § 190.1, subds. (a), (b) & (c).) Section 190(a) provides that the punishment for first-degree murder is 25 years to life, life without

the possibility of parole, 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" (Ibid.)

Section 190.3 requires the jury to impose LWOP unless the jury finds the existence of at least one additional aggravating factor above and beyond what was found during the guilt phase, and then finds that the factors in aggravation outweigh any factors in mitigation. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), an aggravating factor is "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.) In the context of a California capital murder conviction, "elements of the crime" can only be interpreted to mean the elements necessary to prove both the first degree murder and whatever special circumstance or circumstances were found during the guilt phase.

Only then is the defendant truly "eligible" for death. The jury then engages in the final, purely normative stage of determining whether a particular defendant should be sentenced to death. Even if the jury concludes that aggravation outweighs mitigation, as noted, it may still

impose LWOP.

To summarize, then, there are four steps to determining whether the sentence in a California capital case will be death or LWOP: (1) the defendant must be found guilty of first-degree murder and at least one of the of the "special circumstances" enumerated in section 190.2 must be found; (2) at least one of a *different* list of "aggravating factors" from section 190.3 must be found; (3) aggravating factors must be found to outweigh any mitigating factors present; and (4) if and only if aggravating factors are found to outweigh mitigating factors present, the jury must choose between death and LWOP.

Of these four steps only the first occurs during the guilt phase of the trial, attended by the Sixth Amendment's protections of unanimity and proof beyond reasonable doubt. In contrast, Steps 2, 3, and 4 occur during the penalty phase. Although occurring in the penalty phase, in actuality steps 2 and 3 are part of the *eligibility* determination as described by this Court in *People v. Tuilaepa* (1992) 4 Cal.4th 569, rather than the *selection* determination. Like the Arizona defendant in *Ring* convicted of first-degree murder, a person convicted of first-degree murder with a special circumstance finding in California is eligible for the death penalty in a "formal sense" only (*Ring, supra,* 536 U.S. at pp. 602-605); death cannot be

imposed until Steps 2 and 3 have occurred.

It is here that California's scheme runs afoul of *Ring* because Steps 2 and 3 do not require juror unanimity or findings beyond reasonable doubt. Yet they do involve factual determinations above and beyond those made in the guilt phase of the trial necessary for the imposition of death. Therefore, under *Ring*, these factual determinations must be made unanimously and beyond a reasonable doubt. A special circumstance findings pursuant to section 190.2 is not the same as an aggravating factor; it can even serve as a mitigating factor. (See e.g., *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance of section 190.2, subd. (a)(1) can be argued as mitigation if murder was committed by an addict to feed addiction].)

In effect, the California legislature has extended steps of the eligibility phase into the penalty phase of the trial. The selection phase does not begin until Step 4, where the jury considers all of the circumstances of the case and defendant, and determines whether to impose death.

The highest courts of Colorado, Missouri, Nevada, Connecticut, Arizona, and Maryland have concluded that steps wholly analogous to Step 2 of California's process involve factual determinations and are therefore

subject to the requirements of *Ring*, and all but Maryland have further concluded that steps analogous to Step 3 of California's process — the determination of whether aggravation outweighs mitigation — is also a factual determination that must be made beyond a reasonable doubt. (See *Woldt v. People* (Colo. 2003) 64 P.3d 256, 263-267; *State v. Whitfield* (Mo. 2003) 107 S.W.3d 259; *Johnson v. State* (Nev. 2002) 59 P.3d 450, 460; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 406-407; *State v. Ring* (Ariz. 2003) 65 P.3d 915, 942-943; *Oken v. State* (Md. 2003) 835 A.2d 1105, 1122.) California is alone among the states in holding that the determination of whether aggravating factors are present need not be made by the jury unanimously and beyond reasonable doubt. Yet in *Prieto*, this Court stated that the high court's reasoning in *Ring* does not apply to the penalty-phase determination in California. (See also *People v. Snow*, *supra,*. 30 Cal.4th at p.126, fn. 32.) In *Prieto*, this Court recognized that a California sentencing jury is charged with a duty to find facts in the penalty phase: "While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true *even though the jury must make certain factual findings* in order to consider certain circumstances as aggravating factors." (*Prieto*, *supra*, 30 Cal.4th 226 at p.

