SUPREME COURT No. **S073205** **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
v.	) Riverside County Superior Ct. No. CR49662
JACK EMMIT WILLIAMS,	)
Defendant and Appellant.	)

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

HONORABLE TIMOTHY HEASLETT , JUDGE

OPENING BRIEF FOR APPELLANT JACK E. WILLIAMS

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PENALTY PHASE ISSUES

XIII.

APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Introduction

Appellant was subject to the death penalty solely because of the robbery-murder special circumstance. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. Because the death penalty law lacks of any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed, it violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

California Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During An Attempted Felony Without Regard To His Or Her State Of Mind At The Time Of The Killing

Appellant was death-eligible solely because he was convicted as an aider and abetter or conconspirator to an attempted robbery during which Ms. Los was killed. (See Penal Code sections 189, 190.2, subd. (a)(17)(i).) While a murder conviction normally requires the

prosecution to prove that the defendant had the subjective mental state of malice (either express or implied), in the case of a killing committed during an attempted robbery, or any attempted felony listed in section 189, the prosecution can convict a defendant of first degree felony murder without proof of any mens rea with regard to the actual murder.

"[F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon, supra*, 34 Cal.3d at p. 477.) This rule is reflected in the standard jury instruction for felony murder:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of _____] is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(CALJIC No. 8.21, italics added.)

Except in one rarely-occurring situation, under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is

the actual killer in a robbery felony murder, the defendant also is death-eligible under the robbery-murder special circumstance. (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].)

The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where the Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance" (Id. at p. 1147.) When the defendant is an aider and abetter rather than the actual killer, however, the jury must find either an intent to kill or that the defendant acted with reckless disregard and was a major participant in the underlying felony [although not necessarily the actual murder]. (See CALJIC 8.80.1.) The Anderson majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (Id. at p. 1152 (*dis. opn.* of Broussard, J.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that, to prove a

felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn.15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.

The Robbery-Murder Special Circumstance Violates The Eighth Amendment's Proportionality Requirement And International Law Because It Permits Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing

The Eighth Amendment prohibits the imposition of "cruel and unusual punishment," (U.S. Const. Amend. VIII), and is applicable to the States through the Fourteenth Amendment. (*Roper v. Simmons* (2005) 125 S. Ct. 1183, 1190, *Furman v. Georgia* (1972) 408 U.S. 238, 239 (per curiam); *Robinson v. California* (1962) 370 U.S. 660, 666-667.) In a series of cases beginning with *Gregg v. Georgia, supra*, 428 U.S. 153, the Supreme Court recognized that the Eighth Amendment prohibition embodies a proportionality principle, and has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia, supra,* 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982)

458 U.S. 782 [death penalty for getaway driver to a robbery felony-murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty for defendant under 18 - years old) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra*, 428 U.S. at p. 183.)

The Supreme Court has addressed the proportionality of the death penalty for unintended felony-murders in *Enmund v. Florida, supra,* 458 U.S. 782, and in *Tison v. Arizona, supra,* 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery murder because he did not take life, attempt to take life, or intend to take life. (*Enmund, supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison, supra*, 481 U.S.

at pp. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane or all–the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional. . . . Enmund held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(Id. at pp. 157-158.)

In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan's dissent which argued that there should be a distinction for Eighth Amendment

purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*Id.* at pp. 168-179 (dis. opn. of Brennan, J.), but that argument was rejected by the majority.

That *Tison* established a minimum mens rea for actual killers as well as accomplices was confirmed clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a mens rea requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in Enmund does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could

> comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, so long as their requirement is satisfied at some point thereafter.

(*Reeves, supra,* 524 U.S. at 99, citations and fns. omitted; italics added.)

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir., 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9. The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the Loving oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in Enmund and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624.
>
> Without speculating on the views of the current membership of the Supreme Court, we conclude that when Enmund and Tison were decided, a majority of the

> Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.
>
> (*Loving, supra*, 220 F.3d at p. 443.)

Moreover, As the *Roper* majority notes, the death penalty must be limited to those offenders who commit "a narrow category of the most serious crimes" and "whose extreme culpability makes them the most deserving of execution." (*Roper* at p. 1186). Like mentally retarded people and children, persons who commit unaggravated, unplanned murders do not fall into this category. The *Roper* and *Atkins* courts recognize that lesser mental states lessen the mens rea of the offender, and that the Constitution requires that the death penalty be reserved for the offenders with the greatest moral culpability. Similarly, the vast majority of states recognize that an offender whose crime was found by the trial court to be unintentional and unaggravated by any fact other than the robbery underlying his felony murder conviction, lacks the requisite mens rea to be deserving of society's harshest punishment.

Another way to conceptualize this problem with the lack of mens rea is that the felony murder rule serves either as a means of presuming malice in order to find a homicide, or it constitutes a

distinct form of homicide (akin to strict liability), based solely upon the intent to commit the underlying felony. (See generally Nelson E. Roth and Scott E. Sundby, Article: *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446 (1985).) The strict liability version of the rule articulates a distinct crime from traditional malice murder and does not include a mental state element for the homicide itself. (*Id.* at 448.) Conceived as an irrebuttable presumption, on the other hand, the felony-murder rule operates to conclusively "impute" the mental state required for murder from the commission of a felony, while at least theoretically retaining the mens rea for the homicide as a formal element of the crime. (*Id* at 455-457.)

Under either view however, felony murder is unconstitutional as a mechanism for presuming malice. The Due Process Clause of the Fourteenth Amendment requires that the State prove every element of a criminal offense beyond a reasonable doubt. *(Sandstrom v. Montana* (1979) 442 U.S. 510, 512.) Conclusive presumptions have been expressly held to violate this requirement as they "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Sandstrom*, 442 U.S. at 522 (quoting *Morissette v. United States* (1952) 342 U.S. 246, 274-275.) Because the constructive malice theory of felony murder formally retains a mens rea element for a homicide, the presumption of innocence must apply to the homicide aspect of the rule. The felony-murder rule, however, completely

bypasses the presumption of innocence as to this element upon proof of a different element, the occurrence of a killing in the commission of a felony.

The Sixth and Fourteenth Amendments to the United States Constitution indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *(Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 (quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510.) To require a jury to find an element of a crime solely on the basis of a presumption would unconstitutionally relieve the jury of that function. (*Sandstrom*, 442 U.S. at 523.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. Applying the first part of the test, "contemporary values" the Court looks to the "evolving standards of decency" standard when analyzing the "cruel and unusual" clause of the Eighth Amendment to the United States Constitution. (*Trop v. Dulles* (1958) 356 U.S. 86; *Weems v. United States* (1910) 217 U.S. 349.) That is, the Court looks "to objective evidence of how our society views a particular punishment today." (*Penry v. Lynaugh* (1989) 492 U.S. 302.) In *Atkins v. Virginia*, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the

country's legislatures." (*Atkins, supra*, 536 U.S. at p. 312.) The United States Supreme Court's recent decision in the case *Roper v. Simmons, supra,* once again applies the "evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." In *Roper*, the Court held that the execution of juvenile offenders is prohibited by the Eighth and Fourteenth Amendments, basing its decision in substantial part upon the fact that thirty states do not permit the execution of juveniles. In *Atkins v. Virginia, supra* ,536 U.S. 304, the Court held that the execution of mentally retarded persons is barred by the Eighth and Fourteenth Amendments, because at the time of its decision thirty states did not engage in that practice. Likewise, evolving standards of decency should preclude appellant's execution. At least thirty-nine states would not execute an offender convicted of appellant's crime.

It is undisputed that the prosecution's only theory of criminal culpability in this case was felony murder. (8 R.T. 813.) Thus, appellant became eligible for a death sentence – and a death sentence was imposed – based solely on the commission of an unintentional killing, with no other fact about him or the crime making it aggravated.

There is presently a national consensus against the execution of an offender whose crime was not intentional and was aggravated only by the felony underlying the death sentence – the robbery. At least twenty-six states would not impose a death penalty under these

circumstances. Another thirteen states do not impose the death penalty. Therefore, in at least thirty-nine states, appellant would not be on death row, but would be serving a term of years or life in prison.

Seven death penalty states – Montana, New Jersey, Ohio, Pennsylvania, Washington, Missouri and South Carolina - do not recognize felony murder as a capital offense. These states require a finding of mens rea - intent, premeditation and deliberation, or "malice aforethought" – in order for a murder to be eligible for the death penalty. Ten others – Alabama, Kansas, Louisiana, New Hampshire, Utah, Virginia, Texas, Oregon, Indiana and Illinois – have effectively abolished simple felony murder as an offense punishable by death by requiring a finding of specific intent to kill; the felony simply serves to aggravate the murder charge to a capital offense. Connecticut's capital felony statute limits the death penalty to felony murder that occurs during the course of a kidnapping or sexual assault.

Three other states – Tennessee, Wyoming and Nevada – have felony murder statutes on their books, but their appellate courts have decided that duplicate consideration of the underlying felony at both the guilt and sentencing phases does not adequately narrow the class of death-eligible murderers such that the death penalty would be reserved for the "worst" murderers. (See *Engberg v. Wyoming* (Wyo. 1991) 820 P.2d 70; *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317; *McConnell v. Nevada* (Nev. 2004) 102 P.3d 606.) That is precisely the factual situation presented in appellant's case. As the *Middlebrooks* court noted:

> "A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability."

(Id. at 345.)

Because so many states (and the federal government) reject felony murder simpliciter as a basis for death eligibility, that tally reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins, supra*, 536 U.S. at p. 312), professional opinion as reflected in the *Report of the Governor's Commission on Capital Punishment* (Illinois) and international opinion also weigh against finding felony murder simpliciter a sufficient basis for death-eligibility. The most comprehensive recent study of a state's death penalty was conducted by the *Governor's Commission on Capital Punishment in Illinois*, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor.

(Report of the Former Governor Ryan's Commission on Capital Punishment, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf>.) The Commission stated, in words which certainly apply to the California statute:

> " Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view f Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal."

(Id. at p. 72.)

There is, however, another norm involved in this issue as well. The United States Supreme Court has long recognized the relevance of international norms in determining "the acceptability of a particular punishment."(*Enmund v. Florida* (1982) 458 U.S. 782, 796 n.22 (quoting *Coker v. Georgia* (1977) 433 U.S. 584, 596 n.10.)) International norms are persuasive authority in interpreting the Eighth Amendment's ban on cruel and unusual punishment. *(Roper v.*

Simmons, 543 U.S. at 1198 (opinion of Kennedy, Stevens, Souter, Ginsber, and Breyer, J.J.) and id. at 1224 (opinion of O'Connor, J. dissenting). The United States is "virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" Roth and Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 447-48 (1985). England, where the doctrine originated, abolished the felony-murder rule in 1957. (The Homicide Act, 5& 6 Eliz. 2, ch. 11 Section 1.) The rule apparently never existed in France or Germany. (*Id.*, note 12 citing Fletcher, *Reflections on Felony Murder*, 12 SW. U.L. REV. 413, 415, note 11 (1981).

Article 6 (2) of the *International Covenant on Civil and Political Rights* ("ICCPR"), to which the United States is a party, also provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (*Human Rights Committee, General Comment* 6(16), ¶ 7; see also *American Convention on Human Rights*, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have not abolished the death penalty, it may be imposed only for

the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*) The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

For these reasons, the imposition of the death penalty on a person who has killed negligently or accidentally fails the first part of the proportionality test. It is simply contrary to evolving standards of decency and does not comport with contemporary values.

Equally important, however, imposition of the death penalty for felony murder simpliciter fails the second part of the proportionality test as well. That is, the death penalty for murder simpliciter does not serve either of the penological purposes required by the Supreme Court – retribution and deterrence. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund, supra*, 458 U.S. at pp. 798-799, quoting

Coker, supra, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" *(Enmund, supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of ... Clergy" would be spared."

(*Tison, supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional and reckless-indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious

> felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia, supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

(*Enmund, supra*, 458 U.S. at pp. 798-99; accord, *Atkins, supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for robbery murder simpliciter clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for robbery murder simpliciter serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the robbery-murder special circumstance is unconstitutional under the Eighth Amendment, and Williams' death sentence must be set aside.

Finally, California law making a defendant death-eligible for felony murder simpliciter violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2) In light of the international law principles discussed previously, appellant's death sentence without any requirement of proof that he

intended any homicide violates the ICCPR as well as customary international law and, therefore, must be reversed.

XIV.

THE TRIAL COURT VIOLATED APPELLANT SIXTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO CORRECT AN OBVIOUS CONFLICT SITUATION.

Introduction

Reversal is automatic when a trial court requires conflicted representation over a timely objection. During the prosecution's penalty phase presentation, the Public Defender himself declared a conflict with a primary prosecution witness previously represented by the public defender's office. The Public Defender revealed that there was confidential information in the office files on that witness; information that would be advantageous to appellant on cross examination. Upon discovering that defense counsel was not personally aware of the information, the judge ordered trial defense counsel not to seek the advantageous information from any office source and ordered the office not to reveal it to defense counsel. The trial judge then refused to allow defense counsel to withdraw.

The trial court's refusal to allow the public defender to withdraw violated appellant's Sixth Amendment right to conflict free counsel, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment right to due process.

The order placed trial defense counsel in the untenable position of favoring one client over another. That is, either defense counsel harmed the prior client by discovering the confidential information and using it for the benefit of appellant; or conversely counsel failed to aggressively seek the confidential information thus benefitting the prior client to the detriment of appellant. Either way, appellant's representation at the penalty phase was fatally compromised and reversal is automatic.

Factual Background

Soon after Mr. Deloney's testimony on direct examination at the penalty phase, Floyd Zagorsky, the Public Defender for the County of Riverside made a special appearance on appellant's behalf. Mr. Zagorsky told the court that he spoke to Deputy District Attorney Nelson earlier in the morning and indicated to her that he would be asking the Court to address a conflict situation *in-camera*. (51 R.T. 5960.) Ms. Nelson replied that she did not know what the conflict concerned; however, if it had to do with Mr. Deloney, Mr. Deloney previously told Ms. Nelson that as to any privilege he may hold, he was willing to waive it and would permit defense counsel Wright to review his file. Depending on what developed at the *in camera* proceedings, the prosecutor might request to be heard on the matter. (51 R.T. 5962)

At the *in camera* session held immediately afterwards, Mr. Zagorsky explained that there might be a conflict because the public

defender's office previously represented Deloney. (Sealed transcripts, 51 R.T.5963.)[103] In addition, there might be other prosecution penalty phase witnesses that the public defender previously represented. Mr Zagorsky was unsure and advised the court he was looking into the matter.

The judge noted that Mr. Deloney already testified on direct (Sealed transcripts, 51 R.T. 5964) and expressed dismay that the public defender's conflict screening process revealed the problem so late in the trial. (Sealed transcripts, 51 R.T 5963-5964.)

Mr. Zagorsky replied that he was not yet in a position to know why the office screening process did not reveal the conflicts earlier, but he noted that there was an actual conflict with respect to Mr. Deloney. (Sealed transcripts, 51 R.T 5964.) Further, the public defender noted that his office had not been given any information on Mr. Deloney as required by Penal Code section 1127a.[104] Thus, any

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[103] The defense does not oppose making these sealed transcripts regarding the conflict situation available to respondent in order to allow respondent to properly prepare a reply.

[104] Penal Code section 1127a subd..c provides:

"When the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant.

The statement filed with the court shall not expand or limit the defendant's right to discover information that is otherwise provided by law. The statement shall be provided to the defendant or the defendant's attorney prior to trial and the

conflict could be resolved if Mr. Deloney's testimony was stricken and the jury admonished. (Sealed transcripts, 51 R.T 5965.) Apart from the Penal Code section 1127a issue, the court could declare a mistrial in the penalty phase and relieve the public defender's office. Another option would be to get a waiver from the clients and all the attorneys involved in accordance with the procedures outlined in *Alcocer*[105]. (Sealed transcripts, 51 R.T 5966.) Mr. Zagorsky asked for more time to determine if other conflicts existed as well. (Sealed transcripts, 51 R.T 5967.) The court agreed to allow Mr. Zagorsky more time during the morning to make a further effort to identify any witness conflicts. (Sealed transcripts, 51 R.T 5967.)

When the hearing reconvened in the courtroom, the court informed the prosecutor that Mr. Zagorsky was being given some additional time to research conflict issues and the court recessed. (51 R.T 5969-5970.)

When the hearing reconvened again, the court informed the parties that it appeared that Mr. Deloney was not a confidential informant for the prosecution, so Penal Code section 1127a had no application to the current situation. (51 R.T. 5970-5971.) The court then went into an *in camera* hearing without the prosecution. At the *in camera* hearing, the court informed Mr. Zagorsky that Penal Code

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information contained in the statement shall be subject to rules of evidence."

105 Alcocer v. Superior Court (1988) 206 Cal.App.3d 951

section 1127 did not apply because Mr. Deloney was a percipient witness and possibly a codefendant in these jail assaults. The statute specifically exempts those categories of witnesses from the disclosure requirements. (Sealed transcripts, 51 R.T 5973.)

Mr. Zagorsky informed the court that in his preliminary review he identified several individuals on the prosecution's witness list who had already testified or who would testify for the prosecution concerning the jail assaults. These witnesses had been represented by the public defender's office. These people included David Ramirez, Christopher Willis, and possibly others. Mr. Zagorsky noted, however, that there might not be a conflict regarding these other people. (Sealed transcripts, 51 R.T 5974-5975.) Mr. Zagorsky advised the court that as far as he was aware, defense counsel Wright did not represent any of these witnesses. (Sealed transcripts, 51 R.T. 5975.)

Mr. Zagorsky then mentioned that also there might be a conflict involving potential witness Timothy Goodfield. Mr. Goodfield was apparently the victim of one of the assaults purportedly perpetrated by Mr. Deloney and defendant Williams. (Sealed transcripts, 51 R.T. 5975.) The court inquired how there could be a conflict if Goodfield was the victim. Mr. Zagorsky responded that the public defender's office represented Mr. Goodfield on several other occasions, although he did not yet know if those other representations would amount to a conflict. He was merely advising the court of a possible conflict. (Sealed transcripts, 51 R.T. 5975-5976.)

Mr. Zagorsky further advised there were other witnesses who had been represented by the public defender's office such as Martin Sanchez who testified. As to Mr. Sanchez, however, Mr. Zagorsky did not believe there was any conflict involving the prior representation. Nevertheless, other possible conflicted witnesses included Arturo Alatorre, Michael Hanna, and Dale Foster. (Sealed transcripts 51 R.T. 5976-5977.)

Mr. Zagorsky then asked the court to reconsider its decision with respect to the Penal Code section 1127a issue with respect to Mr. Deloney and the other prosecution witnesses involved in the jail assaults. (Sealed transcripts, 51 R.T. 5978.)

The court reiterated that section 1127a had nothing to do with these jail incidents. Section 1127a was aimed at informants who overhear confessions and things of that nature and who subsequently testify for the prosecution in exchange for some type of benefit. (Sealed transcripts, 51 R.T. 5979-5979.) Mr. Zagorsky submitted. (Sealed transcripts, 51 R.T. 5980.)

The court then advised that it read the *Alcocer* case cited by the defense, and opined that *Alcocer* was a waiver case. The judge noted that since it had not yet found that there was any actual conflict, getting a waiver from counsel and the witnesses was probably premature. (Sealed transcripts, 51 R.T. 5980.) The information the judge wanted to know was whether defense counsel Wright was either counsel for any of these witnesses or was otherwise privy to

confidential information from their public defender files. If not, then the judge did not see any conflict. (Sealed transcripts, 51 R.T. 5980.)

Mr. Zagorsky responded that although he was not aware that defense counsel Wright either represented any of these witnesses or was privy to any information in their files, there was still a conflict situation. For example, **Mr. Zagorsky was aware that there was information in Mr. Deloney's file** [that would be inappropriate to divulge at the *in camera* hearing] **that defense counsel would want to use to benefit Mr. Williams**. ([Emphasis added] Sealed transcripts, 51 R.T. 5981.)

The judge replied that defense counsel could not get confidential information from another attorney's file anyway, so the problem only arises where the attorney himself represents two different persons testifying against each other. The court then cited *People v. Clark* [(1993) 5 Cal.4th 950] for the proposition that one of two public defenders assigned to defending a man found that he had a conflict with a prosecution witness. The attorney recused himself and the other public defender handled the cross examination. The California Supreme Court found that procedure to be acceptable and concluded there was no divided loyalty. The court also cited *People Williams* in support of its reasoning. (Sealed transcripts at 51 R.T. 5982-5985.)

The judge then proposed to ask defense counsel Wright whether he represented any of these witnesses and whether he was in actual

possession on any confidential information with respect to any of these witnesses. (Sealed transcripts 51 R.T. 5985.)

Mr. Zagorsky responded that it was not his intent to derail the penalty phase trial. Nevertheless, he still believed there was a conflict in this case. He also told the court that he had actually reviewed only the Deloney file and in his opinion there was a definite witness conflict there. (Sealed transcripts 51 R.T. 5985-5986.) He was not yet prepared to declare a definite conflict as to the other witnesses since he had not yet reviewed their files. (Sealed transcripts 51 R.T. 5986.)

The court then asked defense counsel Wright whether he previously represented any of the proposed prosecution witnesses. (Sealed transcripts 51 R.T. 5986-5987.) Mr. Wright replied that he couldn't be absolutely sure because some of them had fairly common surnames. Nevertheless, to the best of his recollection he had not previously represented any of these witnesses. (Sealed transcripts. 51 R.T. 5987.) While he did not see any conflict with respect to actual representation, he understood that there was a file with information in it that he did not know about. He had not reviewed any of the public defender's files on these witnesses. (Sealed transcripts 51 R.T.5987.) Therefore, he could not address whether there might ultimately be a conflict. (Sealed transcripts 51 R.T.5988.)

The court noted that the only remaining possible problem that it saw was whether there might be some way that Mr. Wright could (or would) access those old public defender files. (Sealed transcripts 51

R.T.5988.)

The judge then asked if Mr. Zagorsky was aware of the prosecutor's representation that Mr. Deloney would be willing to waive any conflict. (Sealed transcripts 51 R.T.5989.) Mr. Zagorsky replied that he was and reiterated that a waiver might be an option if the court appointed separate counsel for Mr. Deloney to advise him on the matter. Obviously the prosecution could not advise him as it had a vested interest in having Mr Deloney testify. (Sealed transcripts 51 R.T.5989.) The court responded that while it would certainly take a personal waiver from Mr. Deloney, it did not think that the appointment of separate counsel was really necessary. (Sealed transcripts 51 R.T.5989.) It saw no constitutional need to protect Mr. Deloney from waiving the attorney client privilege other than a personal inquiry about whether he wanted to do so. (Sealed transcripts 51 R.T.5989-5990.) It would be different of course if the court was going to ask the defendant to waive the privilege, then separate counsel would be appropriate. (Sealed transcripts 51 R.T.5990.)

Mr. Zagorsky replied that such an inquiry put the public defender's office in an awkward position. By way of example, if someone came to the public defender and asked to see what was in Mr. Deloney's file, the public defender would not be in a position to advise Mr. Deloney what to do. On the other hand, because of its continuing ethical duty to protect his interests, it could not stand mute

when someone else asked him to waive the privilege. The court should appoint separate counsel to obviate the problem. (Sealed transcripts 51 R.T.5990.)

The court then asked hypothetically whether it would be proper for a lawyer who now knows that important confidential information exists in an old public defender's client file - a client whom the lawyer did not personally represent - to go find that file and rummage through it to discover that information. . (Sealed transcripts 51 R.T.5991.)

Mr. Zagorsky demurred noting that individual circumstances may vary, but the conflict issues remain. (Sealed transcripts 51 R.T.5991.)

The judge again asked hypothetically if it would be unethical for one public defender who represented former client "A" to volunteer confidential information from "A"'s file to another public defender representing client "B" so that the public defender representing client "B" could cross examine former client "A." In the court's view, just because both attorney's are from the same firm does not permit compromise of client confidences. . (Sealed transcripts 51 R.Tp.5991-5992.)

With respect to defense counsel Wright, the court opined that if Mr. Wright represented that he had not looked at another client's file and determined that it would not be proper to do so, then the court would have no hesitation in accepting Mr. Wright's words on the

matter. (Sealed transcripts 51 R.T.5992.)

Mr. Zagorsky disagreed. He noted that in view of the stakes in this case and the likelihood of appellate review, it might be best to determine exactly what the parameters of the problem were. Mr. Zagorsky reiterated that he had only reviewed Mr. Deloney's file, not the files of the other prosecution witnesses. Nevertheless, when the public defender has a client whose life is at stake, it has a duty to do everything it can to zealously represent that client. Now that the office was aware that it had information that would benefit Mr. Williams, it certainly had an ethical problem with not being able to divulge the information that might save Mr. Williams' life. More importantly, it was the office of the public defender that represents Mr. Williams, not defense counsel Wright. (Sealed transcripts 51 R.T.5992-5993.)

The judge replied that whether this is a capital case is not the issue. The issue is whether an attorney can compromise his or her ethical responsibilities by disclosing confidential client information. (Sealed transcripts 51 R.T. 5993.)

Mr. Zagorsky responded that **the court was forcing the public defender's office to position one client adversely to another. Avoiding that problem was the whole purpose behind the conflict rules.** (Sealed transcripts 51 R.T. 5993.)

The judge stated that under the case law, he was empowered to accept the word of Mr. Wright that as an officer of the court he (Wright) had no connection with the witnesses nor had he obtained

any confidential information on these witnesses. Under those circumstances, the judge could keep Mr. Wright on the case and would do so subject to Mr. Zagorsky's further review of the files on the proposed prosecution witnesses. (Sealed transcripts 51 R.T. 5994.)

Mr. Zagorsky reiterated his objection that there was a conflict, at least as to Mr Deloney. (Sealed transcripts 51 R.T. 5994.)

The court asked if that objection was still based on Mr. Zagorsky's belief that there was information in Mr. Deloney's file that would benefit Mr. Williams. Mr Zagorsky said it was. (Sealed transcripts 51 R.T. 5994.)

Mr. Zagorsky asked for a noon recess to look at the cases cited by the judge and to determine if there was any law that would require the judge to appoint separate counsel to advise Mr. Deloney on a waiver of the attorney client privilege. (Sealed transcripts 51 R.T. 5995.) The court again stated that there was nothing for Mr. Deloney to waive since the court would consider it an ethical violation for the public defender's office to disclose any confidential information in its files to defense counsel Wright. (Sealed transcripts 51 R.T. 5995.)

Before taking the noon recess, the court again reminded the public defender of its duty to adhere to its ethical responsibilities and to ensure that defense counsel Wright had no connection with the files on the other prosecution witnesses who were formerly public defender clients. (Sealed transcripts 51 R.T. 5996.)

After the noon recess, the judge and Mr. Zagorsky resumed the

in camera hearing. Mr. Zagorsky distinguished the *Clark* cases relied upon by the judge noting that the public defender in question there possessed no confidential information from any prior representation by his office. Further, cross examination would not be affected by any prior representation by the public defender's office. (Sealed transcripts 51 R.T. 5999.) Mr. Zagorsky noted that as things stood at that point, the same could not be said of the facts in this case. (Sealed transcripts 51 R.T. 5999.) The defense again asked the court to take waivers from the parties involved so that there would be no question of a conflict. (Sealed transcripts 51 R.T. 5999.)

The court reiterated, however, that unless defense counsel Wright possessed some confidential information concerning Mr. Deloney, there was no actual conflict situation. (Sealed transcripts 51 R.T. 6000.) Moreover, since defense counsel Wright did not believe he represented any of the witnesses with common surnames, the likelihood of a conflict was small. (Sealed transcripts 51 R.T. 6000.)

Mr. Zagorsky replied that defense counsel Wright still had an ethical obligation to do everything he could to defend Mr. Williams, including uncovering impeachment evidence. (Sealed transcripts 51 R.T. 6000.)

The court noted that Mr. Wright was not prohibited from doing that investigation so long as he did not look in the public defender's files. Certainly he could not look in counsel files if a witness had been previously represented by an outside law firm. In the judge's opinion,

the files of the public defender's office occupied the same relative status. They were equally privileged and ethically defense counsel Wright could not look at them. (Sealed transcripts 51 R.T. 6001-6002.)

Mr. Zagorsky answered that if the court was ordering defense counsel Wright not to look at the files then the Public Defender was left in the position of having to make a decision. (Sealed transcripts 51 R.T. 6001.)

The court stated that there is no obligation on an attorney, especially the Public Defender, to violate his ethics even in a capital case. (Sealed transcripts 51 R.T. 6002.)

Mr. Zagorsky replied that he understood what the judge was saying, but that the court's decision put his office in an awkward spot. **If defense counsel Wright was ordered not to review the confidential files, but the Public Defender knows the files contain useful impeachment information, was defense counsel Wright being improperly compromised in his ability to defend Mr Williams?** ([Emphasis added] Sealed transcripts 51 R.T. 6002.)

The court acknowledged that this was a difficult question and offered to give Mr. Zagorsky more time to gather the files on all of the potential witnesses and review them to determine what, if any, other conflicts might exist. (Sealed transcripts 51 R.T. 6002-6003.) The court then recessed the *in camera* hearing. (Sealed transcripts 51 R.T. 6003.)

The next day, the *in camera* session resumed. (Sealed transcripts 52 R.T. 6058.) Mr. Zagorsky informed the court that he had been able to review only a few of the files on prospective prosecution witnesses that his office previously represented. (Sealed transcripts 52 R.T. 6058.) Nevertheless, he reviewed the files on Timothy Goodfield and Dale Foster and there were public defender conflicts as to those two. Mr. Goodfield had not yet testified but Mr. Foster had. (Sealed transcripts 52 R.T. 6058.)

Mr. Zagorsky then asked for more time to review additional files. While he understood the court's position, he believed it was necessary to make a complete record of all the public defender conflicts in this case. (Sealed transcripts 52 R.T. 6058-6059.)

The court inquired whether this was a conflict based on the public defender's prior representation of these witnesses. (Sealed transcripts 52 R.T. 6059.) Mr. Zagorsky replied that it was. (Sealed transcripts 52 R.T. 6059.) The court then inquired whether defense counsel Wright ever represented any of these people. Mr. Zagorsky replied that he did not yet know for sure. (Sealed transcripts 52 R.T. 6059.) When queried by the court directly, defense counsel Wright stated that he was not familiar with those names. (Sealed transcripts 52 R.T. 6059.)

Mr. Zagorsky then reiterated that if Mr. Deloney was going to be allowed to testify further, a conflict waiver should be taken and Mr. Deloney should be given independent counsel. (Sealed transcripts 52

R.T. 6060.) The court refused noting that since Mr. Deloney did not have any rights at issue in this proceeding, there was nothing for independent counsel to advise him about. (Sealed transcripts 52 R.T. 6060.)

When Mr. Zagorsky continued to argue the point, the court responded that as long as defense counsel Wright never represented any of these witnesses there was no actual conflict. Absent a conflict, there was no need to obtain any sort of waiver from either Mr. Deloney or Mr. Williams. (Sealed transcripts 52 R.T. 6061.)

The court said that it understood Mr. Zagorsky's position to be that as long as the public defender's office previously represented any prosecution witness on any matter, there was a conflict with its current representation of the defendant. (Sealed transcripts 52 R.T. 6062.)

Mr. Zagorsky replied that the court took the defense position too far. There could be cases where there was no conflict. **In this case, however, he was representing to the court that there was a defense conflict with these witnesses.** ([Emphasis added] Sealed transcripts 52 R.T. 6062.)

The court said that the cases held that the defense lawyer himself had to be involved with the adverse witnesses in some material way in order to have a conflict situation. Here, however, Mr. Wright had no apparent involvement. (Sealed transcripts 52 R.T. 6062.)

Mr. Zagorsky said that he could not speak to all situations. **On**

the facts of this case, however, he declared what he believed to be a conflict. ([Emphasis added. Sealed transcripts 52 R.T. 6062.)

Mr. Zagorsky then asked for additional time to review the rest of the files. (Sealed transcripts 52 R.T. 6063.) The court observed that since the prosecution indicated that Mr. Deloney might be willing to waive any privilege or conflict, defense counsel Wright might confer with the prosecutor and see if Mr. Deloney would consent to Mr. Wright's review of his file. (Sealed transcripts 52 R.T. 6063.)

Mr. Zagorsky responded that the prosecutor was not in the best position to advise Mr. Deloney. As he pointed out previously, the prosecutor had a vested interest in having Mr. Deloney testify. Nevertheless, the court could appoint independent counsel for Mr. Deloney and resolve the problem that way. (Sealed transcripts 52 R.T. 6064.) The court made no response.

Mr. Zagorsky then clarified that it was his understanding that the court was ruling that as long as defense counsel Wright did not personally represent any of these adverse penalty phase witnesses and had no knowledge of what was in their files, there was no actual conflict with his representation of Mr. Williams. The court replied affirmatively. (Sealed transcripts 52 R.T. 6064.)

Mr. Zagorsky then clarified that it was also his understanding that the court found that there was no conflict with the public defender's office either. (Sealed transcripts 52 R.T. 6065.) The court replied that it was not making any ruling on that issue since the

conflict cases dealt only with whether defense counsel himself had a conflict. Therefore, the court was confining itself to that finding. (Sealed transcripts 52 R.T. 6065.)

The *in camera* session then recessed to allow Mr. Zagorsky additional time to review the files of all the potential prosecution witnesses who had been previously represented by the public defender's office. (Sealed transcripts 52 R.T. 6066.)

When the *in camera* session resumed, Mr. Zagorsky informed the court that he reviewed a number of files and declared a conflict as to witnesses Alatorre, Dale Foster, Michael Hanna, Martin Sanchez, Christopher Willis and Timothy Goodfield. Mr. Zagorsky noted that the latter two had not yet testified in this case. Mr. Zagorsky also noted that he did not have sufficient information to know whether there was a conflict with David Ramirez because the name is so common that the office had represented numerous people with that name. (Sealed transcripts 52 R.T. 6100.)

The court noted that it previously ordered Mr. Wright not to look at the files of those witnesses. Out of an abundance of caution, however, the court then specifically ordered Mr. Zagorsky and his office not to provide information to defense counsel Wright that would violate the attorney-client privilege. Nevertheless, defense counsel Wright would be permitted to develop similar information from other sources. (Sealed transcripts 52 R.T. 6101.)

Mr. Zagorsky then asked about the process with regard to other

prosecution witnesses. (Sealed transcripts 52 R.T. 6100-6101.) The court responded that the order applied to all of the witnesses. (Sealed transcripts 52 R.T. 6101.)

The court then suggested that with respect to Mr. Deloney, Mr. Wright might want to ask Mr. Deloney directly if he would waive the privilege. (Sealed transcripts 52 R.T. 6101-6102.) Mr. Zagorsky asked if the court would appoint separate counsel for Mr. Deloney before Mr. Wright made that inquiry. The court said it would not. (Sealed transcripts 52 R.T. 6102.)

Mr. Zagorsky observed that without separate counsel to advise Mr. Deloney, Mr. Wright would be in a difficult position. Since the public defender's office represented Mr. Deloney and Wright would be asking Mr. Deloney to waive the privilege without the benefit of counsel, effectively, Mr. Wright would be in a position of divided loyalty. He would be asking one client to waive the attorney-client privilege to benefit another client. (Sealed transcripts 52 R.T. 6102.)

The court acknowledged that if Mr. Wright had been Mr. Deloney's lawyer previously, there would certainly be a conflict. Since he was not, however, and he had no knowledge of what was in the file, and since the public defender's office no longer represented Mr. Deloney, the court saw no conflict. (Sealed transcripts 52 R.T. 6103.)

Mr. Zagorsky then asked the court if it would appoint separate counsel for Mr. Williams to conduct the cross examination of the prosecution witnesses previously represented by the public defender's

offices. (Sealed transcripts 52 R.T. 6103.)[106]

The court noted that if it found a conflict with Mr. Wrights's representation, it would have to explore the possibility of appointing separate counsel for Mr. Williams. Finding no conflict, however, the court refused to appoint separate counsel. (Sealed transcripts 52 R.T. 6103-6104.)

Mr. Zagorsky informed the court that it would continue to try and resolve whether proposed prosecution witness David Ramirez had ever been represented by the public defender's office. Aside from that, however, the court and Mr. Zagorsky agreed that the arguments over the conflict issue pretty much had been exhausted. (Sealed transcripts 52 R.T. 6104.)

Before recessing, the court again inquired of defense counsel Wright whether he was personally aware of any conflict with the prosecution witnesses, other than the issues arising from their prior representation by the public defender's office. Mr. Wright replied that he was not. (Sealed transcripts 52 R.T. 6105.)

The *in camera* session was then terminated and the penalty phase trial continued as set forth more fully in the statement of facts.

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[106] Although unspoken, it appears that the court and Mr. Zagorsky understood that the rationale for this request was that defense counsel Wright might have a divided loyalty to the prior clients of the public defender's office. That is, he might not zealously seek impeachment evidence about these witnesses for fear of compromising the attorney client privilege they had with other attorneys in the office.

Conflict of Interest Violates the Sixth, Eighth and Fourteenth Amendments as well as the California Constitution.

The Sixth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment and Article I, section 15 of the California Constitution ensures fairness in the adversary criminal process. (*Wheat v. United States* (1988) 486 U.S. 153.) The right is considered "fundamental;" it is among those rights so basic to a fair trial that their infraction can never be treated as harmless error. (*Cuyler v. Sullivan* (1980) 446 U.S. 335,343; *Holloway v. Arkansas* (1978) 435 U.S. 475, 489.) A conflict of interest exists in any situation in which an attorney's loyalty to, or efforts on behalf of a client are threatened by his or her responsibilities to another client or third person, or by the attorney's own interests. (*People v. Bonin* 1989) 47 Cal.3d. 808, 835; citing ABA Model Rules of Prof. Conduct (1983) rule 1.7 and Comment thereto.)

Additionally, the error violates the heightened reliability requirements of the Eighth and Fourteenth Amendments. (*Beck v. Alabama, supra*, 447 U.S. 625, 637-638 [heightened reliability required by the Eighth and Fourteenth Amendments for conviction of a capital offense]; and *Woodson v. North Carolina, supra*, 428 U.S. 280, 304 [reliable, individualized capital sentencing determination is required by the Eighth and Fourteenth Amendments]; *Zant v. Stephens* (1983) 462 U.S. 862, 869 [same]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [same].)

Conflicts on Criminal Cases

In a criminal case, a conflict arises when an attorney represents a defendant and currently has, or formerly had, an attorney-client relationship with a person who is a witness in that matter. The conflict springs from the attorney's duty to provide effective assistance to the defendant facing trial and his fiduciary obligations to the witness with whom he has had or has a professional relationship. (*People v. Bonin, supra*, 47 Cal.3d at p. 475; *Leverson v. Superior Court* (1983) 34 Cal.3d 530, 536-540; *United States v. Armedo- Sarmiento* (2ndCir. 1975) 524 F.2d 591, 592; *People v. Pennington* (1991) 228 Cal.App.3d 959, 965. [A conflict of interest exists "where an attorney, or a member of the attorney's firm or office, represents a criminal defendant after having previously represented a prosecution witness.")

An attorney is forbidden to use against a former client any confidential information acquired during the attorney-client relationship. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 333; Bus. & Prof. Code, § 6068; Rules of Prof. Conduct, rule 4-101; rule 5-102(B).) An attorney has an ethical duty to withdraw, or apply to the court for permission to withdraw, from representation that results in conflicting obligations to present and former clients. *(People v. Bonin, supra*, 47 Cal.3d at p. 835.)

It has long been true that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one

lawyer shall simultaneously represent conflicting interests." *(Glasser v. United States* (1942) 315 U.S. 60, 70 [86 L.Ed. 680, 699, 62 S.Ct. 457]; accord, *People v. Chacon* (1968) 69 Cal.2d 765, 774].) "When an attorney attempts to represent his client free of compromising loyalties, and at the same time preserve the confidences communicated by a present or former client during representation in the same or a substantially related matter, a conflict arises." *(United States v. Agosto* (8th Cir. 1982) 675 F.2d 965, 971, cert. den. 459 U.S. 834 [74 L.Ed.2d 74, 103 S.Ct. 77]; *United States v. Dolan* (3d Cir. 1978) 570 F.2d 1177, 1181.) As the court in *Light bourne v. Dugger* (11th Cir. 1987) 829 F.2d 1012, 1023 recognized. **"An attorney who cross examines a former client inherently encounters divided loyalties.**"[Emphasis added.] Morever, "the mere fact that cross-examination might appear 'vigorous' does not necessarily expunge this aspect of the constitutional error. [Citation.] Rather, the dangers inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did: **'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.**'" ([Emphasis added] *Church v. Sullivan* (10th Cir. 1991) 942 F.2d 1501, 1512 (quoting *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 489.)

In this regard, both the American Bar Association and this Court, through its approved Rules of Professional Conduct, have sought to prevent attorneys from developing conflicts of interest. Rule 3-310 subd. (C) of this Court's Rules of Professional Conduct states

that a member of the California State Bar shall not represent conflicting interests. Rule 3-310 of the Rules of Professional Conduct provides in pertinent part as follows:

> "(C) A member shall not, without the informed written consent of each client:
>
> "(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> "(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
>
> "(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

The American Bar Association's Model Rules of Professional Conduct, rules 1.7[107] and 1.9[108] contain similar provisions.

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[107] Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[108] Rule 1.9 provides:

a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would

Numerous cases have recognized that the violation of any of these rules of professional conduct establishes an actual conflict of interest. (See, e.g., *United States v. Iorizzo* (2nd Cir, 1986) 786 F.2d 52, 57, citing *United States v. McKeon* (2d Cir. 1984) 738 F.2d 26, 34-35; *United States v. Dolan* (3rd Cir. 1978) 570 F.2d 1177, 1184.) Reference to established rules of professional conduct provides one manner in which to determine what constitutes an "actual conflict of interest." Such a definition is not exhaustive however. Numerous courts have found actual conflicts of interest without any reference to the established rules of professional conduct. For instance, in his concurring opinion in *Cuyler v. Sullivan, supra*, 446 U.S. 354-358, Justice Marshall noted a "'Conflict of interest" is a term that is often used and seldom defined." *(Ibid.*, at p. 356 fn.3.) After noting that the standards embodied in the rules of professional conduct do not "define the constitutional standard" for determining an actual conflict, Justice Marshall set forth the following definition of an "actual conflict" within the context of multiple representation: "There is an actual, relevant conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." (*Ibid.*)

These definitions recognize the numerous strategic and tactical

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permit or require with respect to a client.

decisions which confront counsel throughout the pretrial and trial proceedings. An actual conflict occurs when counsel has an interest or a motivation for choosing one option or course of conduct over another. The presence of such an interest prevents counsel from providing his client with absolute undivided loyalty. Indeed, this court recognized that an unconflicted lawyer may have made the same strategic decisions, but that the unconflicted attorney would have made the decision thinking only of his client's interests and not those of a former client. (*People v. Mroczko* (1983) 35 Cal. 3d 86, 107-108. See also *United States v. Christakis* (9th Cir. 2001) 238 F.3d 1164, 1171 ("[A]ll that Christakis must show here to demonstrate adverse effect is that [counsel]'s actual conflict probably influenced his decision . . . .".)