263, emphasis added.)

Thus, California's statutory law, jury instructions, and this Court's previous decisions leave no doubt that facts must be found, and fact-finding must occur, before the death penalty may be considered. Yet, this Court has attempted to avoid the mandates of *Ring* by characterizing facts found during the penalty phase as "facts which bear upon but do not necessarily determine which of these two alternative penalties is appropriate." (See *People v. Snow, supra*; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.) This is a meaningless distinction. There are no facts either in Arizona's scheme or in California's scheme that are necessarily determinative of a sentence; in both states the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. The jury's role in the penalty phase of a California capital trial requires that it make factual findings regarding aggravating factors that are a prerequisite to a sentence of death. *Ring* clearly applies. California's statute, as written, applied, and interpreted by this Court, is unconstitutional and must fall.

B. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion For Finding (1) that an Aggravating Factor Exists, (2) that the Aggravating Factors Outweigh the Mitigating Factors, and (3) that Death is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination

informed by historical settled usages].)

California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal. R. Ct. 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) 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, and the Sixth Amendment's guarantee to a trial by jury. (See e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra,* 122 S.Ct at 1443.)

Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v.*

Oklahoma, supra, 447 U.S. at p. 346.)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and does not apply at all to the finding of the existence of aggravating factors. There is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the state had the burden of proof beyond a reasonable doubt regarding the existence of any factor in aggravation, and the burden of persuasion regarding the propriety of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth,Sixth, Eighth and Fourteenth Amendments, and is reversible *per se*. (*Sullivan v. Louisiana, supra.*) That should be the result here, too.

C. The Trial Court's Failure To Instruct The Jury on Any Penalty Phase Burden of Proof Violated Appellant's Constitutional Rights To Due Process And Equal Protection Of The Laws, And To Not Be Subjected to Cruel And Unusual Punishment.

Appellant's death sentence violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances exist beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer*, *supra,* 455 U.S. at pp. 754-767; *In re Winship*, *supra,* 397 U.S. 358.)

Appellant has argued above that the appropriate burden of proof for the requisite findings that one or more aggravating factors are present, and that such factors outweigh the mitigating factors, is beyond a reasonable doubt, and that the prosecution has the burden of persuasion in all sentencing proceedings. (See, Section A, *ante*.) In any event, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital

punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; emphasis added.) The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[36] This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty.

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36. See, e.g., *People v. Dunkle*, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at p. 725.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra,* 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida, supra,* 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. at p.374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either. Such chaos is not allowed for factual findings in non-capital cases, or even in sentencing proceedings before a judge after all essential foundational factors have been found by a jury.

The error in failing to instruct the jury on what the proper burden of

proof is or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.) In cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant.

D. California Law Violates The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Unanimous Jury Agreement On Aggravating Factors.

Jury Agreement

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord, People v. Bolin* (1998) 18 Cal.4th 297, 335-336; *People v. Miranda* (1988) 44 Cal.3d 57, 99.) Consistent with this construction of California's capital sentencing scheme, no instruction was given requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any

particular combination of aggravating factors warrants the sentence of death. Indeed, on the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote, had it been put to the jury as a reason for the death penalty.

It is inconceivable that a death verdict would satisfy the Eighth and Fourteenth Amendments if it were based on (i) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warrants death, and (iii) each such vote coming out 1-11 against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility. The result here is thus akin to the chaotic and unconstitutional result suggested by the plurality opinion in *Schad v. Arizona* (1991) 501 U.S. 624, 633 [plur. opn. of Souter, J.].

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor -

- including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Fifth, Sixth, Eighth and Fourteenth Amendments. (E.g., *Murray's Lessee*, *supra*; *Griffin v. United States, supra.*) And it violates the Fifth, Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty. A death sentence under those circumstances would be so arbitrary and capricious as to fail Fifth, Eighth and Fourteenth Amendment scrutiny. (See, e.g., *Gregg v. Georgia, supra,* 428 U.S. at pp. 188-189.)

Under *Ring v. Arizona, supra,* it would also violate the Sixth Amendment's guarantee of a trial by jury. The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical elements of California's sentencing scheme, and a prerequisite to the weighing process in which normative determinations are made. The U.S. Supreme Court has held that such determinations must be made by a jury, and cannot be somehow attended with fewer procedural protections than decisions of much fewer consequences. See Section A, ante.