Standard of Relief in Conflict Situations

The standard for obtaining relief under the Sixth Amendment based on conflict of interest depends on whether the defendant objected to the conflict at trial. Where a trial court requires the continuation of conflicted representation over a timely objection, reversal is automatic. (*Mickens v. Taylor* (2002) 535 U.S. 162, 168, *Holloway v. Arkansas, supra,* 435 U.S. 475, 488; *People v. Clark* (1993) 5 Cal.4th 950, 994.) But if the defendant does not object at trial, he must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. (*People v. Clark, supra*, 5 Cal.4th at pp. 994-995; *People v. Easley* (1988) 46 Cal.3d 712, 724; *Cuyler v. Sullivan, supra,* 446 U.S. 335, 338 [64 L.Ed.2d 333, 100 S.Ct. 1708].)

In that regard,"[t]o determine whether counsel's performance was 'adversely affected,' [the Supreme Court has] suggested that [federal constitutional law] requires an inquiry into whether counsel 'pulled his punches,' i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict. [Citation.] In undertaking such an inquiry, we are ... bound by the record. But where a conflict of interest causes an attorney *not* to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. [Citation.]" (*People v. Cox* (2003) 30 Cal.4th 916, 948-949.)

On the other hand, under the California Constitution, regardless of whether the defendant objected, even a potential conflict may require reversal if the record supports an informed speculation that the defendant's right to effective representation was prejudicially affected; proof of actual conflict is not required. (*People v. Clark, supra*, 5 Cal.4th at p. 995; *People v. Cox, supra,* 53 Cal.3d 618, 654; *People v. Mroczko, supra,* 35 Cal.3d 86, 104-105.) Under this standard, there must be at least some grounds to believe that prejudice occurred. (*People v. Clark, supra*, 5 Cal.4th at p. 995; see *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1014.)

It is important to note that these principles apply when counsel

represents clients whose interests may be adverse even though they are not defendants in the same trial. (*People v. Mroczko, supra*, 35 Cal.3d at p. 105.) For example, in *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, a public defender refused appointment as counsel based in his declaration of a conflict with representing another, unnamed client. The public defender explained that "he could not disclose the nature of the relationship that gave rise to the conflict without breaching the confidence of the existing client." (Id., at p. 529.) The Court of Appeal affirmed the superior court's order directing the municipal court to appoint different counsel. In doing so, the Court of Appeal stated: "[T]he mere fact that the conflict exists as to defendants in different proceedings is not a sufficiently significant distinction. Separate and distinct proceedings can pose the same problems of constitutional and ethical conflicts of interests." (*Id.*, at p. 535; see also, *People v. Perry* (1966) 242 Cal.App.2d 724 (request to be relieved as trial counsel for conflict based on representation of codefendants who had previously pleaded guilty).) Thus the problem of a conflict can affect both successive and concurrent representation equally.

That said, the protected interests differ slightly when there is successive representation rather than concurrent representation. In *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240, the court observed that: " 'Where an attorney's conflict arises from successive representation of clients with potentially adverse interests, "the chief fiduciary value jeopardized is

that of client *confidentiality."* [Citation.] ... [¶] A different test is utilized where the attorney's conflict arises from simultaneous representations. "The primary value at stake in cases of simultaneous or dual representation is the attorney's duty-and the client's legitimate expectation-of *loyalty,* rather than confidentiality." [Citations.] " '[R]epresentation adverse to a *present* client must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients." ' [Citation.]" ' (71 Cal.App.4th at p. 1253, fn. 8, quoting *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 73-74, italics in original.)

With respect to confidentiality however, an attorney's duty of confidentiality is broader than just client communications and **extends to all confidential information, privileged or unprivileged, and whether learned directly from the client or from another source.** ([Emphasis added] *Perillo v. Johnson* (5th Cir. 2000) 205 F.3d 775, 779.)

The Conflict Situation Here Requires Automatic Reversal

The trial court's order here forced the defense to choose one client over another, the very thing the conflict rules undergirded by the Sixth Amendment were designed to prevent. The essence of the defense counsel Wright's conflict is this: since, as a result of the *in camera* hearing defense counsel knew that his office was in possession of confidential information on a former client the exposure of which would benefit his current client, counsel and his office owe a duty of

loyalty and confidentiality to Mr. Deloney (and the other proposed prosecution witnesses) as well as Mr. Williams.

A hypothetical will illuminate Mr. Wright's conflict problem more clearly. Suppose the confidential information in the public defender's file was that Mr. Deloney was the mastermind of all the jail incidents and he used threats and violence against other people to help him commit additional violent jail assaults as well. Certainly Mr. Deloney's acceptance of a high degree of casual violence in the jail environment makes this a more than plausible scenario. If Mr. Wright discovered that information and used it during cross examination, the information would clearly benefit Mr. Williams but pose considerable risk of additional prosecution to Mr. Deloney. On the other hand, if Mr. Wright refused to use that evidence or even failed to aggressively seek its discovery, he would fail in his duty to represent Mr. Williams to the best of his ability. He would not use this very beneficial information to seriously impeach the credibility of the primary prosecution witness at the penalty phase - the witness who more than any other painted Mr. Williams as a man prone to violence to achieve his own selfish ends.

When trying to resolve that dilemma, it is important to recall this court's words in *People ex rel. Deukmejian v. Brown* (1981) 29 Cal. 3d150, 155: "An attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use

against his former client knowledge or information acquired by virtue of the previous relationship. (*Id.* at 156 (citation omitted).) Counsel may not "use information or do anything which will injuriously affect his former client."

For this reason, cross examination of Mr. Deloney (or the the other prosecution witnesses) on other jail assaults for which they or Mr. Deloney could suffer would pose an irreconcilable conflict for the public defender's office. It would injuriously affect the prior client(s) of the public defender's office in order to benefit its current client, Mr. Williams.

Additionally, the trial court's order simply exacerbated the ethical dilemma. While the trial court obviously sought to ameliorate the ethical problem by allowing Mr. Wright to seek the information from any source outside the public defender's office, the practical reality was that the order effectively blocked Mr. Wright from obtaining the beneficial information. As *Perillo v. Johnson , supra,* makes clear, confidential information can come from almost any source, not just the client. (*Perillo v. Johnson, supra,* 205 F.3d at p. 779.) Thus, if Mr. Wright learned of confidential information concerning Mr. Deloney (or the other witnesses), even from a source not connected with the public defender's office, the information itself is still confidential.[109] Thus Mr. Wright ran a significant risk of

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For example, suppose a private investigations firm contained a retired public defender investigator who did not work on Mr. Deloney's case but knew generically of

violating the court's order simply by discovering the information.

The corollary problem with the court's order is that Mr. Wright might not be aggressive in seeking the beneficial information in order to avoid violating the trial judge's order. If Mr. Wright did not aggressively seek out that confidential information, he would be "pulling his punches" in his defense of Mr. Williams. After all, if the information is truly confidential, the likelihood of that information being available from a source other than the public defender's office is almost infinitesimal. The evidence might just as well be locked away on another planet for all the likelihood that Mr. Wright would have in discovering it without violating the court's order.

For these reasons, the practical effect of the trial court's offer to allow Mr. Wright to pursue the information from any source outside the public defender's office was simply to worsen this ethical dilemma.

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confidential information provided by Mr. Deloney. After leaving the public defender's office this investigator shared the generic information with other members of his private investigations firm. If Mr. Wright was able to link the generic information he obtained from the investigations firm specifically to Mr. Deloney and then use it for cross examination of Mr. Deloney, would the information itself lose its privileged status? The answer is obviously in the negative. It is still confidential information and the fact that Mr. Wright did not learn it directly from a source in the public defender's office would not absolve him from the ethical prohibition against using that information against Mr. Deloney.

Public Defender Office Conflicts

There is an additional twist to the conflict situation presented here, the problem of vicarious disqualification. Because Mr. Wright did not personally possess any confidential information concerning Mr. Deloney or the other prosecution witnesses even though his office did, the trial judge took the position that there was no vicarious disqualification. That is, Mr Wright did not have to be disqualified from continued representation so long as he did not actually learn of the confidential information kept by the public defender's office. (Sealed transcripts 52 R.T. 6061.)

The California Rules of Professional Conduct do not specifically address the question of vicarious disqualification. Thus, the rules governing vicarious disqualification have been shaped in large part by decisional law. As a general rule, however, in California, where there is an actual conflict, disqualification of both the attorney and the firm is required. (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 114; *Klein v. Superior Court* (1988) 198 Cal.App.3d 894, 912-913; see also *People ex rel. Dep't of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal. 4th 1135, 1139 ["When a conflict of interest requires an attorney's disqualification from a matter, the disqualification normally extends vicariously to the attorney's entire law firm."]; *Trone v. Smith* (9th Cir. 1980) 621 F.2d 994, 999 [same].)

Nevertheless, it might be argued that the conflict

disqualification rules that apply to a private law firm should not apply to the public defender's office. That is, public defender offices perform services for indigent clients and therefore do not have the same financial incentive to favor more important clients over lesser ones. Additionally, disqualification of public sector attorneys can result in increased public expenditures for legal representation. (See, e.g., *People v. Christian* (1996) 41 Cal.App.4th 986, 997.)

While the foregoing commentary is seductive, it is simply wrong. Formal Opinion No. 1981-59 of the State Bar asserts that if the public defender represents two defendants charged in separate unrelated criminal cases, and one defendant seeks to become a witness against the other, the public defender should not continue to represent either of them. (See the opinion located at: http://calbar.ca.gov/calbar/html_unclassified/ca81-59.html)

While that opinion is not binding on the courts, it sets forth the correct and prudent rule. Moreover, the notion that the public defenders office should be treated differently in conflicts cases from private law firms because of a purported lack of financial incentive to favor one client over another is similarly without merit. As the courts of this state have repeatedly explained at length, a conflict involves an ethical dilemma. The fact that it might cost the state more money to provide conflict free counsel has never been a consideration when adhering to constitutionally mandated standards ensuring a fair trial. (*People v. Barboza* (1981) 29 Cal. 3d. 375, 380-381 [expense is an improper consideration in determining where counsel's fiduciary

responsibilities lie]; see also *Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.) "[T]he pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial."].)

Most importantly, however, in *Mickens v. Taylor, supra,* 535 U.S. at p. 169, fn2,[110] the United States Supreme Court flatly rejected any distinction between private law firms and state appointed counsel when evaluating conflict situations. Thus, if a conflict exists, it does not somehow become less important or less of a conflict because the entity representing a criminal defendant is the public defender rather than a privately retained law firm.

Despite the foregoing, the trial judge relied on this court's decision in *People v. Clark, supra,* for the proposition that as long as Mr. Wright did not personally know of the confidential information and the public defender's office did not reveal it to him, there was no

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[110] Footnote 2 in *Mickens* states:

"In order to circumvent *Sullivan's* [*Cuyler v. Sullivan*] clear language, Justice STEVENS suggests that a trial court must scrutinize representation by appointed counsel more closely than representation by retained counsel. *Post*, at 1250 (dissenting opinion). **But we have already rejected the notion that the Sixth Amendment draws such a distinction. "A proper respect for the Sixth Amendment disarms [the] contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel ··. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.**" *Sullivan, supra,* at 344, 100 S.Ct. 1708." [Emphasis added]

actual conflict. Thus the conflict rules simply did not apply. (Sealed transcripts 51 R.T. 6000.)

The *Clark* case, however, supports appellant's position. In *Clark*, this Court found no conflict where the public defender's office previously represented three of the prosecution witnesses and the public defender himself previously represented a fourth prosecution witness. With respect to the witnesses who had been represented by the public defender's office, this court opined that defense counsel was "in the best position to assess whether a conflict of interest existed or was likely to arise." In *Clark*, defense counsel informed the court **he possessed no confidential information relating to any of the witnesses**. ([Emphasis added] *Id.* at p. 1001.) Additionally, he and co-counsel, a private attorney, told the court that cross-examination of the witnesses would not be affected. (*Ibid.*)

Finally, *Clark* stated that because the public defender's office did not represent any of the witnesses at the time of the defendant's trial, the public defender "did not have any interest in attempting to shield these witnesses from impeachment or to otherwise ensure that their testimony was well-received." (*Ibid.*) As to the one witness whom the public defender himself previously represented, the public defender terminated his representation of the witness when he learned that person was likely to be a witness in the defendant's trial and had arranged for the private attorney co-counsel to conduct the cross-examination of the witness. *Clark* concluded, however, that because of his prior representation of the witness, defense counsel was in

possession of attorney-client information and so, despite having withdrawn from the representation, "likely would have been in a situation of divided professional duties if he had cross-examined [the witness] or assisted in that cross-examination." (*Id.* at p. 1002.) Nevertheless, because the cross-examination was handled by the private attorney, who had no conflict of interest, along with representations from that attorney and the public defender that neither the public defender nor his office provided the private attorney with any confidential information obtained from or relating to the witness, *Clark* held that there had been no adverse effect on the defendant's representation resulting from the public defender's potential conflict of interest. (*Ibid.*)

Clark differs from this case in an absolutely critical respect: here, Mr. Zagorsky reviewed Mr. Deloney's file and told the court that **he objected to going forward because there was an actual conflict of interest**. (Sealed transcripts 51 R.T. 5985-5986.) Thus, unlike *Clark* where the public defender assured the court that here was no conflict of interest , **here, the opposite occurred**. In this case, the public defender was adamant that because there was an actual conflict with his office, Mr. Wright could not represent Mr. Williams properly. Mr. Williams' interests diverged from those of Mr. Deloney and the other named prosecution witnesses. (Sealed transcripts 51 R.T. 5985-5986,)

Additionally, unlike Clark, because there was an actual conflict here as well as a vigorous defense objection, the refusal to disqualify

defense counsel causes this case to fall under the rule of automatic reversal. (*Leverson v. Superior Court, supra*, 34 Cal.3d at pp. 539-540)

Even if state law precedent was not enough, the United States Supreme Court has also provided guidance in situations where the public defender declares a conflict. The high court has directed that trial courts defer to the judgment of counsel regarding the existence of a disabling conflict. In *Mickens v. Taylor, supra,* the court held that a defense attorney is in the best position to determine when a conflict exists; he or she has an ethical obligation to advise the Court of any problem, and his or her declarations to a court are "'virtually made under oath.'" (*Mickens v. Taylor, supra,* 535 U.S. at p. 167; quoting *Holloway v. Arkansas, supra*, 435 U.S. at p. 485-486; see also *People v. Hardy* (1992) 2 Cal.4th 86, 137.) Thus, **the declaration of counsel is sufficient to establish a conflict without disclosure of the underlying facts** . (*Uhl v. Municipal Court, supra,* 37 Cal.App.3d 526, 535.)[111]

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[111] In *Holloway v. Arkansas, supra* the court explained that rational as follows:

"In so holding, the courts have acknowledged and given effect to several interrelated considerations. An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists and will probably develop in the course of a trial.' ... Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem.... Finally, attorneys are officers of the court and ' " when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." ' ... We find these considerations persuasive." *Id.* at pp. 485-486, citations omitted.)

In *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, the court of appeal found that it was sufficient to establish a conflict when there was an affirmative representation either by personal appearance or by declaration that the chain of command at the county public defender's office reviewed the facts, and concurred with trial defense counsel that there was a conflict. (*Id.* at p. 594, fn. 8.) In the view of the Court of Appeal, the county public defender did not declare conflicts lightly and thus there was little danger of multiple frivolous conflict declarations. (*Id.*, at p. 594.)

Here, since the public defender himself declared a conflict and he was in the best position to know, the existence of an actual conflict is factually established. (*Holloway v. Arkansas, supra*, 435 U.S. at p. 485-486.) There is little evidence that the public defender was simply declaring a frivolous conflict in order to effect a mistrial at the penalty phase hearing.

More to the point, the public defender even advised the trial court how to **avoid** any possible conflict. Mr. Zagorsky suggested that in accordance with the procedures outlined in *People v. Alcocer* (1988) 206 Cal.App.3d, 951, 961-962 the court could simply appoint independent counsel for Mr. Deloney to advise him whether he should waive any conflict. (Sealed transcripts 51 R.T.5989.)

Finding no conflict, however, the trial court refused to appoint independent counsel for Mr. Deloney (or Mr. Williams). Instead, the court tried to find a way out of the conflict situation by suggesting that

Mr. Wright could ask Mr. Deloney directly if he would waive any conflict. (Sealed transcripts 51 R.T.5989-5990.)

As Mr. Zagorsky explained, however, since there was an actual conflict, it would be unethical for Mr. Wright to ask Mr. Deloney directly if he would waive any conflict. Mr. Wright would be seeking a waiver from one client solely to benefit another. (Sealed transcripts 51 R.T.5990-5993)

Certainly it is true that courts need not appoint independent counsel every time a possible conflict arises. (*People v. Carpenter* (1997) 15 Cal.4th 312, 375.) Nevertheless, when there is an actual conflict of interest, independent counsel must be appointed. (*People v. Alcocer, supra,* 206 Cal.App.3d 961-964) This is so because counsel could not ethically give advice to one client in order to benefit himself or another client. (See, e.g., *United States ex rel. Simon v. Murphy* (E.D.Penn. 1972) 349 F.Supp. 818, 823 ["A conflict of interest arises where the lawyer is faced with the task of giving advice to the client on optional courses of action where the lawyer stands to benefit personally from the adoption of one course to the exclusion of the other. "].) Under these circumstances then, the trial judge's proposed remedy to the conflict situation by asking Mr. Deloney to waive any conflict was untenable. The defense could not ethically seek a waiver from Mr. Deloney or any of the other proposed prosecution witnesses without the appointment of independent counsel to advise them.

Had the trial judge read *Alcocer* a little more closely and erred on

the side of caution, he could have easily avoided the conflict situation presented here. While it would have cost the court a little more money and perhaps delayed the penalty phase trial somewhat, [112] appointing independent counsel would not be nearly as costly or time consuming as retrying the penalty phase at this late date.

Duty to Disclose Favorable Witness Information

There is another problem with the conflict situation that complicated matters considerably. Aside from the favorable information on Mr. Deloney and the other prosecution witnesses contained in the defense files, did the prosecution know or reasonably have access to similar favorable information and fail to disclose it? That appears to be the thrust of Mr. Zagorsky's argument that Penal Code section 1127 applied to this case. There is little reason to suppose Mr. Zagorsky would seek to invoke the disclosure provisions of Penal Code section 1127 unless he was persuaded that the confidential information in the Public Defender files was such that the prosecution either had access to it or reasonably could have had access to it.

Whether or not Penal Code 1127 applies to this case, under the due process clauses of the federal and California Constitutions, the

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[112] Since there were numerous other penalty phase witnesses who had not yet testified at the time this conflict problem arose, those witnesses could have been testifying while the disputed witnesses were being advised by independent counsel. Thus, there is a good chance that there would have been no material delay and the jury might not have been inconvenienced at all.

state always has an independent obligation to disclose material evidence favorable to a criminal defendant. (U.S. Const., 5th & 14th Amends.; Cal Constitution art. I, § 15.) "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to either guilt or to punishment." (*Brady v. Maryland* (1963) 373 U.S. 83, 87; *United States v. Bagley* (1985) 473 U.S. 667, 676; *In re Brown* (1998) 17 Cal.4th 873.) "Favorable" evidence includes not only evidence that is exculpatory but also evidence that serves to impeach the credibility of government witnesses. (*Giglio v. United States* (1971) 405 U.S. 150, 154.) It includes information known to the entire prosecution team such as another member of the prosecution's office or to other members of law enforcement. *(Ibid.; In re Imbler* (1963) 60 Cal.2d 554, 566.)

In addition, the prosecution has a duty to disclose any favorable evidence that could be used "in obtaining further evidence." (*Giles v. Maryland* (1967) 386 U.S. 66, 74.) Favorable evidence need not be competent evidence or evidence that would be admissible in court. (*United States v. Gladding* (S.D.N.Y. 1967) 265 F. Supp. 850, 886; *Sellers v. Estelle* (5th Cir. 1981) 651 F.2d 1074, 107, fn.6.)

Under the federal Constitution, the intentional or inadvertent suppression of material evidence, whether or not specifically requested by the defense, requires reversal of a conviction. (*Giglio v. United States, supra*, 405 U.S. at p.153.) Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A

'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley, supra*, 473 U.S. 667, 682.)

Additionally, this responsibility to disclose is a continuing one [including post trial], even if the defense learns of the evidence on its own. (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383.)

Given Mr. Deloney's proud and unrepentant attitude about his status as a long term prisoner, his extensive criminal history and his record of prison/jail violence to support his own selfish ends (49 R.T. 5836-5838), it is indeed remarkable that his sole motivation to testify in this case was because, as he put it, "there's a time when a person comes in good with his own self and trying to do the right thing." (49 R.T. 5871.)

Thus, the trial court's determination that no conflict existed ultimately is not dispositive. If the prosecution had access to information on these witnesses favorable to the defense (similar to what was in the public defender files) and failed to disclose it, there is still a Constitutional violation and appellant's right to a fair trial was fatally compromised.

Conclusion

For the reasons set forth above, because the defense vehemently objected to a conflict situation where it was being forced to choose between two clients, the trial court's order requiring continued representation compels automatic reversal of the penalty phase trial.

(*Leverson v. Superior Court, supra,* 34 Cal.3d at pp. 539-540.)

XV.

THE TRIAL COURT ERRED IN FAILING TO CORRECT THE JURY'S MISUNDERSTANDING CONCERNING THE MEANING OF A SENTENCE OF LIFE WITHOUT PAROLE AND IN FAILING TO AMELIORATE ITS FEAR THAT THE SENTENCE IT IMPOSED WOULD NOT BE CARRIED OUT.

Introduction

The prosecution presented extensive evidence of, and argument on, appellant's future dangerousness. During deliberations, however, the jury sent the court a note requesting an explanation of the meaning of a sentence of life without parole and whether a death sentence would actually be carried out. That is, would the sentencing decision have the practical effect of allowing the defendant to gain his freedom at some point?