For all of these reasons, the sentence of death violates the Fifth,

Sixth, Eighth and Fourteenth Amendments.

Jury Unanimity

Of the twenty-two states like California that vest the responsibility for death penalty sentencing on the jury, fourteen require that the jury unanimously agree on the aggravating factors proven.[37] California does not have such a requirement.

Thus, appellant's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from the factors relied on by the other jurors, i.e., with no actual agreement on why appellant should be condemned.

The United States Supreme Court decision in *Apprendi v. New Jersey*, *supra*, confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a

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37. See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

reasonable doubt by a jury acting as a collective entity. (*Id.*, 530 U.S. at 478.) 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 to the jury's satisfaction beyond a reasonable doubt. Under California's capital sentencing scheme, a death sentence may not be imposed absent findings (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) Accordingly, these findings had to be found beyond a reasonable doubt by a unanimous jury.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor*, *supra*, 52 Cal.3d at 749.) This holding was overruled by *Ring v. Arizona, supra*, which held that any factual findings prerequisite to a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See Section A, *ante*.)

The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Particularly given the "acute need for

reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[38] *accord Johnson v. Mississippi, supra*, 486 U.S. at p. 584), the Fifth, Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

The finding of an aggravating circumstance is such a finding. An enhancing allegation in a non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Since capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. at 957, 994), and certainly no less (*Ring, supra,* 536 U.S. 617-618) and since providing more

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38.The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. `It is of vital importance' that the decisions made in that context `be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique `in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the `qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) (`[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." *(Monge v. California, supra,* 524 U.S. at 731-732.)

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), it follows that unanimity with regard to aggravating circumstances is constitutionally required.[39]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[40] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

This Court has said that the safeguards applicable in criminal trials

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39. Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C., § 848, subd. (k).)

40. The first sentence of Article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439.) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda*, *supra*, 44 Cal.3d at p. 99.) But unanimity is not limited to final verdicts. For example, it is not enough that jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (*People v. Diedrich* (1982) 31 Cal.3d 263,

281-282.) It is only fair and rational that, where jurors are charged with the most serious task with which any jury is ever confronted – determining whether the aggravating circumstances are so substantial in comparison to the mitigating as to warrant death – unanimity as to the existence of particular aggravating factor supporting that decision, and as to the fact that such factors outweigh the mitigating factors, likewise be required. These "foundational factors" of the sentencing decision are precisely the types of determinations for which appellant is entitled to unanimous jury verdicts beyond a reasonable doubt. (See *Ring v. Arizona, supra.*)

The error is reversible *per se*, because it permitted the jury to return a death judgment without making the findings required by law. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-281; *United States v. Gaudin*, *supra,* 515 U.S. at pp. 522-523 [aff'g 28 F.3d at pp. 951-952.]) In any event, given the difficulty of the penalty determination, the State cannot show there is no reasonable possibility (*Chapman v. California*, *supra,* 386 U.S. at p. 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.) that the failure to instruct on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) As a result, the penalty verdict must

be set aside.

E. California Law Violates The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of such a provision does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are elsewhere 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.* at p. 267.)[41] The same reasoning applies to the far graver decision to put someone to death. (See also, *People v. Martin* (1986) 42 Cal.3d 437, 449-450 (statement of reasons essential to meaningful appellate review).)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (*Harmelin v. Michigan, supra,* 501 U.S. at

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41. 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.

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, supra,* 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *Id.* at 383, n. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra*, 52 Cal.3d at 643) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43,79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six

require a written finding as to at least one aggravating factor relied on to impose death.[42]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances), and finding that these aggravators outweigh any and all mitigating circumstances. In some cases, the jury may rely upon aspects of a special circumstance found at the guilt phase trial as a penalty phase aggravating circumstance and conclude that it outweighs the mitigating

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42. See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

circumstances, but there is no requirement that the jury treat a special circumstance finding as a penalty phase aggravating factor or that the jury accord such a factor any particular aggravating weight. Thus, absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under Ring and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

F. 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. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "`that the [aggravating and

mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida*, *supra,* 428 U.S. at p. 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note 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." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra,* 465 U.S. 52, n. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument.) The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from

outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304; *Thompson v. Oklahoma* (1988) 487 U.S. at 821, 830-31; *Edmund v. Florida* (1982) 458 U.S. 782, 796 n. 22 [102 S.Ct. 3368]; *Coker v. Georgia* (1977) 433 U.S.584, 596 [97 S.Ct. 2861].)

Thirty-one of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238 . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[43]

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43. See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's

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Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment. Categories of crimes that 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."[44] Categories of criminals that warrant such a comparison include persons suffering from insanity (*Ford v. Wainwright* (1986) 477 U.S. 399) or mental retardation; see *Atkins v. Virginia, supra.*)

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system

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44. Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more that we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev.1, 30 (1995).)

of case review permits the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

G. 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 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 during the sentencing phase, as outlined in § 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 ; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United State's Supreme Court's recent decisions in *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, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See Section A, ante.) The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. See Section A, ante. 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.

H. 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,* 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

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

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens, supra,* 462 U.S. at p. 879; *Johnson v. Mississippi , supra,* 486 U.S. at 584-85.)

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, as well, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" *Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, quoting *Gregg v. Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at 112.)

J. California Law that Grants Unbridled Discretion to the Prosecutor Compounds the Effects of Vagueness and Arbitrariness Inherent on the Face of the California Statutory Scheme.

Under California law, the individual prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness. There can be no doubt that under this statutory scheme, some offenders will be chosen as

candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible conditions, including race and economic status. Further, under *People v. Morales* (1989) 48 Cal.3d 527, the prosecutor is free to seek the death penalty in almost every murder case.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme-in charging, prosecuting and submitting a case to the jury as a capital crime- merely compounds, in application, the disastrous effects of vagueness and arbitrariness inherent on the face of the California st6atutory scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. 280, such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia, supra,* 408 U.S. 238.

XVI. THE DIRECTIVE OF CALJIC NO. 8.84.1 AND 8.85 TO THE JURY TO DETERMINE THAT FACTS FROM THE EVIDENCE RECEIVED DURING THE ENTIRE TRIAL VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO LIMIT THE AGGRAVATING CIRCUMSTANCES TO SPECIFIC LEGISLATIVELY-DEFINED FACTORS.

A. Factual and Procedural Background

The trial court instructed the jury in the language of CALJIC No. 8.84.1 that "you must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise." (Vol. 2 CT342.) In addition, the court also instructed the jury in the language of CALJIC No. 8.85 that "in determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." (Vol. 2 CT343.)

B. The Use of the Above Stated Language was Constitutionally Improper

There is no statutory basis for the mandate given the jury to determine the facts under CALJIC Nos. 8.84.1 and 8.85. What the jury may consider at the penalty phase is dictated by section 190.3, as construed to meet constitutional requirements. Section 190.3 sets forth specific aggravating and mitigating factors which must be considered by the jury.

CALJIC No. 8.84.1 contravenes the requirements of section 190.3.

In *People v. Boyd* (1985) 38 Cal.3d 762, this court held that pursuant to section 190.3. the "prosecution's case for aggravation is limited to evidence relevant to the listed factors exclusive of factor (k)" (*People v. Boyd, supra,* 38 Cal.3d at p. 775.) The directive to the jury in CALJIC No. 8.84.1 violated section 190.3 by permitting the jury to interpret anew guilt phase evidence as factors in aggravation although the evidence failed to fit into any of the specific statutory factors. For instance, under the sweeping mandate of CALJIC No.8.84.1 that the jury "must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise," the jury was required to consider evidence of appellant's "anti-social attitudes," his attitude toward women, his possible immersion in the gang culture and his association with known gang members. (See Argument VII. *supra.*) All of this evidence is constitutionally impermissible (*Zant v. Stephens* (1983) 462 U.S. 862); unconstitutionally vague (*People v. Sanders* (1990) 51 Cal.3d 471); and irrelevant with respect to the jury's determination of penalty.

This Court held in *People v. Boyd, supra,* 38 Cal.3d 762, that non-statutory factors in aggravation cannot be considered by the jury. *Boyd* necessarily implies that the wholesale incorporation of the guilt phase

evidence into the record for the jury's consideration at the penalty phase is improper. Even without *Boyd*, however, constitutional safeguards would preclude consideration of such evidence.