Instead of answering the jury's question, the trial court simply referred the jury to the prior sentencing instructions which the note plainly showed the jury did not understand. The trial court's failure to ensure that the jury understood its sentencing responsibilities deprived appellant of his Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment right to due process.

Factual Background

In her trial brief filed prior to the beginning of the penalty phase, the prosecutor argued that she should be allowed to argue appellant's

future dangerousness to the jury. (19 C.T. 5316-5330.)

During the penalty phase, the prosecution presented extensive testimony concerning assaults and extortion perpetrated by appellant and his alleged partner Deloney in the Riverside County jail during the five years appellant was awaiting trial on these charges. The factual details of those assaults is set forth extensively in the statement of facts so it will not be repeated here.

During closing argument, the prosecutor recounted each of appellant's assaults and misdeeds while in the jail. (55 R.T. 6584-6591.) Then she argued:

> "So now what you get to think about, because you're the ones who decide whether or not he's going to be locked up for life with guards, civilian employees, counselors, nurses, doctors, and other inmates, not all of whom are violent like Mr. Williams, you get to take into consideration that if he gets life without parole there's nothing they can do to him. They can't give him one more day. They can't do anything to him, because he will have already received the maximum. So if he assaults another inmate or rapes another inmate or stabs another inmate, he won't be prosecuted. So you are the ones that have to make the decision on behalf of society. And society does include those people within the prison as well as free society.
>
> And so I'm not suggesting to you that you have to find that factor in order to execute Mr. Williams, because the evidence in this case is clear, based on the circumstances of the crime being the murder, the fact that he had no remorse at the time about the murder, based on his conduct, all the other crimes he's committed, and the

> impact of those crimes on so very many people, he deserves to die anyway. But the other factor that has been interjected is of concern **what's he going to do in the future**? And I say to you, no one, but no one, can control Jack Williams. Thank you." ([Emphasis added] (55 R.T. 6591.)

Recognizing this problem of future dangerousness, the defense proposed the following instruction:

> "You must assume that if you sentence the defendant to death, he will be executed in the gas chamber or by lethal injection. If you choose the sentence of life in prison without the possibility of parole, you must assume that he will not be paroled." (19 C.T. 5282)

The prosecution objected to the proposed instruction as unnecessary unless the jury specifically asked about the various penalties. (54 R.T. 6369.) The trial judge expressed concern that the instruction might mislead the jury since it was not at all certain the penalty adjudged would inexorably be carried out. (54 R.T. 6370-6371.)

Defense counsel responded that it was for that reason that he inserted the words "you are to assume" into the instruction. Those words avoided misleading the jury. (54 R.T. 6371.) After further argument, however, the trial court determined not to give any similar instruction at all unless the jury specifically asked about the effect of their decision. (54 R.T. 6370-6371.)

During penalty phase instructions, the jury was instructed *inter*

alia in accordance with CALJIC 8.84 that:

> "... the defendant in this case has been found guilty of murder of the first degree. The allegation that the murder was committed under a special circumstance has been specially found to be true.
>
> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance alleged in this case has been specially found to be true.
>
> Under the law of this state, you must now determine which of these penalties shall be imposed on the defendant." (61 R.T. 6630-6631.)

The trial court also instructed the jury in accordance with CALJIC 8.88 which explained the aggravating and mitigating factors pertinent to the choice between the two penalties. (61 R.T. 6635-6636.)[113]

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[113] CALJIC 8.88 as it was read to the jury provides:

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its

During the subsequent deliberations, the jury sent the court a note with the following two questions. First: "If we vote for life imprisonment without parole. Does that mean good time off at all. or he may be able to get out in 40 or 50 years or whatever. Will he spend the rest of his natural life in prison and never get out.

Second: If we vote for the death penalty can the judge overturn

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guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which 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.

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom."

our decision?" (19 C.T. 5337.)

When the parties gathered in the courtroom to discuss the note, the trial judge proposed the following response:

> Ladies and gentlemen of the jury, in regards to your question concerning whether or not good time applies to the defendant's sentence should you render a verdict of life without possibility of parole, or will the defendant spend his natural life in prison, the Court's instructs you that you are not to speculate on such issues but are to follow the Court's instructions previously given.
>
> As to your remaining question as to whether the trial judge could overturn your decision of death, you are instructed that you are not to speculate as to such issues but instead are instructed to concentrate on your responsibilities and functions as you have previously been instructed. (61 R.T. 6651- 6652.)

Defense counsel observed that the proposed response "really dodges" the question. (61 R.T. 6652.)

The prosecution noted that there was extensive case law on what the jury should be told. Moreover, whatever the court decided in the way of a response, the instruction should not be misleading. (61 R.T. 6654-6655.) The court replied that telling the jury not to speculate avoided misleading the jury concerning what might happen after the sentence was rendered. (61 R.T. 6655-6656.) That is, the court's proposed solution avoided the problem of telling the jury too much or too little. (61 R.T. 6656.) After more discussion, eventually, both sides

concurred with the court's proposed response, although the defense concurred "reluctantly." (61 R.T. 6657- 6658.)

The judge then sent the foregoing response in writing to the jury. (19 C.T. 5338.)

Erroneous Instruction

The trial court's failure to give a proper instruction clarifying the consequences of the penalty determination violated appellant's Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment right to due process.

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The punishment in a capital case must be "tailored to [the defendant's] personal responsibility and moral guilt." (*Enmund v. Florida, supra*, 458 U.S. at p. 801.) The jurors must deliberate on the penalty choices with a full awareness of the gravity of their task "with due regard for the consequences of their decision." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330.) Jurors must "assume that the sentence . . . they imposed would be carried out." (*People v. Fierro* (1991) 1 Cal.4th 173, 250.) The death sentence determination in petitioner's case failed to meet these requirements because there is a reasonable likelihood that at least some of the jurors failed to understand the consequences of their decision and believed

that their sentence would not be carried out.

Petitioner's death sentence is invalid because of the likelihood that the jurors failed to understand the penalty instructions regarding the meaning of a sentence of "life without possibility of parole" (LWOP) and to assume that such a sentence would be carried out. "It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." (*Simmons v. South Carolina* (1994) 512 U.S. 154, 169.) In *Simmons*, the Supreme Court noted that public opinion polls and juror surveys revealed that jurors were confused about the meaning of a life sentence and often assumed the possibility of parole. (*Id.* at p. 169, fn. 9.) But even in California where jurors are instructed in regard to a sentence of life without possibility of parole, empirical studies show a pervasive mistrust that a sentence of LWOP really means no parole will be given. (Haney, Sontag, and Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death,* (1994) 50 J. of Social Issues 149, 170-171.)

In this case, however, jury confusion is more than a theoretical possibility. The jury note specifically told the court that the jury was confused. Nevertheless, instead of clarifying the jury's understanding of the consequences of its decision, the trial court simply referred the jury to the instructions previously given. It was certainly of no help to the jurors to be referred to instructions which their note plainly told the court they did not understand. (Cf. *Simmons v. South Carolina, supra,* 512 U.S., at 178, 114 S.Ct. 2187 (O'CONNOR, J.) ("that the jury in this

case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison").

Moreover, as appellant explained previously "[t]he responsibility for adequate instruction becomes particularly acute when the jury asks for specific guidance." (*Trejo v. Maciel, supra,* 239 Cal.App.2d at p. 498 ; see also *McDowell v. Calderon, supra,* 130 F.3d 833; accord, *Bartosh v. Banning, supra,* 251 Cal.App.2d at p. 387.)

Further, "[w]here ... the need for more [instruction] appears, it is the duty of the judge ... to provide the jury with light and guidance in the performance of its task." (*Wright v. United States, supra,* 250 F.2d at p. 11.) "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States, supra,* 326 US at pp. 612-613 [90 L.Ed 350]; accord, *Powell v. United States, supra,* 347 F.2d at pp. 157-58; *United States v. Harris, supra,* 388 F.2d at p. 377.)

The reason for the requirement of clarity is simple: "To perform their job properly and fairly, jurors must understand the legal principle they are charged with applying ... A jury's request for ... clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration." (*People v. Thompkins, supra,* 195 Cal.App.3d at p. 250.) Additionally, Penal Code section 1138 "imposes a 'mandatory' duty to clear up any instructional confusion expressed by

the jury." (*People v. Beardslee, supra,* 53 Cal.3d at pp. 96-97.)

Moreover as appellant has also previously argued, while the precise nature of any amplification, clarification or rereading of instructions is a matter of judicial discretion (*United States v. Bolden, supra,* 514 F.2d at p. 1308; see also *People v. Beardslee, supra,* 53 Cal.3d at p. 97), nevertheless, "there are necessarily limits on that discretion." (*United States v. Bolden, supra.* 514 F.2d at p. 1308) "When the jury makes a specific difficulty known ... [a]nd when the difficulty involved is an issue ... central to the case ... helpful response is mandatory." (*Price v. Glosson Motor Lines, supra,* 509 F.2d 1033, 1037.) The reinstruction or amplification should be fully sufficient to eliminate the confusion. *United States v. Walker, supra,* 575 F.2d at p. 213 [trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion].) Critical to the problem in this case, a "perfunctory rereading" of the general instructions which were previously given is insufficient as well. (*United States v. Bolden, supra,* 514 F.2d at 1308-09.)

Because there was extensive evidence and argument on the issue of appellant's future dangerousness, the trial court's refusal here to counter the common misunderstanding regarding parole by directly informing the jurors explicitly of the consequences of their decision was contrary to well-established precedent interpreting the Due Process Clause. (See *Simmons v. South Carolina, supra,* 512 U.S. at p. 164.) This refusal to adequately address the jury's concern in the face of demonstrated confusion deprived appellant's jury of information

crucial to the penalty determination. (*Id.* at pp. 163-164.)

Shafer v. South Carolina (2001) 532 U.S. 36, 39 [121 S. Ct. 1263, 149 L. Ed. 2d 178] reaffirms *Simmons* and makes clear that in situations where the jury might not understand that a life sentence does not include the possibility of parole, the trial court has an **affirmative duty** to make sure the jury actually understands the defendant's parole ineligibility. (149 L.Ed.2d. at p. 1274.) Significantly, the high court explained that is **not** enough to tell the jury that "life imprisonment means until the death of the defendant." The jury might still assume that there were circumstances under which a convicted capital defendant might become eligible for parole. (149 L.Ed.2d. at p. 1274.)

More recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the Court again reversed a South Carolina death sentence for this same error, even though the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (534 U.S. at p. 256.)

The Supreme Court opinion in *Kelly* makes it quite clear that there was an inference of future dangerousness in that case sufficient to warrant an instruction on parole ineligibility. Thus, the Court ruled that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that

point does not disappear merely because it might support other inferences or be described in other terms." (*Kelly, supra*, 534 U.S. at p. 254 [footnote omitted].) In that case, the Court found that future dangerousness was a logical inference from the evidence and injected into the case through the state's closing argument. (*Id.* at pp. 250-251; see also *Shafer, supra*, 532 U.S. at pp. 54-55; *Simmons, supra*, 512 U.S. at pp. 165, 171 (plur. opn.) [future dangerousness in issue because ""State raised the specter of . . . future dangerousness generally" and "advanc[ed] generalized arguments regarding the [same]""]); *id.* at p. 174 (conc. opn. of Ginsburg, J.); *id.* at p. 177 (conc.opn. of O''Connor, J.).

As Justice Rehnquist pointed out in his dissent from the *Kelly* decision,"the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." (534 U.S. at p. 261(dis. opn. of Rehnquist, J.).) The rule is invoked, "not in reference to any contention made by the State, but only by the existence of evidence from which a jury might infer future dangerousness." (*Ibid.*)

In this case, the evidence not only raised an implication of future dangerousness, but the prosecutor **explicitly argued it** during penalty phase closing argument. Thus, when the jury wrote its note concerning whether or not appellant could be paroled, there was an unequivocal expression of concern that appellant might present a future danger to society. The failure to correct this misunderstanding is a federal due

process violation under the Fourteenth Amendment. (*Shafer v. South Carolina, supra*, 532 U.S. at p. 1272.)

It is certainly true that somewhat similar arguments have been rejected by this court. (See, e.g., *People v. Martinez* (2003) 31 Cal.4th 673, 698-700; *People* v. *Prieto* (2003) 30 Cal.4th 226, and *People v. Smithey* (1999) 20 Cal. 4th 936, 1009.) This court has concluded that unlike *Simmons* and *Shafer*, CALJIC 8.84 and 8.88 resolve any ambiguity on the issue of whether a defendant receiving a life sentence ever would be eligible for parole. (*People v. Martinez, supra,* 31 Cal.4th at p. 699.)

While that conclusion may be true in the abstract, certainly it was **NOT** true here. As explained above, the very fact that the jury asked about the meaning of a life sentence told the trial court that the instructions it had previously been given were **NOT** sufficient to clear up the confusion. *(Simmons v. South Carolina, supra,* 512 U.S., at 178, 114 S.Ct. 2187.)

Moreover, the defense submits that in *Martinez, Prieto* and *Smithey*, this court has drawn a distinction without a difference. While it is true that CALJIC 8.84 says that a defendant will be confined for "life without parole", the language of the defective South Carolina instruction in *Simmons* [imprisonment until death] permits exactly the same conclusion.

The problem that neither instruction fully addresses is the empirical research showing that juries believe that through some

formula, even a capital defendant might become eligible for parole. That is, most citizens believe that a sentence "to life" (e.g., "15 years to life") means that technically there will be no parole. Nonetheless, similarly sentenced defendants are routinely paroled. Thus, there is great skepticism that any "life" sentence absolutely precludes parole. It is for that reason that *Simmons* and later *Shafer* require that a jury be instructed that a sentence of life without parole means that there is, in fact, no possibility of parole. CALJIC 8.84 does not resolve that fundamental problem. Additionally, since the empirical research indicates that the problem with misperception of the reality of the penalty is so widespread, there is certainly no drawback to requiring a better definition of life without parole. A better definition of "life without parole" would eliminate this problem once and for all.

Although this court has rejected proposed instructions stating that the defendant will never get out of prison or never be executed because they are technically inaccurate (i.e., the Governor could grant clemency or the defendant could escape),[114] the judge could have instructed the jury in accordance with the defense proposed instruction to "assume" that their sentence would be carried out. Such an

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[114] See, e.g., *People v. Hines* (1997) 15 Cal.4th 997 (proposed instruction telling the jury that a sentence of life imprisonment without the possibility of parole meant that appellant could never get out, and a sentence of death meant that appellant would be executed was properly rejected since it is inaccurate); *People v. Osband* (1996) 13 Cal.4th 622 (trial court properly refused to instruct the jury that a sentence of life without possibility of parole meant that appellant would "remain in state prison for the rest of his life and [would] not be paroled at any time," and that a sentence of death meant that appellant would be executed, because such an instruction is not completely accurate)

instruction avoids the problems encountered in *Hines* and *Osband, supra.* Further, there is nothing inaccurate about telling the jury what it should assume in choosing between its sentencing options. (See, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 249-250 (footnote omitted).)[115]

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[115] In *Fierro*, this court observed:

> First defendant claims the court erred in refusing to give a proposed instruction which provided: "You are instructed that if your decision in the penalty phase of this trial, is that the defendant should be put to death, the sentence will be carried out. On the other hand, if you determine that life without the possibility of parole is the proper sentence, you are instructed that the defendant will never be released from prison." In response to the court's observation that the instruction was untrue, defense counsel proposed to modify the instruction to provide that the jurors must "assume that the sentence that they impose will be carried out." The prosecutor opposed both the original and the modified instruction, noting that the jury had not manifested any concern about the issue. The trial court refused to give the instruction in either form.
>
> The trial court properly refused the proffered instruction. In *People v. Thompson, supra*, 45 Cal.3d 86, we affirmed a trial court's decision to reject an instruction virtually identical to that presented here. As we there observed, the proposed instruction contains the twin vices of misstating the facts and inviting "the same sort of speculation as to whether unidentified officials will in the future perform their job" which we cautioned against in *People v. Ramos* (1984) 37 Cal.3d 136. (*People v. Thompson, supra*, 45 Cal.3d at p. 130; accord *People v. Johnson* (1989) 47 Cal.3d 1194, 1245, fn. 13.) The jury here received no information and raised no question as to whether the sentence would in fact be carried out. Accordingly, the requested instruction was properly refused.
>
> Defendant's alternative request to instruct the jury that they should assume the sentence they imposed would be carried out, **was not similarly misleading,** and, as we have previously observed, should have been given. ([Emphasis added] *People v. Thompson, supra*, 45 Cal.3d 86, 131 .)"

(But see *People v. Arias* (1996) 13 Cal.4th 92 (no reasoning; no mention of *Fierro*

Execution Portion of CALJIC 8.84 Similarly Flawed.

CALJIC 8.84 as it was given here suffered from the same flaws in its description of the imposition of a sentence of execution as it did with the sentence of life without parole discussed above. The jury note clearly indicates that at least some of the jurors believed that the sentence they imposed might not be carried out. An instruction telling the jurors to presume that their sentence would be carried out would have remedied that flaw. Indeed, telling jurors that they were to presume that a sentence of execution would be carried out would have corrected the federal due process problem that *Simmons* and *Schafer* addressed with respect to jurors' perceptions of the efficacy of their sentencing decisions and conformed to this court's direction in *Thompson* and *Fierro* concerning the appropriate language necessary to counter these perceptions.

No Waiver

It might be argued that since trial defense counsel reluctantly agreed to the judge's response, the entire issue is waived. (See, e.g., *People v. Martinez, supra,* 31 Cal.4th at p. 698.) On the facts of this case, however, the waiver doctrine is inapplicable.

At the time trial defense counsel reluctantly agreed to the trial court's proposed response, the trial court had already refused appellant's correctly phrased instruction. Thus it would have been futile to simply reargue the same instructional language that had

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or *Thompson*.)

already been rejected. Given these circumstances, "'The law neither does nor requires idle acts.'"(*People v. Kitchens* (1956) 46 Cal.2d 260, 263; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 422 [13 L.Ed.2d 934, 85 S.Ct. 1074]; *People v. Anderson* (2001) 25 Cal.4th 543, 587.) Moreover, making the best of a bad situation brought on by the trial judge's prior erroneous ruling is not waiver. (Cf. *People v. Coleman* (1988) 46 Cal.3d 749, 781, fn 26; *People v. Calio* (1986) 42 Cal.3d 639, 643.)

Even if that was not so, however, since the jury note indicated that the jurors simply did not understand the instructions previously given to them, the court had a **sua sponte** obligation under Penal Code section 1368 to "clear up any instructional confusion expressed by the jury." (*People v. Beardslee, supra,* 53 Cal.3d at pp. 96-97.) Once a trial court is alerted to the need for an instruction, the court has an obligation "to give a correctly phrased instruction." (*People v. Forte, supra,* 204 Cal.App.3d at p. 1323.) That is, "[A] court may give only such instruction as are correct statements of the law. [Citation]." (*People v. Gordon, supra,* 50 Cal.3d at p. 1275.) This duty requires the trial court to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the parties was incorrect. (*People v. Fudge, supra,* 7 Cal.4th at p. 1110 [judge must tailor instruction to conform with law]; see also *People v. Falsetta, supra,* 21 Cal.4th 903, 924 [; *People v. Malone, supra* ,47 Cal.3d at p. 49.) The court must insure that instructions adequately state the law and adequately assist the jury in resolving the issues the instructions

address. (*People v. Key, supra,* 153 Cal.App.3d at 898.) "Even an accurate statement of the law may be erroneous as an instruction if it is likely to mislead or misdirect a jury upon an issue vital to the defense..." (*People v. Cole* (1988) 202 Cal.App.3d 1439, 1446; disapproved on other grounds in *People v. Mastia* (2001) 25 Cal.4th 1180, 1191.)

Moreover, a defendant does not have to request that an instruction be modified in order to have the issue reviewed on appeal where the error (as here) consists of a breach of the court's fundamental duty to properly instruct. (*People v. Smith, supra,* 9 Cal.App.4th at p. 207 fn 20.) Indeed, as *Simmons, Shafer* and *Kelly* make clear, the failure to ensure that the jury fully understands the meaning of life without parole is a breach of a fundamental duty and a due process violation. Indeed, if the jury gave appellant the death penalty on the mistaken belief that it was the only way to be sure he never left prison, a greater violation of due process can scarcely be imagined. In that regard, in criminal actions, a claim of constitutional error can almost always be raised initially on appeal. (*People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn 1; criticized on another ground in *People v. Williams* (1975) 51 Cal.App.3d 65, 67; See also Penal Code section 1259 ["The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if substantial rights of the defendant were affected thereby."].)

More importantly, when the jury indicates that it does not

understand the instructions given, it is the responsibility of the judge, not counsel, to correct those fundamental misunderstandings. (*Wright v. United States*, *supra,* 250 F.2d at p. 11.) Thus defense counsel's grudging assent here, does not absolve the trial court from its basic responsibility to ensure that the jury properly understood its sentencing responsibilities.

Conclusion

The error in failing to correct the jury's manifest misunderstanding of its sentencing responsibilities resulted in a fundamentally unfair and unreliable death sentence. For this reason, the issue was not waived and appellant's death sentence must be reversed.

XVI.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL "VICTIM IMPACT EVIDENCE"

Introduction

The victim impact evidence in this case consumed almost one fifth of the prosecution's entire penalty phase case in chief. The sheer volume of emotional evidence overwhelmed any realistic notion of an impartial assessment of the propriety of a death verdict. Moreover, the quality of the evidence and the type of argument crossed the line between an appropriate request for a death verdict based on the impact of the killing and the improper request for a death verdict based significantly on an invidious comparison between the societal worth of the deceased and the societal worth of the defendant. That is, Ms. Los was not only someone special to her family but an extraordinary person who contributed as much as she could to society. By contrast, appellant had little social worth. He renounced hard work and study. Instead he preyed on others and chose violence and manipulation as a way of satisfying his desires. Underlying this overt presentation was yet another message, a subtle appeal to race. The prosecution's penalty phase theme was basic: an extraordinary valuable Caucasian life was snuffed out by a black defendant of little social value. Indeed, that

theme permeated the entire penalty phase presentation. For these reasons the death verdict must be set aside.