In *Zant v. Stephens*, *supra,* 462 U.S. at pp. 873-880, the United States Supreme upheld Georgia penalty phase jury instructions which allowed the jury to consider nonstatutory aggravating circumstances, provided at least one statutory aggravating circumstance was found to be true. In so ruling, however, the High Court specifically held that a "constitutionally necessary function" of statutory aggravating circumstances is to "circumscribe the class of persons eligible for the death penalty." (*Id.* at p. 878.) Under *Zant,* a statute which fails "to create any 'inherent restraint on the arbitrary and capricious infliction of the death sentence," remains unconstitutional. (*Ibid.*) Such a defect exists in CALJIC No. 8.84.1, which allows a jury to consider nonstatutory aggravating factors. by allowing the jury to consider, as in this case nonstatutory aggravating factors and to consider in its total discretion, as offered by CALJIC No. 8.84.1 any or all guilt phase evidence as circumstances warranting the death penalty.

A similar conclusion was drawn by the Supreme Court of Washington in *People v. Bartholomew* (Wash. 1984) 683 P.2d 1079, which held, as a matter of both state and federal constitutional law, that

nonstatutory aggravating circumstances cannot be given the same weight as specifically listed statutory factors. (*Id.* at p. 1089.)

At the very least, the trial court was obligated to reassess the balance of prejudice and probative value of evidence adduced at the guilt phase before placing it wholesale before the jury for its mandatory consideration at the penalty phase pursuant to CALJIC No. 8.84.1. The California instruction was erroneous precisely because it permitted the jury to sentence appellant to death even if it considered the nonstatutory aggravating circumstances or evidence introduced during the guilt trial. (See *Simmons v. South Carolina* (1994) 512 U.S. 154; *Stringer v. Black, supra,* 503 U.S. 222.)

For these reasons, instruction of the jury in the vague, unmodified language of CALJIC No. 8.84.1 in this case was erroneous as a matter of statutory construction and as a matter of state and federal constitutional law. Appellant was denied his right to due process under the Fifth and Fourteenth Amendments and his right to a reliable determination of penalty under the Eighth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280.)

XVII. THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTIONAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

In accordance with CALJIC No. 2.90, the trial court instructed the jury at appellant's trial that appellant was presumed to be innocent until the contrary was proved and that this presumption placed upon the state the burden of proving him guilty beyond a reasonable doubt. (Vol. 2 CT290.) In addition, the jury was also instructed on the meaning of reasonable doubt in interrelated instructions which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence and which addressed proof of specific intent and/or mental state. (Vol. 2 CT285- 286; 291-292.) Except for the fact that they were directed at different evidentiary points, each of these three instructions informed the jury, in essentially identical terms, that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." [45]

This repealed directive was contrary to the requirement that appellant may be convicted only if guilt is proved beyond a reasonable doubt.

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45. The issue of the erroneous circumstantial evidence instructions has not been waived. Penal Code section 1259 provides that "The appellate court may also review any instruction given, refused, or modified even though no objection was made in the lower court, if the substantial rights of the defendant were effected, thereby." (See *People v. Hannon* (1977) 19 Cal.3d 588,600.)

(*Jackson v. Virginia, supra,* 443 U.S. 307.) As a result, appellant's federal and state rights to due process of law, to a jury trial, and to a reliable determination of guilt and penalty were violated. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The problem lies in the fact that the instructions required the jury to accept an interpretation of the evidence that was incriminatory, but only "appear[ed]" to be reasonable. These instructions are constitutionally defective in that telling jurors that they "must" accept a guilty interpretation of the evidence as long as it "appears to be reasonable" is blatantly inconsistent with proof beyond a reasonable doubt and allows for a finding of guilt based on a degree of proof less than that required by the Due Process Clause. (See, *Cage v. Louisiana* (1990) 498 U.S. 39 (per curiam) .)

These instructions given in appellant's case were also unconstitutional because they required the jury to draw an incriminatory inference when such an inference merely appeared to be reasonable. The jurors were told that they "Must" accept such an interpretation. Thus, the instructions operated as an impermissible mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (*Carella v. California* (1989) 491 U.S. 263.)