Factual Background

At the beginning of the penalty phase hearing counsel for appellant asked for an Evidence Code section 402 hearing out of the presence of the jury before certain testimony. (52 R.T. 6067.)

When the hearing convened, counsel for appellant specifically objected to the testimony of Christopher Reusch, Captain Margaret Foltz and Paul Petrosky. Counsel noted that there were two videotapes that the prosecution intended to introduce through the testimony of these witnesses. The first was a video of the dedication of the Los Hall barracks building at March Air Force Base and included a memorial to Ms. Los. (People's exhibit 83.) The second was a series of still pictures, set to music, which essentially depicted Ms. Los' entire life and were duplicative of other matters already in evidence. (People's exhibit 82.)

Defense counsel urged that the evidence on these tapes and from these witnesses was not proper victim impact evidence. This evidence, at least with respect to the acquaintances and co-workers of Ms. Los, was not evidence of any direct impact on her family. Instead, the evidence was in the nature of character evidence including friendship and diligence as a worker. Such evidence would be highly emotional. Additionally, because there would likely be a closing argument based on this evidence, the evidence would be unduly prejudicial and would

render the trial fundamentally unfair within the meaning of the due process clause of the Fourteenth Amendment. (52 R.T. 6069.)

Citing to this court's decision in *People v. Edwards* (1991) 54 Cal.3d 787, defense counsel noted that the evidence was likely to devolve into argument that would divert the jury's attention from its proper role in assessing the factors set forth in 190.3, and which might invite an irrational and subjective response. An emotional response would be improper. Further, counsel submitted that the proposed prosecution evidence here would clearly fall into that prohibition particularly the music on the sound track of the video and family pictures. (52 R.T. 6070.)

Further to the extent that the video pictures would be supported by testimony from Mr. Petrosky, Ms. Los' fiancee, counsel had the same objection. While there was a closer relationship between Ms. Los and Mr. Petrosky than the other witnesses such as the coworkers, the music on the video was still overwhelmingly prejudicial. It was designed to elicit an emotional response from the jury.

Additionally, many if not all of the photographs depicted in the video were either the same or similar to the ones already marked and on the photoboards as exhibits. In that respect, therefore, the evidence would be repetitive, time consuming, and unduly prejudicial. Defense counsel for Dearaujo concurred. (52 R.T. 6970-6071.)

The prosecutor responded that the first tape on the military dedication ceremony (Prosecution Exhibit 83) would be offered

through the testimony of Sgt. Reusch, who was present. While family members were present as well, they were not emotional or crying. This was merely a military ceremony. Further, "... the jury is entitled to be aware that Miss Los was a living, breathing human being who has been missed by her death, and so the memorial dedication of the building, with respect to 352, I don't believe it's prejudicial or emotional. It is simply a dedication ceremony." (52 R.T. 6072.)

With respect to the second videotape, the prosecution stated that it was a series of still photographs which had simply been placed on the video. She intended to introduce the tape through the testimony of Paul Petrosky. The prosecutor further urged that the still photos were considerably less prejudicial than a video of a deceased in live action and to the extent that some of the photos were already in evidence, they certainly could not add any prejudice. (52 R.T. 6072-6073.).

When queried by the court, the prosecution stated that in the video of the building dedication ceremony, Ms. Los' superior officers were present and at the end they gave a folded flag to Ms. Los' family. (52 R.T. 6074.) There was also some sound in that video but it was muted. (52 R.T. 6074.)

With the consent of the parties, the court took a few minutes to look at the beginning of both tapes [but not all of the tapes] to get a sense of what each tape was about. (52 R.T. 6075-6076.)

After reviewing "representative parts" of exhibits 82 and 83, the court ruled that both tapes were admissible. Nevertheless, it would

order the sound turned off on Exhibit 82 as the music "is an aspect that might appeal to the more emotional side of the matter that is being presented and doesn't add anything to the probative value..." (52 R.T. 6076.)

The prosecution then called Capt. Margaret Ellen Foltz to the stand. (52 RT 6079.) Captain Folz served at March Air Force base when Ms. Los was assigned there. She knew Ms. Los because Ms. Los worked for her. (52 R.R. 6080.) Over defense objection, Capt. Folz was asked to describe what it was like to work with Ms Los. (52 R.T. 6081.) Capt. Folz described Ms. Los as "[v]ery upbeat, outgoing, a bubbly-type person. She was independent in the position she had, had to be autonomous, because she was the only enlisted person working in the position." (52 R.T. 6081.) Capt. Folz then went on to identify several military awards won by Ms. Los and the significance attached to each. These included NCO [non commissioned officer] of the quarter. She won that award for two quarters and again for the entire year of 1988, which made her the "cream of the crop". (52 R.T. 6081.) Capt. Folz further opined that Ms. Los was a "nice person to work with" and had a wonderful interaction with her (Ms. Los') daughter. (52 R.T. 6081-6082.) When Capt. Folz learned of the killing she was stunned. She turned on the television and heard a news anchor describing the events. The news anchor made the whole killing seem so mundane that Capt. Folz was motivated to do something [to impress upon the anchor the gravity of the incident] so she drove from her home to the scene. There, she took it upon herself to at least correct the

news anchor's pronunciation of Ms. Los' name. (52 R.T. 6082-6084.)

The prosecution then called Sgt. Reusch to the stand. (52 R.T. 6084.) He worked with Ms. Los at the base hospital where she was his immediate senior. Over defense objection, he was asked about his views of Ms. Los. Sgt. Reusch opined that Ms. Los was a good person, very outgoing and very knowledgeable about her work. (52 R.T. 6085-6086.) After Ms. Los' death, there was a building dedicated in her honor. He was in attendance. There were also a number of Generals and the base commander in attendance as well. Subject to the prior objection, the defense stipulated to the foundation for Prosecution Exhibit 83. The prosecution then played the videotape of the building dedication ceremony. (52 R.T. 6089)

The prosecution then recalled Paul Petrosky (Ms. Los' fiancee) to the stand. (52 R.T. 6090-6091.) Over the reiterated defense objection, he testified that he and Ms. Los were just friends in the Air Force for many years before they became engaged. (52 R.T. 6091.) Over time, their relationship became closer. Eventually, he transferred to March Air Force Base and moved into a duplex on base. He and his children lived in one half of the duplex, Ms. Los and her children lived in the other half. (52 R.T. 6092.) They were planning to get married within 8 months of the time she was killed. (52 R.T. 6092.)

Mr. Petrosky described Ms. Los as " Very busy. She was very family oriented, religious person, Catholic religion, both her and I, our children. As a matter of fact, she played a very big part in helping my

children become baptized as Catholics, and that was like really big for her, and it was a goal to make the family one whole unit, and that's what we were striving for." (52 R.T. 6092-6093.)

The prosecutor then asked Mr. Petrosky to read an award that Ms. Los won when she was runner up in the "mother of the year" contest. (52 R.T. 6093.) The award had been placed on a photoboard in the courtroom as Prosecution Exhibit 76. (52 R.T. 6093.) When Mr. Petrosky said he was too emotionally overcome to read it, the prosecutor asked in open court if the defense had any objection to her reading it. Not surprisingly, neither defense counsel objected in front of the jury. (52 R.T. 6093.) The award read:

> "Yvonne Los is duly recognized as the great mom that she has been to Patrick [her young son]. Furthermore, let it be known that this award has been bestowed in appreciation of her daily hugs and kisses, for her patience when healing bee stings and scraped knees, for her outstanding ability to maintain a sense of humor, and the courage she has displayed when presented with frogs, spiders and other such formidable creatures, and especially for the unsurpassed hours of love, laughter and learning she has so generously shared reading books with Patrick." (52 R.T. 6094.)

The prosecutor then asked how she was with her children Patrick and Michelle. (52 R.T. 6094.) Mr. Petrosky answered that she was a great mother. He told the jury:

> "what she strived for, is to raise the kids in a fashion that -- better citizens, and by showing them all the things in life

> and all the facets that we're able to teach them, that we could raise them in a better way, and this is what we strived for. I mean, how else do you raise your kids, or how else do you want your children? You want them to be the best you can make them, and this is what she was trying to do." (52 R.T. 6094-6095.)

Mr. Petrosky opined that Ms. Los was very dedicated to the military and all her awards, activities and achievements showed that. (52 R.T. 6095.) The prosecution then asked if she did things that were above and beyond the call of duty. (52 R.T. 6095.) Mr. Petrosky replied in the affirmative. Then, at the behest of the prosecution, he began describing some of the things she did. Ms. Los started a new clinic on her own within the base hospital. She found there was a need for a separate preadmission area for surgery. She wanted to make the transaction from walking into the hospital to the actual day of the operation a very smooth operation. To accomplish this, she needed to create a central location where all of the paperwork, lab work, x-rays, and EKG's could be done. She took it upon herself to actually create this clinic, and she accomplished that feat. Many hours were spent, hanging curtains, decorating, making plans, doing paperwork, and making regulations. Everything had to be in order and approved by the service. The program to create the clinic went through in record time. Ms. Los had a lot of recognition, and not just from hospital staff, but from all the patients whose stay was made much easier. Patients did not have to worry so much about getting everything done. Ms. Los made it a point to be sure that patients were taken care of, and she went above

and beyond her normal duty hours to perform this action and make the clinic come true. (52 R.T. 6095-6096.)

Mr. Petrosky also testified that in her off hours on Wednesday nights, she did home health care for a disabled, handicapped child. She had been doing this for many months before she died. (52 R.T. 6096.)

The court recessed for lunch and when it reconvened the prosecutor asked Mr. Petrosky if he had some difficulty answering her prior questions. He replied that he had. (52 R.T. 6106.) He noted that it was hard to describe Ms. Los or what life was like with her in the short period of time that he was on the stand. (52 R.T. 6106.) The prosecutor invited him to elaborate and he launched in to the following emotional narrative:

> "I thought of a way to do it, and I don't know if it would make you feel you know her, and you probably wouldn't, but I could tell you what she's done for me, the way she loves unconditional, and what she's done for our family. That, I can tell you, and the feeling she's made in the family.
>
> Take a moment out in your life to go back in time -- I'm going to try and describe to you the feelings I get, the feelings she's given to the family, and maybe by explaining it this way you could feel a little more of the feelings we get of love in the family -- at a time in your life when you were at your peak for feelings and emotions, when you're a father or grandparent and you have a brand-new baby coming into the world, and the first time as a father or grandparent you grab the baby and pick him up and hold him close to you, nobody, nobody for each and every one of you in this room, nobody can feel what

you feel at that moment, the love, the tenderness, the devotion, all those things you want to give to this child. And the child doesn't know yet, but he does or you know in your heart the way you feel what this child has given you at that moment, that very special moment.

Or someone that you love is very close to you and you would look at each other and you don't have to say a word, you just know they're your soul mate. There is no words, but yet you have that feeling between you two. It's just there.

Those are the things that I'm trying to explain to you, that is what Yvonne has done for our family, unconditional love. It's there. It's just there. Once in your life you get a chance to feel that, and if you get the chance it's wonderful." (52 R.T. 6106-6107.)

After describing the effect of Ms. Los' death on him (52 R.T. 6108), Mr. Petrosky described the impact of her death on her children, Patrick and Michelle. For several weeks after her death, Patrick, who was very young, would follow Mr. Petrosky everywhere as if afraid to let Mr. Petrosky out of his sight for fear of losing him too. (52 R.T. 6109.)

Michelle "became withdrawn in herself and didn't say much. She would still be there, do things, but she was very, very quiet. And you knew that inside it was tearing her up." (52 R.T. 6109.)

At the prosecutor's request, Mr. Petrosky then detailed the things he did to assist in winding up Ms. Los' personal affairs. (52 R.T. 6109.) Most notably, he was the uniformed military escort for her body when it was transported back to Iowa for her funeral. He stayed

through the funeral ceremony and was the last to leave the gravesite. (52 R.T. 6109-6110.)

The prosecutor then specifically asked what happened to Ms. Los' vehicle. (52 R.T. 6110.) Mr. Petrosky replied that he reclaimed it. When he arrived at the police impound yard, the vehicle was in the same condition as it had been on the day of the incident. The car still contained the blood, broken glass and fingerprint evidence just as he remembered from the night of the killing. (52 R.T. 6110.) Commenting on having the vehicle repaired, Mr. Petrosky stated:

> "It took a long time for them to fix the car. And even after that it still wasn't the same, because of the smell of the blood. They had to replace all the carpets the upholstery. It still wasn't the same. It was never the same." (52 R.T. 6110.)

The prosecutor then asked if Mr. Petrosky had been back to Iowa since the funeral. He replied that he visited Ms. Los' parents. Then he said: "We planted a tree in front of her mother's house, the kitchen window right outside, maybe 10 or 15 feet outside the kitchen window to represent Yvonne as a tree that would grow, hopefully, memories and love, all that would spread, continue on of her. So that's what the tree was planted for." (52 R.T. 6111.)

Finally, the prosecution asked Mr. Petrosky if he could identify the photographs on a videotape and played the tape for the jury. (52 R.T. 6111.) Immediately after the conclusion of the tape, the prosecutor asked: "Mr. Petrosky, are you okay to talk? The photographs that were

just shown on People's 82 for identification are **photographs of Yvonne from childhood spanning her lifetime**?" ([Emphasis added] 52 R.T. 6111.) Mr. Petrosky responded that they were. (52 R.T. 6111.) They included many photos of her grave, the places she visited in her hometown and the Los family home. (52 R.T. 6111-6112.)

The prosecutor asked Mr. Petrosky if there was anything else he could tell the jury about how Ms. Los' death affected him. He replied: "It's sad, because we shouldn't be here, none of us. I realize things happen, but still we shouldn't be here. And all I can say is I hope none of you ever have this happen to you. It's not fair." (52 R.T. 6112.)

Neither defense counsel had any questions for Mr. Petrosky. (52 R.T. 6112.)

In addition to Captain Folz, Sgt. Reusch and Mr. Petrosky, numerous other victim impact witnesses testified. Ms. Los' parents, two of her siblings, both of her children, and her ex-husband testified about Ms. Los, her life and the effect of her loss on them.[116]

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[116] Although defense counsel did not specifically object to testimony from these victim impact witnesses, it is clear that any objection would have been futile. Over defense objection the judge admitted the videos, the testimony from other victim impact witnesses and the defense objection to the likely argument from the prosecution concerning that evidence. (52 R.T. 6069-6071.) Given the admission of these even more egregious forms of victim impact evidence, it is hard to imagine a scenario where the judge would have prevented the testimony of these witnesses. Counsel is not required to make futile objections. (*People v. Kitchens* (1956) 46 Cal.2d 260, 263; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 422 [13 L.Ed.2d 934, 85 S.Ct. 1074]; *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Further, since the court admitted the improper evidence, and overruled the defense

Ms. Los' parents testified that Yvonne Los the oldest of their six children. (47 R.T. 5489; 5501; 5510; 5522.) All the children were raised on the family farm in Iowa and the family had always been very close. (47 R.T. 5489, 5490; 5492, 5501; 5510; 55516, 5522.) There was testimony about Ms. Los' participation in family holidays and trips as a child. (47 R.T. 5492.)

Her father, Mr. Holschlag testified that in high school, Ms. Los was a candy striper (47 R.T. 5490-5491; 5502; 5514), and looked after the other children when the family business took Mrs. Holschlag away from the home. (47 R.T. 5501; 5510; 5522-5523.) Her father identified People's exhibit 71, 71-D and B. as photos taken about the time Ms. Los graduated from high school. (47 R.T. 5490.)

Ms. Los' parents described how at age 14 she wanted to pursue medical training to help people (47 R.T. 5491) and she entered the Air Force to obtain a nursing degree. (47 R.T. 5491; 5503.) They described each of her tours of duty including her assignments during Operation Desert Storm. (47 R.T. 5503-5504.) They also noted that she continued to do volunteer work even after joining the Air Force. (47 R.T. 5492; 5504-5505.)

In especially riveting and emotional testimony elicited by the

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objection to the probable prosecution argument about this highly prejudicial evidence, any defense objection to the prosecution's argument of the testimony from these witnesses would have been a futile gesture as well. Therefore, the issue of the impropriety of this evidence and the way it was argued to the jury is fully preserved for appeal. (*People v. Melton* (1988) 44 Cal.3d 713,735; *People v. Hamilton* (1989) 48 Cal. 3d 1142, 1184, fn. 27.)

prosecutor, Mr. Holschlag related what it was like to discuss her death with the parish priest, to buy a grave site for his child, and to wait 11 days for her body to be returned from California to Iowa. He then identified and described Prosecution Exhibits 71, H, I, K, photographs of the grave site. (47 R.T. 5492-5495.) He also described what it was like to sort through and dispose of Ms. Los' personal effects. (47 R.T. 5493-5495.)

Mr. Holschlag then went on to describe what it was like to attend the dedication ceremony of Los Hall at March Air Force Base where Ms. Los' many achievements were recounted, and to receive a shadowbox from Ms. Los' command containing a folded flag, her picture, buttons from her uniform and her military decorations. (47 R.T. 5497-5498.) Her father then noted her many lifetime certificates and awards, both military and civilian, that were on the prosecution's photoboard. (47 R.T. 5497.) He commented that although he probably heard about many of these achievements as they happened, he had forgotten what a tremendous list it was. (47 R.T. 5497-5498.)

Mrs. Holschlag described Ms. Los' activities as a child, including helping with the garden, canning cleaning and running the family business when Mrs. Holschlag was out of town. (47 R.T. 5501-5502.) Mrs. Holschlag also described Ms. Los' volunteer activities at a hospital as a teenager. (47 R.T. 5502.) A particularly poignant part of Mrs. Holschlag's testimony was her description of Ms. Los's volunteer care for a young bedridden boy and her subsequent description of naming one of her new grandchildren for Yvonne. (47 R.T. 5505-

5506.) Finally, Mrs. Holschlag described in vivid terms bringing Ms. Los' son, Patrick to the grave site the year before trial when he was old enough to understand what had happened to his mother. Mrs Holschlag testified that Patrick was very stoic while at the actual grave but as soon as he came down the hill, he "came apart." (47 R.T. 5508.) The testimony was so moving that the prosecutor told the judge he did not want to ask the witness any more questions. (47 R.T. 5508.) Understandably, neither defense counsel had any questions either. (47 R.T. 5508.)

Ms. Los' brother, David Holschlag described what it was like growing up on a farm in a small town with his sister Yvonne. (47 R.T. 5510- 5511.) David then identified and described 19 photographs on the prosecution's photoboard. These included pictures from the town, the church, the hospital where she was a candy striper, and other activities that Ms. Los participated in when she was a youth. (47 R.T. 5513-5514.) There were also pictures of Ms. Los' funeral, the delivery of the folded American flag to Ms. Los' parents, pictures of her military service and a picture of her wedding to Nigel Los. (Prosecution Exhibits 71and 72; 47 R.T. 5513-5514.)

Ms. Los' sister, Susan Baker testified that although as a family they were always close, she became particularly close to her sister after Ms. Los joined the Air Force and went overseas. They often talked on the phone late at night. (47 R.T. 5523.) She described crying over her emotional loss when her parents first took Ms. Los to the bus stop to leave home to join the military. She also described her participation in

Ms. Los' wedding and how it was one of the nicest times they had as a family. (47 R.T. 5524.) Ms. Baker went on to describe how important it was for Ms. Los to be a mother, how much she loved her children and the values she tried to instill in her children. (47 R.T. 5526-5527.)

Nigel Los, Ms. Los' ex-husband, testified that he met Yvonne while in the Air Force and they were married in 1980. (47 R.T. 5531-5532.) They had two children, Patrick and Michelle. (47 R.T. 5532.) He described her sprightly personality, her dedication to caring for others and her pride in her military service. (47 R.T. 5533.) He also described in detail her devotion to the children and the activities they were involved with. (47 R.T. 5335-5536.) Their divorce in 1988 was amicable. (47 R.T. 5334.)

After Ms. Los' death, Nigel assumed the responsibility for their children. He related extensively the severe emotional trauma that Michelle went through in trying to come to terms with the loss of her mother. (47 R.T. 5537-5538, 5540-5543.) He also described in particularly vivid terms the emotional pain of having his children go through all their possessions of a lifetime to pick out the things they could take back to Germany where he was stationed. (47 R.T. 5539-5540.)

Patrick Los was ten years old when he testified. He did not really know why he was in court and he did not remember his mother very well. He was very young when she died. He did remember, however, she took him special places on his birthdays, would read him

stories before bed and took him to a particular restaurant. (47 R.T. 5546.)

Michelle was fifteen years old when she testified. (47 R.T. 5549.) She vividly remembered the night her mother died. They had a disagreement that day. (47 R.T. 5550.) Michelle got angry and went to bed without saying good night to her mother. She went to sleep that night wishing she could go live with her father. (47 R.T. 5551.) The next morning, she was awakened early and told her mother was dead. (47 R.T. 5551.) It was so hard for her because she felt that in some way she was ultimately responsible for her mother's death. (47 R.T. 5556.)

When her father came to get her to take her to Germany to live with him, she could only take the special things, the mementos. It was disorienting. (47 R.T. 5552-5553.) She did not remember much about the funeral, just a few things. She did remember the wake, however. Her mother's make-up was wrong and it did not seem to Michelle that that was the way her mother would have wanted to look. Also, there was one rosary that her mother wanted to be said at her burial and it was not. (47 R.T. 5554.)

Michelle also testified that her mother was involved in everything Michelle did, work, church, shopping and cooking. Her mother always made time for the children even though she had a very busy schedule. (47 R.T. 5554-5555.)