The erroneous reasonable doubt/circumstantial evidence instructions require reversal of appellant's conviction. The error is reversible without any inquiry into trial evidence, both because it involved the basic standard to be applied at trial, and ths undermined the verdicts in this case, and because the error operated as an improper mandatory, conclusive presumption. (See *Carella v. California, supra,* 491 U.S. at pp. 267-273 (conc. opn of Scalia, J).)

Even if this Court does not find that this error is reversible per se, it is of constitutional magnitude, hence, the state must prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The errors in the instructions' explanation of reasonable doubt/circumstantial evidence require reversal of the judgment.

XVIII. EVEN IN THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (*Monge v. California, supra,* 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural perfections 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 identified the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of

all other rights...It encompasses in a sense, 'the right to have rights.'" (*Trop v. Dulles* (1958) 356 U.S. 86, 102.)

If the interest identified is "fundamental", then the courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra, Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet this burden. In this case, the equal protection guarantees of the state and federal constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

The Equal Protection Clause of the Fourteenth Amendment to the

United States Constitution therefore requires that capital defendant receive at very least the same procedural protections of proof beyond a reasonable doubt as do non-capital felons. By not so requiring, the California death penalty scheme is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

XIX. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of

Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website (www. amnesty. org)[46]

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

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46. These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895)159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 ; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100; *Atkins v. Virginia, supra,* 536 U.S. at pp. 315-316.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded

persons, 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. (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, at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311.]

Recently, the United States Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551, 567, struck down the death penalty for defendant's who committed the capital crime as juveniles. In doing so, the Court made

reference to the international communities disfavor of the death pena lty of juveniles, signaling the High Court's inclination to bring this country more into line with international standards vis a vis capital punishment. (*Ibid.*)

Thus, the very broad death scheme in California, and death's use as regular punishment randomly imposed, violate the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

XX. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

There were numerous penalty trial errors in this case. There were also significant guilt phase errors. This Court has recognized that guilt phase errors that may not otherwise be prejudicial as to the guilt phase may nevertheless improperly and adversely impact the jury's penalty determination. (See, for example, *In re Marquez* (1992) 1 Cal.4th 584,605, 607-609.) This Court is also obliged to consider the cumulative effect of multiple errors on the sentencing outcome. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 ; *People v. Holt* (1984) 37 Cal.3d 436,459.)

The cumulative weight of the guilt and penalty phase errors was prejudicial to appellant. As demonstrated elsewhere in this opening brief in respect to various guilt phase errors, appellant's rights were violated under

the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the penalty trial, appellant was deprived of a fair and reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Together, the cumulative effect of the errors was prejudicial.

It is both reasonably probable and likely that both the jury's guilt and penalty determination were adversely affected by the cumulative errors. (*Chapman v. California*, *supra,* 386 U.S. at p. 24.) In the absence of the errors, the outcome would have been more favorable to appellant. It certainly cannot be said that the errors had "no effect" on the jury's penalty verdicts.

CONCLUSION

By reason of the foregoing, appellant Bernard Albert Nelson respectfully requests that the judgment of conviction on all counts, the special circumstance findings, and the judgment of death be reversed and the matter remanded to the trial court for a new trial.

Appellant was denied his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The grievous errors deprived appellant of his right to a meaningful determination of guilt and a reliable

determination of penalty.

The citizens of the State of California can have no confidence in the reliability of any of the verdicts rendered in this case.

August 9, 2007

Respectfully submitted,

Glen Niemy
Attorney for Appellant

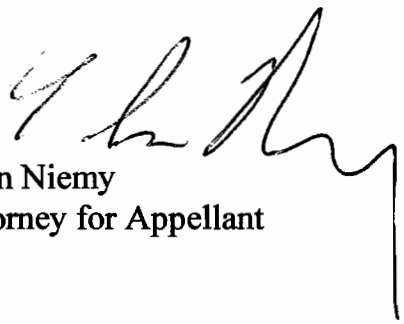
CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13-point Times New Roman

Font and contains 57,294 words.

August 9, 2007

Respectfully submitted,



Glen Niemy
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Bernard Nelson
S085193

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Opening Brief**, on each of the following by placing the same in an envelope addressed (respectively)

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Each envelope was then on August 9, 2007, sealed and placed in the United States mail, mailed priority, at Bridgton Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of California and Maine that the foregoing is true and correct this August 9, 2007 at Bridgton, ME

Glen Niemy