During closing argument at penalty phase, the prosecutor

discussed the victim impact evidence. One of the first things she told the jurors was to consider the pictures of the decedent while she was alive and the videotape of the memorial service. As the prosecutor reminded the jury; "Now, obviously, you're also allowed to consider the evidence of the impact of these crimes on Yvonne's family. And, you know, I know it's hard to watch the picture of Yvonne. It was hard to listen to her family. It's hard to see the videotape of her memorial service, because she's not here and they miss her." (55 R.T. 6578.)

She also asked the jury directly to compare the appellant's life with that of Ms. Los. As the prosecutor explained it:

> " Look at all the lives he has touched and compare that with all the lives that Ms. Los touched in such a positive manner. The child that she cared for was disabled and in bed. That's the way that people affect other people's life. How does Mr. Williams affect the lives of the community? He and his buddy shove girls in the backseat of their car. He shoves guns in women's and men's faces and takes their cars. This is how he touches people's lives." (55 R.T. 6575.)

The prosecutor also discussed her view of the defendant. For the first time she directly mentioned race and the defendant's failure to make anything of himself. Although couched in innocuous language, she told the jury:

> "...during the trial we heard information about where the defendant lived. He lived in a middle class neighborhood. This group of kids was a multi-racial group of kids. This wasn't some minority thing or some gang like Crips, just a bunch of kids that got together in a neighborhood that had

> parents that taught him right from wrong, that taught him right from wrong. His dad said, "Yeah, we made him go to school. He had some problems, but he got help." What did his dad say? When he was 18, he did the same thing most middle class parents say, "Look, get a job, go to college, finish school. You're not going to sit around here on your bottom. You're going to do something with your life."
>
> ****
>
> So let's not kid ourselves, ladies and gentlemen, that Jack Williams didn't have choices in his life. He had choices, and he made them. He took the easy way out, the criminal way out, the violent way out, the sociopath way out. That's what he did. (55 R.T. 6580.)

The prosecutor then discussed the incident at the Taco Bell as evidence of appellant's violent nature (55 R.T. 6581-6583) and spent the next seven pages of transcript detailing appellant's various jail infractions to support her thesis. (55 R.T. 6583-6590.) At the conclusion of that recitation, she told the jurors that they had to make the determination concerning life or death but that his history showed that appellant was a violent person and that no one could control him. (55 R.T. 6591.)

Finally, it should be noted that the victim impact evidence constituted nearly one fifth of the total evidence presented in the prosecution's penalty phase case-in-chief. [117]

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[117] The prosecution's evidentiary presentation in its case-in-chief at penalty phase consumed approximately 780 pages of transcript . (pp. 5488-6247.) Of that, approximately 125 pages was devoted exclusively to victim impact evidence. (pp. 5488-5577, 6080-6115.) Since there was no transcript of the videotapes, the time the jury spent

The Applicable Law

Penal Code section 190.3, which sets out the relevant aggravating and mitigating circumstances to be considered by the jury, does not include victim impact evidence.[118] This Court has explicitly barred the use of any non statutory aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Nevertheless, in *People v. Edwards, supra,* 54 Cal.3d 787, this Court stated that evidence of the specific harm caused by the defendant could be admitted under Penal Code section 190.3, subdivision (a), as part of the circumstances of the crime. The evidence in issue in *Edwards* consisted of three photographs of the twelve year old victims taken shortly before their deaths. The trial court admitted the photos as evidence of the circumstances of the crime (Pen. Code § 190.3(a) because they showed the girls as the defendant arguably saw them. (*Id.* at 832.) This court stated that "circumstances of the crime.., does not mean merely the immediate temporal and spatial circumstance of the crime. Rather it extends to that which surrounds materially, morally or logically the crime. The specific harm caused by the defendant does surround the crime materially, morally and logically." (*Id.* at pp.833-834.) But see *Edwards*' cautionary language: "Our holding does not mean there are no limits on emotional evidence and argument." (*Id.* at p. 835*).*

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watching those exhibits was not calculated.

[118] Although Penal Code section 1191.1 permits certain victim impact evidence, it is doubtful that section applies to capital cases. (*People v Brown* (2003) 31 Cal.4th 518, 573, fn 24.)

In *Booth v. Maryland* (1987) 482 U.S. 49 [96 L.Ed.2d 440, 107 S.Ct. 2529], and *South Carolina v. Gathers* (1989) 490 U.S. 806 [96 L.Ed. 2d 440, 107 S. Ct. 2529], the United States Supreme Court forbade evidence or argument regarding the victim's characteristics or the impact of the murder on the victim's family members. The Court concluded that such evidence was not only irrelevant but that its use in a capital trial violated the Eighth Amendment ban on cruel and unusual punishment. In *Booth* the defendant murdered an elderly couple. Pursuant to a state statute requiring such evidence, the prosecution introduced evidence of the victim's personal characteristics and the emotional impact of the crimes on the victim's family.

The court held that in a particular case this evidence might be "wholly unrelated to the blameworthiness of a particular defendant" and "could divert the jury's' attention" away from the defendant's background and record and the circumstances of the crime. (*Booth* at U.S. 504-505.) In *Gathers*, the victim was killed in a public park and his belongings scattered on the ground. The evidence in question was a religious tract found near his body which the prosecutor read to illustrate the victim's personal characteristics. The court concluded that the contents of the tract did not relate directly to the circumstances of the crime because there was no evidence that the defendant had read the tract and it was unlikely that he had. (*Gathers*. at pp. 811-812.)

However in *Payne v. Tennessee* (1991) 501 U.S. 808, 827, [111 S.Ct. 2597, 115 L.Ed.2d 720] the high 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*." (emphasis added.)

Therefore, to determine the scope of the victim impact evidence permitted by *Payne v. Tennessee, supra,* 501 U.S. 808, the facts that were before the United States Supreme Court in *Payne* must be examined. *Payne* involved a single victim impact witness who testified about the effects of the murder of a mother and her 2-year old daughter on the woman's 3-year-old son, who was himself present at the scene of the crime and suffered serious injuries in the attack. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 811-812.) The boy's grandmother testified that he cried for his mother and sister, that he worried about his sister, and that he couldn't seem to understand why his mother did not come home. (*Id.* at pp. 814-815.)

To be consistent with the facts and holding of *Payne,* the admission of victim impact evidence, if such evidence is admitted at all, must be attended by appropriate safeguards to minimize its prejudicial effect and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. There are three such safeguards that apply to the nature of the evidence itself. None of those safeguards was employed in the instant case.

First, victim impact evidence should be limited to testimony from a single witness, like the testimony from the grandmother in *Payne*. This limitation is imposed by judicial decision in New Jersey

(*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180) and by statute in Illinois (Illinois Rights of Victims and Witnesses Act, 725 ILCS 120/3(a)(3); see *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107).

The Supreme Court of New Jersey explained the reason for this limitation:

> °"The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness." (*State v. Muhammad*, *supra*, 678 A.2d at p. 180.)

Here, however, 10 victim impact witnesses testified at length about the life and character of the decedent and the impact of her death. As noted above, almost one fifth of the prosecution's penalty phase case-in-chief was devoted to victim impact evidence presented by these 10 witnesses.

Second, victim impact evidence should be limited to testimony which describes the effect of the murder on a family member who was present at the scene during or immediately after the crime.

Third, victim impact evidence should be limited to those effects which were known or reasonably apparent to the defendant at the time

he committed the crime or were properly introduced to prove the charges at the guilt phase of the trial.

The limitations set forth above are consistent with *Payne*, where the victim impact evidence described the effect of the crime on the son and brother of the victims who was himself present at the scene of the crime and whose existence and likely grief were therefore well-known to the defendant. Further, these limitations are also necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes and to avoid expanding the aggravating circumstances to the point that they become unconstitutionally vague. In California, aggravating evidence is only admissible when it is relevant to one of the statutory factors (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776), and victim impact evidence is admitted on the theory that it is relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835).

To be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*Edwards*, *supra,* at p. 833.) The only victim impact evidence which meets this standard is evidence of "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935) and evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase."

(*People v. Fierro, supra*, 1 Cal.4th at p. 264-265 (conc. and dis. opn. of Kennard, J.)).

Here, however, the prosecution wildly exceeded these common sense limitations. For example, NONE of these victim impact witnesses were present at the scene at the time of the homicide. Moreover, Mr. Petrosky barely mentioned being at the scene soon afterwards and then only by virtue of a passing reference to the condition of the vehicle. (52 R.T. 6110.)

Capt. Folz, who was not even a family member, testified that she went to the scene later. She did so, however, not to assist the police investigation, but to correct a news anchor's pronunciation of Ms. Los' last name. More important, she testified that one of her motivations in going was to try to do something to make Ms. Los' death seem more important, or at least less mundane. (52 R.T. 6082-6084.) The clear message from Capt. Folz' testimony was this was not just a killing. Instead, because of who Ms. Los was, hers was an extraordinary death and should be treated in an extraordinary way. That emotional message could not have been lost on the jury.

Moreover, the victim impact evidence included numerous details of Ms. Los' activities and achievements, beginning in her childhood and continuing through incidents well past her death. These things included her work as a candy striper when she was a youth, her volunteer activities including the care of a disabled, bedridden child, her heart rending certificate citation from a "mother of the year"

contest, her activities in setting up a presurgical clinic at a base hospital and finally Air Force dedication of a building in her honor. Appellant could not possibly have known about any of these things. Additionally, Ms. Los' relatives and friends described events and emotional anguish that literally took place months or years after her death. Indeed, the video of the dedication of Los Hall at March Air Force Base is a perfect example. There is no way that appellant could reasonably have anticipated that event or the effect it would have on the Los family.

Significantly, since appellant was not present and did not even know a carjacking would take place, let alone a homicide, he could not have known or even reasonably anticipated any of the characteristics that made Ms. Los so special to her family and friends. Ms. Los was simply a random victim selected by Lyons and Dearaujo. Had these two randomly selected another person, perhaps a fugitive with a substance abuse problem and a sour disposition, the victim impact evidence would have been much less significant. The fact that the killing was essentially random, and the ultimate choice was not controlled by appellant makes the impact of this overwhelmingly emotional testimony so highly prejudicial.

Under these circumstances, an interpretation of "circumstances of the crime" so broad that it would allow for admission of the victim impact evidence in this case would render that factor unconstitutionally overbroad and vague. (See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776 [111 L.Ed.2d 606, 110 S.Ct. 3092].) Sentencing factors must have a common-sense core of meaning that juries are capable of

understanding. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975 [129 L.Ed.2d 750, 114 S.Ct. 2630].)

Things that happened many years before the crime (like the victim's activities as a child when she was candy striper or her status in a "mother of the year" contest) or many months or years after (like the dedication of a building) do not fall within any reasonable common-sense definition of the phrase "circumstances of the crime." Nevertheless, all these things, and more, were introduced under the rubric of victim impact in this case. If this evidence was properly introduced under state law, factor (a) of Penal Code section 190.3 is unconstitutionally vague. (But see, e.g., *People v. Boyette* (2002) 29 Cal.4th 381,445, rejecting a similar argument where substantial, but much less extensive, victim impact testimony was presented. Moreover, in *Boyette*, the evidence was limited to family members, unlike this case.)

An Exhaustive Account of Ms. Los' Complete Life History, Including Detailed Descriptions of Her Activities, Achievements and Awards, Was Improperly Presented to the Penalty Jury

The penalty trial should have focused on appellant's background and character and the circumstances of the crime. (*Zant v. Stephens, supra,* 462 U.S. 862, 879 [77 L.Ed.2d 235, 103 S.Ct. 2733]; *People v. Mickey* (1991) 54 Cal.3d 612, 692.) Instead, a considerable portion of the penalty phase of the trial was diverted from its proper purpose and

converted into what amounted to a testimonial or memorial service for the deceased.

This evidence was not limited to the "quick glimpse" of the victim's life approved in *Payne v. Tennessee, supra*, 501 U.S. 808. It did not merely humanize the victim; it glorified her; and the prosecutor in this case, like the prosecutor in *Moore v. Kemp* (11th Cir. 1987) 809 F.2d 702, sought "'not merely to let the jury know who the victim was, but rather to urge the jury to return a sentence of death *because of* who the victim was'" (*id.* at p. 749, emphasis in original [conc. and dis. opn. of Johnson, J.]), rendering the penalty trial unconstitutionally unreliable and unfair.

1. ***The Extensive Life History Evidence Was Unfairly Inflammatory***

In *Payne v. Tennessee, supra*, 501 U.S. at pp. 822-823, the United States Supreme Court held that a state could allow the admission of evidence providing "'a quick glimpse of the life' which a defendant 'chose to extinguish'" in order "to show.., each victim's 'uniqueness as an individual human being.'"As *Payne* noted, however, that "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Id.* at p. 825.)

In *People v. Edwards, supra*, 54 Cal.3d at pp. 835-836, this Court suggested additional limitations, emphasizing that "we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne, supra*, ... " This Court further warned that:

> "Our holding also does not mean there are no limits on emotional evidence and argument. In *People v. Haskett*, *supra*, 30 Cal.3d [841] at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.]" (*Id.* at p. 836, n.11.)

Although this Court has not established detailed guidelines for the admission of evidence about the victim's character, the cases in which the admission of such evidence has been approved generally involve evidence that was brief, factual, and noninflammatory. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215,267 [evidence of the victim's plan to enlist in the Army at time of her death]; *People v. Montiel, supra,* 5 Cal.4th 877, 934-935 [evidence that victim was in excellent health at time of his death, that he needed to use a walker to get around, and that he could still enjoy life]; *People v. Edwards*, *supra*, 54 Cal.3d at p. 832 [photographs of the victims shortly before their deaths].)

Other states have established more specific standards. The Supreme Court of Tennessee, for example, has held that "Generally, victim impact evidence [about the victim's character] should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed." (*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891.) Similarly, the Supreme Court of New Jersey has held that victim character

evidence "can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests," but that "testimony should be factual, not emotional, and should be free of inflammatory comments or references." (*State v. Muhammad, supra*, 678 A.2d at p. 180.)

The need for restraint in the admission of victim character evidence was also emphasized by the Supreme Court of Louisiana. Although it held that the prosecutor could "introduce a limited amount of general evidence providing identity to the victim," it also warned that special caution should be used in the "introduction of detailed descriptions of the good qualities of the victim" because such descriptions create a danger "of the influence of arbitrary factors on the jury's sentencing decision." (*State v. Bernard* (1992) 608 So.2d 966, 971.) The Supreme Court of New Mexico likewise held that "victim impact evidence, *brief and narrowly presented*, is admissible" in capital cases. (S*tate v. Clark* (N.M. 1999) 990 P.2d 793, 808, emphasis added.)

In this case, the evidence about the victim's character far exceeded the "quick glimpse" of the victim's life approved in *Payne v. Tennessee, supra*, 501 U.S. at pp. 822-823, or the "general factual profile of the victim" approved in *State v. Muhammad, supra*, 678 A.2d at p. 180. Here, Ms Los' virtues were explored at length, and the evidence also included an exhaustive account of her complete life history, from birth to death and beyond, including detailed descriptions of her activities, achievements, and awards complete with photos, documents and certificates. (See e.g. the 19 photographs contained in

prosecution exhibits 71and 72, plus the videos contained in prosecution Exhibits 82 and 83.) The presentation resembled a memorial service or celebrity tribute more than a capital penalty trial. The prosecution's victim character evidence was simply overwhelming and included matters far beyond anything the defendant reasonably could have known or even reasonably have anticipated. Indeed, as counsel for codefendant Dearaujo pointed out to the trial judge, there were times when not only the jurors, but court staff were in tears. (Supplemental R.T. volume 9 at p. 7063.)

Extensive life history evidence was addressed more recently in *State v. Salazar* (Tex.Crim.App. 2002) 90 S.W.3d 330. There, the victim impact testimony was very brief; only two witnesses testified and their testimony filled a total of five pages of the transcript. However, the prosecution also introduced a 17-minute video montage of approximately 140 still photographs which had been prepared by the victim's father for his son's memorial service. The video covered the victim's entire life, from infancy to young adulthood. Almost half of the photographs depicted the victim's infancy and early childhood; there were also photographs of his entire extended family, and a visual portion of the video was accompanied by a musical soundtrack. (*Id.* at pp. 333.)

In a unanimous decision, the Texas Court of Criminal Appeals held that both the visual and audio portions of the video had been improperly admitted because they were far more prejudicial than probative. Like the *Cargle* court, the *Salazar* court was particularly

critical of the video's "undue emphasis on the adult victim's halcyon childhood," noting that the defendant had "murdered an adult, not a child," a fact which the video tended to obscure (*State v. Salazar*, *supra*, 90 S.W.3d at 337), and that the video was "barely probative of the victim's life at the time of his death" (*id.* at p. 338).[119]

Additionally, the court found that the life history evidence was prejudicial because of its sheer volume (*State v. Salazar*, *supra,* 90 S.W.3d at p. 337) and noted that "A 'glimpse' into the victim's life and background is not an invitation to an instant replay" (*id.* at p. 336). It held that "[T]he punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial."

(*Id.* at pp. 335-336.)

This case is practically on all fours with the *Salazar* case. Here the prosecutor admitted that the video was a montage of the decedent's "entire life. " (52 R.T. 6111.) Moreover, the victim impact testimony was much longer, and the victim character evidence included still photographs as well as certificates, awards, and other documents not presented to the jury in the *Salazar* case. The net effect was overwhelming and overwhelmingly emotional.

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[119] *Salazar* was a non-capital case, but the court applied the principles that govern the admission of victim impact testimony in capital cases. (See *id.* at p. 335 and fn. 5..)

2. The Detailed Account of the Victim's Virtues Invited Invidious Comparisons, and the Prosecutor Explicitly Urged the Jurors to Make Those Comparisons During Closing Arguments

a. Why Comparisons Involving the Victim's Character Are Improper

The presentation of extensive evidence concerning the outstanding character of the homicide victim creates the risk that arbitrary and irrelevant comparisons will influence the sentencing decision. (*Booth v. Maryland*, *supra*, 496 U.S. at p. 506 and fn. 8; *State v. Carter* (Utah 1995) 888 P.2d 629, 652; *Alvarado v. State* (Tex.Crim.App. 1995) 912 S.W.2d 199, 222 [conc. opn. of Baird, J.].) It is wrong to allow "such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." (*Booth*, *supra*, at p. 506.)

Whether the comparison is phrased as a comparison between victims or a comparison between the defendant and the victim, the effect is exactly the same, and the result is a death sentence that is not only arbitrary and unfair (*Booth*, *supra*, at p. 506) but also a violation of the equal protection of the laws. (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 [145 L.Ed.2d 1060, 120 S.Ct. 1073].) (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 15 and 17.)

The most obvious discrimination is unique to the capital punishment context - the danger that defendants whose victims are perceived as assets to society will be more likely to receive the death

penalty than equally culpable defendants whose victims are perceived as less worthy. (*Booth*, *supra*, at p. 506.) However, a more familiar form of discrimination is lurking as well - discrimination based on race. "[I]n many cases, expansive [victim impact evidence] will inevitably make way for racial discrimination to operate in the capital sentencing jury's life or death decision." (Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 280 [hereafter cited as Blume].)

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray* (1986) 476 U.S. 28, 35 [90 L.Ed.2d 27, 106 S.Ct. 1683].) That danger is particularly acute in cross-racial crimes like this one, where the victim and her surviving relatives are white and the defendant is black.

Neither the race of the victim nor the race of the defendant is a constitutionally permissible factor in capital sentencing. (*McCleskey v. Kemp* (1987) 481 U.S. 279 [95 L.Ed.2d 262, 107 S.Ct. 1756] [race of victim]; *Zant v. Stephens*, *supra*, 462 U.S. at p. 885 [race of defendant].) Nevertheless, "Virtually every statistical study, including one commissioned by the federal government, indicates that although the death penalty is rarely sought in black-victim cases, it is sought (and obtained) in a disproportionate share of cases involving black defendants and white victims." (Blume, *supra*, at p. 280, fn. omitted.) The sad reality is that "Prosecutors and jurors tend to place a premium on the value of white lives and a discount on the value of black ones."

(Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U. L.Rev. 26, 44, fn. omitted.) Moreover, as appellant pointed out previously, in Riverside county African Americans constitute only a small minority of the population but receive the overwhelming majority of death sentences. (See *In Re Seaton*, *supra* 34 Cal.4th at pp. 202-203 [despite some statistical support, racial disparity claim barred on procedural grounds].)

Here, the prosecutor's request to compare the value of lives was explicit. She told the jury to " Look at all the lives he has touched and compare that with all the lives that Ms. Los touched in such a positive manner. (55 R.T. 6575.) The prosecutor then raised the image of Ms. Los caring for a disabled bedridden child, and contrasted it to the image of appellant and his friends shoving "guns in women's and men's faces and tak[ing] their cars." (55 R.T. 6575.)

If that was not enough, only a few transcript pages later the prosecutor raised the race issue directly. Although phrased in politically correct terms, the racial overtones were obvious. First, the prosecutor said that this incident was not related to racial stereotypes such as violence erupting from a notorious black gang like the Crips. ["This group of kids was a multi-racial group of kids. This wasn't some minority thing or some gang like Crips..." (55 R.T. 6580.)] Then she told the jury that despite all the advantages that appellant had during his upbringing, nevertheless, he resorted to "the violent way out, the sociopath way out." (55 R.T. 6580.) Since there was no evidence whatsoever about sociopathic tendencies, the clear implication was that

appellant reverted to stereotypical black gang behavior and got what he wanted by using violence.

If the prosecutor was simply trying to tell jurors that appellant had an unfettered choice to do good or evil and he chose evil, why paint images of black gangs and sociopathic violence, unless it was to implant the frightening idea of the Crips in their minds. This rhetoric was nothing more than an inflammatory emotional appeal to the jury's fear of racial violence.

There is more to the issue than that, however. Here, the trial court eliminated the only two black jurors for their purported misconduct based on their belief that blacks were treated differently. The questioning of jurors and particularly the jury foreman revealed almost complete insensitivity to racial differences. In the jury foreman's view, juror #10 did not deliberate like the other [mostly white] jurors and failed to accept their views. (45 R.T. 5371.) She failed to reason logically to a conclusion but would instead stick to a position that the other jurors saw as having no intellectual merit. (45 R.T. 5371.) The frustration between juror #10 and the other jurors reached a boiling point and there was a heated exchange in the jury room where race became an issue. (45 RT 5373.) As explained in Issue I, however, it was a little more than a mere heated exchange. As juror #10 herself explained to the trial judge, she was attacked verbally, screamed at and cut off during deliberations. (45 R.T. 5434-5435.) Further, Juror #2 explained that juror #10 realized she was the only African American in the room and felt "picked on because of her race." Indeed, when juror

#10 tried to explain the black culture that may have influenced how the events unfolded in this case, the rest of the jurors specifically told her not to bring race into it. (45 R.T. 5386, 5389.) Thus, there is little doubt that the jury was particularly sensitive to racially divisive issues and probably to racial stereotypes.

Evidence which glorifies the homicide victim and emphasizes her virtues exacerbates this disparity. In *Moore v. Kemp*, *supra*, 809 F.2d 702, the victim character evidence was much less extensive than it was in this case, and the prosecutor's comparison argument was much less explicit. Neither mentioned race expressly. (*Id.* at pp. 747-748 and fn. 12.) Even so, Judge Johnson readily concluded that "it could not but help inflame the prejudices and emotions of the jury to be confronted with a father's testimony of the virtuous life of his white daughter violated and then mercilessly snuffed out by this black defendant." (*Id.* at p. 749, emphasis in original [conc. and dis. opn. of Johnson, J.].)

Overt prejudice is not the only danger. There are many subtle ways in which conscious or unconscious racism can color the jurors' perception of the defendant, their evaluation of his defenses, and their assessment of the seriousness of his crime. (*Turner v. Murray*, *supra*, 476 U.S. at p. 35.) Evidence which focuses the jury's attention on the character of the victim gives these improper influences free rein, causing majority jurors to view the crime as especially serious because they empathize and identify with the white victim. (See Berger, *Payne and Suffering - A Personal Reflection and a Victim- Centered Critique* (1992) 20 Fla. St. U. L.Rev. 21, 25, 48.)

A death sentence is surely unconstitutional "if it discriminates against [the defendant] by reason of his race,.., *or if it is imposed under a procedure that gives room for th play of such prejudices.*" (*Furman v. Georgia, supra*, 408 U.S. 248, 242, emphasis added [33 L.Ed.2d 346, 92 S.Ct. 2726] [conc. opn. of Douglas, J.].) Therefore, while it may be impossible to eliminate the pernicious effect of race from capital sentencing altogether (*McCleskey v. Kemp, supra*, 481 U.S. at pp. 308-314), the courts should engage "in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system" (*id.* at p. 309) and disapprove any procedures which create an unnecessary risk that racial prejudice will come into play. (*Batson v. Kentucky* (1986) 476 U.S. 79, 99 [90 L.Ed.2d 69, 106 S.Ct. 1712]; *Turner v. Murray, supra*, at pp. 35-37.)

For the reasons previously stated, the presentation of extensive biographical evidence about the virtues and accomplishments of the homicide victim is one such procedure. It invites both purely arbitrary comparisons and, especially in cross-racial cases like this one, arbitrary comparisons tainted by racial bias. Because these improper influences operated in this case, reversal is required. As will be shown by the arguments which follow, the evidence invited the jury to rely on two types of invidious comparisons as reasons to sentence appellant to death.

b. Comparison Between Victims

In *State v. Carter, supra*, 888 P.2d 629, the Utah Supreme Court

prohibited the admission of victim impact evidence as a matter of state law and explained:

> "In our society, individuals are of equal value and must be treated that way. We will not tempt sentencing authorities to distinguish among victims - to find one person's death more or less deserving of retribution merely because he or she was held in higher or lower regard by family and peers. Such a scheme draws lines in our society that we think should not be drawn. The worth of a human life is inestimable, and we do not condemn those who take life more or less harshly because of the perceived value or quality of the life taken. [Citation.] Indeed, society is probably incapable of even-handedness in such judgments." (*State v. Carter*, *supra*, at p. 652.)

The Utah death penalty statute was later amended to abrogate *Carter*'s blanket prohibition on the admission of all victim impact evidence, but the new statute retained *Carter*'s prohibition on evidence of comparative worth providing that in capital sentencing proceedings evidence may be presented on "the victim and the impact of the crime on the victim's family and community *without comparison to other persons or victims*." (Utah Crim. Code, § 76-3-207, subd. (2)(a)(iii), emphasis added.)

The majority in *Payne v. Tennessee*, *supra*, 501 U.S. 808, discounted *Booth*'s concern that the admission of victim character "evidence permits a jury to find that defendants whose victims were assets to their communities are more deserving of punishment than those whose victims are perceived to be less worthy." (*Payne*, *supra*, at p. 809.) The only reason given for its position was the assertion that, as

a general matter, "victim impact evidence is not offered to encourage comparative judgments of this kind." (*Ibid.*) *Payne* did not hold or suggest that evidence and argument that *was* offered to encourage such comparative judgments would be permissible. As Justice Moreno pointed out in his concurring and dissenting opinion in *People v. Robinson* (2005) 37 Cal.4th 592, the *Payne* decision left intact the Constitutional restrictions announced in *Booth* that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Id.*, at p. 656.) There is a definite line between proper victim impact testimony and improper characterization and opinion by the victim's family. (*Ibid.)*

A review of the evidence and argument in this case reveals that here the evidence of the victim's character was most likely offered to encourage, and would inevitably have provoked, the type of comparative evaluations found impermissible in *Booth*. The volume of the evidence alone created an unacceptable risk that the jury's attention would be focused on improper considerations. The focus of this case on the character of the victim rendered the penalty trial fundamentally unfair. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

c. Comparison Between the Victim and the Defendant

The presentation of extensive evidence about the virtues of a homicide victim also creates the risk that the death sentence will be improperly imposed based on a comparison between the victim and the

defendant. (See, e.g., *Burns v. State* (Fla. 1992) 609 So.2d 600, 610.) That comparison has the same effect as a comparison between victims: If two defendants have identical backgrounds and commit crimes of equal gravity, the defendant who killed a victim regarded as an asset to the community will fare worse in the comparison than the defendant who kills a less worthy victim and hence will be more likely to receive the death penalty. Even though the victims are not compared directly, it is the difference in the worth of the victim that causes a different sentence to be imposed in otherwise identical cases.[120]

Therefore, most courts which have considered the question have held that comparisons between the worth of the victim and the worth of the defendant is improper. For example, in *State v. Koskovich* (N.J. 2001) 776 A.2d 144, the trial court instructed the penalty phase jury to "balance[] the victim's background and circumstances against the defendant's background. Balance them." (*Id.* at p. 179.) The New Jersey Supreme Court held that this was improper because it was "akin to asking the jury to compare the worth of each person." (*Id.* at p. 182.)

> "Common experience informs us that comparing convicted murderers with their victims is inherently prejudicial because defendants in that setting invariably will appear more reprehensible in the eyes of jurors .... We are

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[120] In *State v. Humphries* (S.C. 2002) 570 S.E.2d 160, 167, the court concluded in dicta that "the comparison prohibited by *Payne* is one between the victim and other members of society," not one between the victim and the defendant, but the analysis in *Humphries* is flawed because it fails to recognize that the comparisons inject equally arbitrary considerations into the sentencing calculus and prejudice defendants in identical ways.

> convinced that the court's instruction infringed on the integrity of the penalty phase and impermissibly increased the risk that the death sentence would be arbitrarily imposed." (*Id.* at p. 182, citations omitted.)

This conclusion was based on the holding of *State v. Muhammad*, *supra*, 678 A.2d at p. 179, which had held more generally that "Victim impact testimony may not be used as a general aggravating factor or as a means of weighing the worth of the defendant against the worth of the victim." Similarly, in *State v. Storey* (Mo. 1995) 901 S.W.2d 886, the prosecutor told the penalty jury that, "[I]t comes down to one basic thing. Whose life is more important to you? Whose life has more value? The Defendant's or [the victim's]?" The Missouri Supreme Court held that the argument was improper, noting that the jury must "consider a wide array of aggravating and mitigating circumstances," but the question of whose life was more important was not among them. (*Id.* at p. 902; see also Utah Crim. Code, § 76-3-207, subd. (2)(a)(iii), which permits the introduction of victim impact evidence but only "without comparison to other persons or victims.")

Judge Johnson reached the same conclusion in *Moore v. Kemp*, *supra*, 809 F.2d 702, finding that the trial court's decision to admit the testimony of the victim's father, which briefly recounted his daughter's achievements and aspirations, "and the prosecutor's suggestion to the jury that it weigh the relative values of the two persons to society is, I think, error of the grossest sort." (*Id.* at p. 748 [conc. and dis. opn. of Johnson, J.].)

In this case, an improper comparison between appellant's worth and the worth of the victim was a major theme in the prosecution's argument for death. Moreover, the comparison was not just implicit from the evidence concerning the backgrounds of the two individuals, but explicit in the prosecutor's argument. As set forth above, the District Attorney specifically told the jury to compare the worth of Ms. Los' life and the persons she touched with the worth of appellant's life and the people he harmed. (55 R.T. 6575.)

Moreover, the comparison went even farther. The prosecutor urged that appellant had a decent upbringing and a concerned father who told him to try and make something of himself. His father urged him to go to college and not just sit around on his backside. (55 R.T. 6580.) The prosecutor's subsequent recitation of appellant's charged and uncharged offenses makes it obvious that appellant did not take his father's advice.

More importantly, the comparison to Ms. Los could not be more stark. The evidence shows that Ms. Los was a veritable dynamo of activity and achievement. Not only was she involved with charitable work, but she rose though the ranks in the military despite an adverse promotional climate in the medical field. She was airman of the quarter twice and airman of the year. She established a presurgical clinic which required not only the manual labor of renovating the physical space but mastering the military's bureaucratic regulatory scheme as well. Indeed, Mr. Holschlag commented that when Ms. Los' achievements were recounted at the building dedication ceremony, he could scarcely

believe the tremendously long list of her accomplishments. (47 R.T. 5497-5498.)

In light of the prosecutor's pointed comparisons, there can be no doubt that the erroneously admitted evidence was prejudicial.

d. Emotionally-Charged Evidence About the Impact of the Crime on the Victim's Survivors Was Erroneously Admitted

The victim impact evidence in this case was not limited to an exhaustive recital of the virtues and achievements of Ms. Los herself. Her relatives, friends and coworkers also testified at length regarding the grief, pain, and enduring sense of loss they suffered as a result of her death. "[V]ictim impact and character evidence may become unfairly prejudicial through sheer volume" (*Mosley v. State* (249) 983 S.W.2d xxx, 263), and here both the sheer volume of the evidence and the heart-rending details of the specific incidents recounted made unfair prejudice inevitable.

Captain Folz set the stage by describing what a wonderful personality Ms. Los was and identified some of the numerous awards that made her the "cream of the crop" in the military. (52 R.T. 6079-6081.) She then testified to her own "stunned" reaction to the news of Ms. Los' death. When she found that the television news anchor treated Ms. Los' death as simply another event, she took it upon herself to drive to the scene to try to do something to make the event less "mundane." (52 R.T. 6082-6084.)

As explained above, the jury could not have missed the message

that the prosecution was trying to convey. That is, Ms. Los was not only someone special to her family but someone very special to the military and to the civilian community. It was that theme of an extraordinary life snuffed out by appellant and his friends that permeated the entire penalty phase presentation.

Mr. Petrosky testified about the smell of Ms. Los' blood in her car even after it was repaired. (52 R.T. 6110.) The cold dead transcript of Mr. Petrosky's testimony on this point cannot begin to convey the emotional impact his testimony must have had on the jury. What must the jurors have felt as they put themselves in Mr. Petrosky's place to try to understand what he went through? Imagine sitting in a fiancee's car long after her death and smelling her blood. The emotional wallop of that description is almost beyond words.

More importantly, however, that description was not necessary or even relevant. In the jury's calculus on the momentous question of whether the defendant should live or die, of what relevance was it that the car still smelled after it was repaired?

This evidence had another purpose entirely. It was the testimonial equivalent of the gory photograph of a blood spattered crime scene. It was specifically elicited by the prosecutor to heighten the jury's visceral revulsion towards the defendant.

This instance of blatant appeal to the jury's darkest emotions should compel reversal of appellant's death sentence all by itself (Cf. *People v. Marsh* (1985) 175 Cal.App.3d 987, 997 [Unnecessary

admission of gruesome photograph can deprive a defendant of a fundamentally fair trial and require reversal]; see also, *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548-549 [Large photos showing victim's blood at the scene were inflammatory. Blood was not relevant to any issue]), but it was only one small part of the prosecution's emotion laden presentation.

At the request of the prosecution, Mr. Petrosky was asked to read the "mother of the year" citation. Mr. Petrosky was so overcome with emotion however, that he could not do it. Thus, the prosecutor read it to the jury for him. (52 R.T. 6093.) The prosecution then elicited testimony from Mr. Petrosky that after the funeral, he helped plant a tree at her parents' house "to represent Yvonne as a tree that would grow, hopefully, memories and love, all that would spread, continue on of her." (52 R.T. 6111.)

After the prosecution played the videotape of photographs spanning Ms. Los' entire life (52 R.T. 6111), Mr. Petrosky was again so overcome by emotion that the prosecutor had to ask if was "okay to talk." (52 R.T. 6111.) Moreover, as noted above, the video included many photos of Ms. Los' grave, the places she visited in her hometown and the Los family home. (52 R.T. 6111-6112.) Finally, Mr. Petrosky delivered the emotional eulogy set forth above wherein he described his feelings for Ms. Los while she was alive. (52 R.T. 6106-6107.)

Nigel Los testified about the wrenching adjustment Patrick and Michelle had to make to suddenly move from California to Germany,

and what it was like for him to watch his children sort through their "possessions of a lifetime" and choose what they could keep and what they could not. (47 R.T. 5537-5543.)

Mr. Holschlag's testimony was even more devastating. He told the jury what it was like to discuss his child's death with the parish priest and to buy her grave. He also identified the photos of the gravesite for the jury. (Prosecution Exhibits 71, H, I, K, ; 47 R.T. 5492-5495.) At the specific request of the prosecution, he described what it was like to sort through and dispose of Ms. Los' personal effects . (47 R.T. 5493-5495.)

Mr. Holschlag then went on to describe attending the dedication ceremony of Los Hall at March Air Force Base, listening to the recitation of his daughter's many achievements, and receiving a shadowbox from Ms. Los' command containing a folded flag, her picture, buttons from her uniform and her military decorations. (47 R.T. 5497-5498.)

Mrs. Holschlag's testimony was in a similar vein but became particularly poignant when she described her daughter's volunteer care for a young bedridden boy and her subsequent description of naming one of her new grandchildren for Yvonne. (47 R.T. 5505-5506.)

Mrs. Holschlag also described in vivid terms bringing Mrs. Los' son Patrick to the grave site and watching him come "apart" as he left the site. (47 R.T. 5508.) As noted above, the testimony was so moving that the prosecutor told the judge she did not want to ask the witness

any more questions. (47 R.T. 5508.)

Finally, there was the touching testimony of Michelle when she described her own guilt and her belief that she was ultimately responsible for her mother's death because she secretly wished she could go live with her father. (47 R.T. 5551, 5556.) She described the funeral, the fact that her mother's makeup was wrong and that a favorite rosary was missing. (47 R.T. 5554.)

Indeed, in closing argument the prosecutor specifically told the jurors to consider the pictures of the decedent while she was alive and the videotape of the memorial service. (55 R.T. 6578.) She also asked the jury to recall Michelle's testimony and what it was like for her in the weeks and months after Ms. Los' death. (55 R.T. 6579.)

The prosecution's presentation here went far beyond the brief victim impact testimony in P*ayne v. Tennessee, supra*, 501 U.S. at pp. 814-815, and tainted the penalty proceedings with unchecked emotion. It would defy reality to characterize as relatively brief and dispassionate (cf. *People v. Boyette, supra*, 29 Cal.4th 381, 445) testimony like that given by Mr. Petrosky, Ms. Los' parents and Michelle. No juror could maintain a detached focus on the issues after listening to these heart rending descriptions and viewing the photographs.

Although there have been few cases in which anywhere near the same volume of the victim impact evidence was introduced, two cases did discuss the inflammatory effect of specific incidents similar to those described here. In *People v. Gurule* (2002) 28 Cal.4th 557, 622, this

Court characterized as "highly inflammatory" the brief portion of a guilt phase stipulation which stated that the victim's mother had hugged him goodbye on the morning of his death. (*Id.* at p. 622; see also *id.* at pp. 654-655, noting that the evidence about the hug would also have been potentially prejudicial if it had been introduced at the penalty phase.)

In *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373, the court held that it was error to admit evidence that the victim's son put flowers on his mother's grave and brushed the dirt away because that evidence "had little probative value of the impact of [the victim' s] death on her family and was more prejudicial than probative."

All of these aspects of the victim impact testimony - its volume, its substance, the inflammatory language used to deliver it - demonstrate that the trial court failed in its duty to carefully monitor the victim impact testimony to insure that emotion did not take precedence over reason. The prosecutor took full advantage of the court's lapse and exploited the evidence during closing argument. Under these circumstances, the admission of this flood of victim impact testimony was undoubtedly prejudicial.

e. The Erroneous Admission of This Mass of Improper Victim Impact Evidence Requires Reversal

"Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) The victim impact testimony in this case was voluminous, detailed, and emotionally-charged. In addition to a history of the victim's entire life, it included glowing descriptions of her

character as a child and an adult, and poignant anecdotes illustrating the devastation caused by her death.

Moreover, the prejudicial effect of the testimony was magnified by the numerous photographs, videos and certificates which accompanied it, including such irrelevant but inflammatory items as a photograph of Ms. Los' wedding, photographs of her grave, photographs of her as a child and young adult, the numerous citations and awards, and the video of the building dedication. "The Chinese proverb of old states it well: 'One pic*t*ure is worth more than a thousand words'." (*People v. Kelly* (1990) 51 Cal.3d 931,963), and this plethora of visual evidence greatly intensified the impact of the already unduly emotional testimony. (see also Justice Moreno's concurring and dissenting opinion in *People v. Robinson, supra* , 37 Cal.4th 592, 656-657. [witness characterizations of the decedent's death were only minimally related to proper victim impact, mostly they just inflamed the jury and as such violated the Eighth Amendment.]

Prejudice

All of the improperly admitted victim impact evidence violated appellant's right to a fair and reliable capital sentencing hearing and his right to the effective assistance of counsel and denied him due process by making the penalty trial fundamentally unfair. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 7, 15, and 17; T*uilaepa v. California, supra*, 512 U.S. 967; *Payne v. Tennessee, supra*, 501 U.S. 808; *Booth v. Maryland, supra*, 482 U.S. 496; *Strickland v. Washington* (1984) 466

U.S. 668; *Rabe v. Washington* (1972) 405 U.S. 313.) The violations of the federal Constitution require reversal unless the prosecution can show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 381 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) The violations of state law during the penalty phase require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the nature and extent of the evidence and the prosecutors' exploitation of it during closing arguments, the errors must be deemed prejudicial.

That was the conclusion of the Supreme Court of Florida in *Burns v. State* (Fla. 1992) 609 So.2d 600, which involved the murder of a police officer during the performance of his duties. In *Burns*, only one type of victim impact evidence, evidence of the victim's character, was improperly introduced, but the court concluded:

> "Reverting to our earlier finding that it was error to admit the background evidence of the deceased, we cannot with the same certainty determine it to be harmless in the penalty phase. The testimony was extensive and it was frequently referred to by the prosecutor. The prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased. These emotional issues may have improperly influenced the jury in their recommendation." (*Id.* at p. 610.)

Here, the evidence was much more extensive, and included many more additional improper considerations. In this case, there were overt disparaging comparisons between not only the character of the decedent

and the defendant, but the relative societal worth of the decedent and the defendant. These included subtle (and not-so-subtle) appeals to racial bias as well. Additionally, the extensive life history of the decedent from birth to death and even after her death contained many laudable characteristics that the defendant not only did not know, he certainly could NOT have known.[121] Finally, the sheer volume of this emotionally devastating evidence overwhelmed any realistic notion that the jury could rationally deliberate appellant's fate. One fifth of the prosecution's total penalty phase presentation was devoted to the victim impact evidence. This huge volume and its cumulative emotional impact far exceeded anything contemplated in *Payne v. Tennessee, supra.* Instead, it opened the emotional floodgates so clearly condemned in *Booth v. Maryland* and *South Carolina v. Gathers.*

Individually and collectively, these improper appeals to the jury's emotion deprived appellant of any semblance of a reliable penalty phase determination. The errors complained of herein violated appellant's Fifth, Sixth, Eighth and Fourteenth amendment right and were so highly prejudicial that reversal is compelled under any standard.

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[121] Indeed, even if the defendant could reasonably have anticipated anguish to immediate family members as a result of the events in this case, how could he have anticipated that the United States Air Force would dedicate a building in Ms. Los' honor?

XV.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE

Introduction

Given the extensive amount and highly emotional nature of the victim impact evidence in this case, the court had a *sua sponte* duty to properly instruct the jury on its appropriate consideration,

Here, although the trial court instructed in accordance with CALCIC 8.84.1 nothing else was said to guide the jury in its consideration of this emotionally volatile evidence. CALJIC 8.84.1 is deficient because it does not caution the jury against an improper or irrational use of the victim impact evidence and does not warn the jury against invidious comparisons between the victim and the defendant. The error deprived appellant of his Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fifth and Fourteenth Amendment rights to due process.

Proper Instructions Required

Under well-settled California law, the trial court is responsible for insuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even

absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct *sua sponte* on the principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) In this case, the trial court breached its instructional obligation by failing to *sua sponte* instruct the jury on the proper use of victim impact evidence.

Defense counsel certainly alerted the court to the need for such an instruction by objecting to the prejudicial effect of the videos, the testimony of non relative witnesses and the likely argument thereon. (52 R.T. 6069-6071.) Although defense counsel did not follow up by submitting a proposed cautionary instruction, this omission did not relieve the court of its responsibility to provide the jury with the guidance it needed to properly consider the victim impact evidence.

An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore it should have been given on the court's own motion. (See generally *People v. Murtishaw, supra*, 48 Cal.3d at p. 1022; *People v. Koontz, supra,* 27 Cal.4th at p. 1085; *People v. Breverman, supra*, 19 Cal.4th at p. 154; see also *People v. Stewart* (1976) 16 Cal.3d 133, 139-139 [defective request for instruction alerted court to its sua sponte duty].).[122] "Because of the

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[122] Moreover, even if it would have otherwise been incumbent on trial defense counsel to make a request for such an instruction, it is likely that any request for a limiting instruction would have been futile. The court had already admitted much of the victim

importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 141, 148.)

The highest courts of Oklahoma, New Jersey, Tennessee, and Georgia have held that, in every case in which victim impact evidence is introduced, the trial court must instruct the jury on the appropriate use, and admonish the jury against the misuse, of the victim impact evidence. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required instruction varies in each state, depending on the role victim impact evidence plays in that state's statutory scheme, common features are an explanation of how the evidence can properly be considered and the admonition not to base a

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impact evidence over defense counsel's objections (see, e.g.,

decision on emotion or the consideration of improper factors. An appropriate instruction for California would read as follows:

> "Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Further, you must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the defendant, the crime, and the appropriate punishment to be imposed."

The first four sentences of this instruction duplicate the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159. The last sentence was added to deal with cases where inadmissible opinion evidence was improperly introduced. (cf. *State v. Koskovich*, *supra*, 776 A.2d at p. 177.)[123]

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[123] In *State v. Koskovich*, *supra*, the New Jersey Supreme Court held:

"We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard." That language might be appropriate for a pattern instruction, but it would not be adequate in a case

This Court addressed a different proposed limiting instruction in *People v. Ochoa* (2001) 26 Cal.4th 398, 445, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, an instruction which was also given in this case (55 R.T. 6631-6632). However, CALJIC No. 8.84.1 does not cover any of the points made by the instruction proposed here. It does not tell the jury why victim impact evidence was introduced; it does not caution the jury against an irrational decision; and it does not warn the jury against comparisons between victims or consideration of survivors' opinions.

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but does not warn against the intense anger or sorrow that victim impact evidence is likely to evoke. Additionally, the jurors probably would not recognize or understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victim's relatives or the private feelings of her friends and coworkers in the Air Force.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841,864.) The limiting instruction proposed here would have conveyed that message to

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like this, where the victim impact witnesses did not remain silent about their views.

the jury; none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., Amends. 6, 8, and 14; Cal. Const., art. I, §§ 7, 15, 16, and 17.)

Prejudice

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 381 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) The violations of appellant's state rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown, supra,* 46 Cal.3d 432, 447-448.) As explained at length in Issue XV, given the volume and highly emotional nature of the victim impact evidence admitted in this case, and the reliance the prosecutor placed on that evidence during her closing arguments , the trial court's instructional error cannot be considered harmless. Reversal is, therefore, required.

XVII.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT ON LINGERING DOUBT IN VIOLATION OF STATE LAW AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Introduction

The defense proposed a penalty phase instruction on lingering doubt. The trial court refused noting that although the instruction was correct on the law, lingering doubt was solely a matter for argument. In view of the jury's repeated notes expressing concern about the limits of appellant's vicarious liability as well as its concern for whether the death penalty was appropriate, the trial court's resolution of this close question was of monumental importance in determining whether to execute appellant or spare his life. Therefore, the failure to give this instruction deprived appellant of his Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment rights to a reliable penalty determination, and his Fifth and Fourteenth Amendment rights to due process.

Factual Background

Prior to penalty phase instructions, appellant proposed the following instruction on lingering doubt.

> "If you have any lingering doubt concerning the guilt of the defendant as to any of those charges of which he was found guilty, or if you have any lingering doubt concerning the truthfulness of any of the special circumstance allegations

which were found to be true, you may consider that lingering doubt as a mitigating factor or circumstance.

A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the jurors a reasonable doubt." (19 C.T. 5278.)

During the discussion concerning penalty phase instructions, appellant's lingering doubt instruction came up for debate. In a terse ruling, the trial court stated: "I think the law is fairly clear that you're free to argue [lingering doubt], but I'm not required to instruct on it." (54 R.T. 6368-6369.)

In closing argument, counsel for appellant mentioned lingering doubt. (55 R.T. 6602-6603, 6625.) Nevertheless, no lingering doubt instruction was given.

Lingering Doubt

Penal Code section 190.3 mandates that the jury "shall take into account any of the following factors if relevant," followed by a list of 11 factors. Under factor (a), the jury must consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding..." (Pen. Code §§ 190.3, subd. (a). If relevant, factor (j) requires the jury to consider "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Factor (k) is a catch-all factor and includes "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Pen. Code §§

190.3, subd. (k).) Pursuant to these provisions, lingering or residual doubts regarding the defendant's guilt of, or his role in, the underlying crime constitutes relevant mitigation that a defendant is entitled to present and have the jury consider. (See, e.g., *People v. Jones* (2003) 30 Cal.4th 1084, 1125 [lingering doubt that another was actual killer is circumstance of offense under section 190.3, subd. (a) and thus is relevant mitigation]; *People v. Earp* (1999) 20 Cal. 4th 826; *People v. Cox, supra*, 53 Cal.3d 618, 676; *People v. Kaurish* (1990) 52 Cal.3d 648, 706; *People v. Hawkins* (1995) 10 Cal. 4th 920, disapproved on a different ground in *People v. Lasko* (2000) 23 Cal.4th 101, 107; *People v. Terry* (1964) 61 Cal.2d 137, 147.)[124] As this court explained, under California law, capital jurors may "conclude that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt but ... still demand a greater degree of certainty of guilt for the imposition of the death penalty. . . . . Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*People v. Terry, supra*, at pp. 145-146; accord, e.g., *People v. Jones*,

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[124] Other jurisdictions agree: see, e.g. *United States v. Davis* (E.D.LA 2001) 132 F.Supp.2d 455 [construing federal death penalty statute]; *Tennessee v. Teague* (Tenn. 1995) 897 S.W.2d 248, 252-253; see also Model Pen. Code §§ 210.6(1)(f) [categorically precludes a death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt."].)

supra, at p. 1125.)

Indeed, lingering doubt is recognized as such a compelling factor in the penalty determination under California law that this court has consistently recognized that a defense counsel may reasonably base his entire penalty phase defense strategy upon it. (See, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1212; *People v. Cox, supra*, at p. 660; see also, e.g., *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 715 [counsel not ineffective for failing to pursue other penalty phase strategies where he relied on "viable lingering doubt defense"]; *Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715-716 [counsel's reliance on lingering doubt was more than reasonable given its "powerful mitigating" effect, as demonstrated by results of comprehensive studies]; *Andrews v. Collins* (5th Cir. 1994) 21 F.3d 612, 624 and n.21, cert. denied 513 U.S. 1114 (1995) [rejecting ineffective assistance of counsel claim where counsel's sole penalty phase strategy rested on lingering doubts, a strategy that "has been recognized as an extremely effective argument for defendants in capital cases"]; *Stewart v. Dugger* (11th Cir. 1989) 877 F.2d 851, 856.) Indeed, as one court has put it, "residual doubt is perhaps the most effective strategy to employ at sentencing." (*Chandler v. United States* (11th Cir. 2000) 218 F.3d 1305, 1320, n. 28; accord *Lockhart v. McCree, supra*, 476 U.S. at p. 181 ["residual doubt has been recognized as an extremely effective argument" in mitigation].)

For Eighth Amendment purposes, the United States Supreme

Court has defined constitutionally relevant mitigating evidence "in the most expansive terms." (*Tennard v. Dretke* (2004) 542 U.S. 274 124 S.Ct. 2562, 2570.) "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (Ibid., quoting from *McKoy v. North Carolina* (1990) 494 U.S. 433, 440-441.) Put another way, constitutionally relevant mitigating evidence is evidence that may "serve as a basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1 at p. 4; accord *McKoy v. North Carolina, supra*, 494 U.S. at p. 441.) Hence, because lingering doubt can "serve as a basis for a sentence less than death" in California, it is also constitutionally relevant mitigating evidence under the federal constitution. "Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." (*Tennard v. Dretke, supra*, at p. 2570, quoting from *Boyde v. California*, 494 U.S. at pp. 377-378 [and authorities cited therein]; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275.) Certainly, there is no question that consideration of lingering doubt serves the paramount need for heightened reliability in death penalty judgments. (See, e.g., *Caldwell v. Mississippi, supra*, 472 U.S. at p. 340; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.)[125]

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[125] To be sure, in 1988, a plurality of the United States Supreme Court questioned — arguably in dicta — whether the Eighth Amendment requires states to give effect to residual or lingering doubts regarding the defendant's guilt or innocence because it reasoned that such doubts are not "over any aspect of a defendant's character or record and any of the circumstances of the offense," and therefore are not constitutionally

Moreover, because California law does recognize and give effect to lingering doubts as a basis for a sentence less than death, a capital defendant has a substantial and legitimate expectation that he will not be deprived of his life or liberty unless his jury considers those doubts. Hence, state action precluding a capital jury from considering lingering doubt in determining the appropriate penalty violates the Fourteenth Amendment's guarantee to due process. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346 [although the federal constitution does not require states to employ jury sentencing in non-capital cases, once a state does so, the right is protected by federal due process because a defendant "has a

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relevant under its prior decisions; the holding of that case, however, was simply that there was no constitutional violation in any event because the jury was not precluded from considering those doubts. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-174, 176.) As a preliminary matter, the plurality''s discussion of the constitutional relevance of lingering doubts is questionable in light of later decisions broadly defining constitutional relevance under the Eighth Amendment, as discussed above. (See, e.g., *Tennard v. Dretke, supra,* 542 U.S. 274, 124 S.Ct. at p. 2570; *McKoy v. North Carolina, supra*, 494 U.S. at pp. 440-441.) In any event, the issue is distinct from that presented here for at least two reasons. First, because California does give effect to lingering doubt as a basis for a sentence less than death, it may serve as a basis for a sentence less than death and therefore becomes relevant under the federal constitution, particularly where the defendant relies on this well settled principle as part of his penalty phase defense. (See *Skipper v. South Carolina, supra*, 476 U.S. at p. 4; *accord McKoy v. North Carolina, supra*, 494 U.S. at p. 441; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Second, the *Franklin* plurality questioned the relevance of lingering doubt as to guilt, or whether the defendant was culpable or involved at all, not the relevance of lingering doubt regarding a "guilty" defendant's actual role in the crime(s). (*See, e.g., Rupe v. Wood* (W.D. Wn._1994) 863 F. Supp. 1315, 1340, affirmed (9th Cir. 1996) 93 F.3d 1434; *Tennessee v. Teague, supra*, 897 S.W.2d at pp. 252-253.) There is no question that a "guilty" defendant's degree of participation, or role, in the crime is relevant to his culpability and thus "constitutionally relevant." (*See, e.g., Lockett v. Ohio* (1978) 438 U.S. 586, 694, 608; *Bell v. Ohio* (1978) 438 U.S. 637, 641-642.)

substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion"]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301, cert. denied 513 U.S. 914 (1994); *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Similarly, because it is a viable penalty phase defense strategy under California law, where counsel attempts to rely on a lingering doubt strategy, state action precluding the jury from considering the defense may violate defendant's Sixth Amendment rights to effective counsel and to present a defense, and Fifth and Fourteenth Amendment rights to a fair trial. (Cf. *Conde v. Henry* (1999) 198 F.3d 734 at pp. 734, 739-740 [trial court''s instructional error and other rulings prevented consideration of primary defense and violated Fifth and Sixth Amendment right to effective counsel, to present a defense, and to a fair trial]; see also *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 847, ["we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing"].)

Finally, the Due Process Clauses of the Fifth and Fourteenth Amendments also entitle a defendant to present evidence relevant to rebut the prosecution's case for death. For instance, even if a defendant's parole ineligibility would not be constitutionally relevant mitigating evidence under the minimum Eighth Amendment standards, a defendant would have an independent due process right to present, and have the jury consider, such evidence if the prosecution relies on the defendant's future dangerousness as a reason for imposing death (as it did in this case). (*Simmons v. South Carolina* (1994) 512 U.S. 154,

161-163; accord *Skipper v. South Carolina, supra*, 476 U.S. at p. 5, n.1 [same — adjustment to jail].) Pursuant to this principle, if the prosecution relies on the defendant's role in the charged crime to urge the jury to vote for death, the defendant has a due process right to present and have the jury consider anything that might rebut or undermine the prosecution's theory. (See, e.g., *Green v. Georgia* (1979) 442 U.S. 95, 97 [evidence that co-participant was the only actual killer "was highly relevant to a critical issue in the punishment phase" in part because prosecutor argued defendant was an actual killer; exclusion from penalty phase violated federal due process]; *Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, 1440-1441 [polygraph test to state's chief witness was relevant to raise doubt as to prosecution's theory regarding defendant's role in crimes, exclusion at penalty phase violated federal due process right to present relevant mitigating evidence]; *Mak v. Blodgett* (1992) 970 F.2d 614, 622-623 [where defendant's role in offense, or relative culpability, is relevant mitigating factor under state law, and where prosecutor makes it relevant through argument that defendant was ringleader, defendant entitled to present, and have jury consider, evidence relevant to that issue under the Eighth Amendment and the Due Process Clause].)

Nevertheless, this Court has held that trial courts do not have an absolute duty to instruct capital juries that they may consider their lingering doubts in determining the appropriate penalty. (See, e.g., *People v. Sanchez* (1995) 12 Cal.4th 1, 77 [and authorities cited therein].) Although lingering doubt is highly relevant to the sentencing

decision in California, this court has reasoned that a special instruction ordinarily is not necessary because, as a general matter, the language of the standard instructions on factors (a) and (k) is broad enough to encompass the concept of lingering doubt. (*Ibid.*; see also, e.g., *People v. Johnson* (1992) 3 Cal.4th 1183, 1252 [maj. opn.]; *People v. Cox, supra*, 53 Cal.3d at pp. 677-678; but see *People v. Johnson, supra,* 3 Cal.4th at p. 1261, conc. opns. of Mosk, J., joined by Kennard, J. [if there is a reasonable likelihood that jurors will not understand that they may entertain and act upon their lingering doubts in penalty phase, court must provide lingering doubt instruction so as to avoid or correct the error]; *People v. Cox, supra*, at p. 678 and n. 20 [evidence may require appropriate lingering doubt instruction upon request].) Put another way, this court has held that nothing on the face of the standard instructions prevents the jury from considering lingering doubt as a mitigating circumstance.

It Is Reasonably Likely That The Jurors Misunderstood That They Were Precluded From Considering And Giving Effect To Their Lingering Doubts That Appellant Was Fully Culpable For Ms. Los' Death When Deciding Whether To Execute Him Or Spare His Life.

While the jury found that appellant was involved in the shooting of Ms. Los as well as the other offenses, the jury notes indicate that it was uncomfortable with the reach of vicarious liability. The jury notes specifically asked about the extent of appellant's liability as an aider and abetter and whether it was exactly the same as Dearaujo's. (19 C.T. 5163). The jury also asked whether there were single or multiple conspiracies and what actually constituted the agreement. (19 C.T.

5165.) Finally the jury asked what would happen if they gave the defendant life without parole: would he get out of prison? (19 C.T. 5336-5337) Given those repeated expressions of discomfort with the conviction and its repercussions, it is inconceivable that the jury did not have lingering doubts as to appellant's moral culpability. Pursuant to the above authorities, appellant was entitled under state law and the Eighth and Fourteenth Amendments to have the jurors consider their lingering doubts that appellant was fully responsible for Ms. Los' demise when determining whether he should be put to death.

Furthermore, appellant had an independent due process right to have the jury consider and give effect to their lingering doubts that he was morally culpable in order to rebut the prosecution's theory. Given the absence of any other significant aggravating evidence, the heart of the prosecution's strategy was to emphasize appellant's's role as the ringleader, to devastating effect. (41 RT 4998 [guilt phase argument].) Indeed, in penalty phase, the prosecutor specifically told the jury that factor (j) (accomplice liability) was NOT a factor the jury could consider in mitigation. (55 R.T. 6567.) Because the jury found the special circumstance to be true, appellant was necessarily a major participant in the killing of Ms. Los. (55 R.T. 6568.)

The distinction between lingering doubt as to guilt and lingering doubt as to the defendant's actual role or relative culpability is a critical one. (Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L. Rev. 1557, 1577-1583 [results of empirical study revealed that "[w]hile

lingering doubt concerning the defendant's actual innocence appeared to play a very infrequent role in influencing the jury's penalty decision, lingering doubt seemed to play a far more significant role when the doubt involved the defendant's level of participation in the murder;" jurors did not consider whether there were lingering doubts as to guilt in penalty phase and expressed antipathy toward defendants who ask them to do so; in contrast, jurors were very receptive to considering lingering doubts as to the defendant's actual role in the crimes and such cases frequently resulted in life sentences].) Certainly, there is no doubt that the distinction was vital in this case. Based upon the evidence, particularly when combined with the jury notes, it is entirely possible — indeed probable — that the jurors had no doubt that appellant was "guilty"of all of the crimes, yet still had deeply troubling lingering doubts about his moral culpability.

Prejudice

Where, as here, error of federal constitutional dimension has occurred, reversal is required unless the Court determines that it was harmless beyond a reasonable doubt. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *Yates v. Evatt, supra*, 500 U.S. at p. 404; *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Lucero* (1988) 44 Cal.3d 1006, 1032.) For state law violations in the penalty phase of a capital trial, reversal is required if there is any "reasonable possibility" that the verdict would have been different in the absence of the error. (*People v. Brown, supra,* 46 Cal.3d 432, 447-448.) Reversal is required under this standard if there is a reasonable possibility that even a single juror

might have reached a different decision absent the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"].) Given that the jurors' penalty determination is an individualized, normative one, and the need for heightened reliability in capital cases, the "reasonable possibility" standard is "more exacting" than the *Watson* standard for reversal applied to guilt phase errors. (*People v. Brown, supra*, 46 Cal.3d at p. 447; see also *People v. Ashmus, supra*, 54 Cal.3d at p. 965 [equating reasonable possibility standard under *Brown* with the federal harmless beyond a reasonable doubt standard].) Under either standard, however, it is clear that the penalty judgment must be reversed.

While it is true that the judge instructed on factor (j) (whether or not the defendant was an accomplice or minor participant) and factor (j) was closer to the critical lingering doubt issue than the general instructions on factors (a) and (k), it was nevertheless insufficient to remedy the defect in the specific lingering doubt instruction. The jurors were told to consider only those factors that were "applicable." (55 R.T. 6632.) On its face, the instruction alerts the jurors that it may contain inapplicable factors. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 776-777.) Indeed, the instruction listed obviously inapplicable factors, such as factor (e) (Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act). (55 R.T. 6632.) Without more, factor (j) would clearly appear to be inapplicable in this case, since it was inconsistent with the jurors'' guilt

phase finding on the special circumstance allegation. Under the circumstances, the only way that the lay jurors would have understood that factor (j) was potentially applicable would have been through understanding that they could consider their lingering doubts over their contrary guilt phase finding. Indeed, the seeming inapplicability of factor (j) was reinforced when the prosecutor specifically told the jury that factor (j) was inapplicable precisely because of the contrary finding in the guilt phase. (55 R.T. 6567-6568.)

At the very least, the instructions as a whole were potentially ambiguous and misleading. Of course, even instructions that "are not crucially erroneous, deficient or misleading on their face, may become so under certain circumstances." (*People v. Brown* (1988) 45 Cal.3d 1247, 1255.) When considered in conjunction with the prosecutor's arguments, there is a reasonable likelihood that the jurors understood that it would be improper for them to consider their lingering doubts as to appellant's culpability in determining whether to execute him. (See, e.g., *People v. Claire* (1992) 2 Cal.4th 629, 663; *People v. Brown, supra*, 45 Cal.3d at p. 1255; *People v. Lucero, supra*, 44 Cal.3d at p. 1031; *Hitchcock v. Dugger* (1987) 481 U.S. 393 at pp. 397-398 [from instruction and prosecution arguments, jurors likely understood that its consideration of mitigating factors was limited to those listed in instruction and no others].)

It is no answer to say that the effect of the misleading instruction and the prosecutor's similarly misleading and impassioned argument was nullified by defense counsel's brief comment that the jury could

consider lingering doubt. It is well recognized that when the defense and the prosecution argue two competing interpretations of the law and the instructions fail to guide the jurors as to which interpretation is the correct one, it is more than reasonably likely that the jury will accept the prosecution's. (See, e.g., *Hitchcock v. Dugger, supra*, 481 U.S. at pp. 397-398 [jury instruction listed mitigating factors to be considered; defense counsel argued mitigation not limited to listed factors; prosecutor argued to the contrary; likely jurors understood consideration limited to listed factors]; *United States v. LaPage* (2000) 231 F.3d 488, 492 [in contrast to the prosecutor, "the jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism"]; *People v. Taylor* (1961)197 Cal.App.2d 372 at p. 383; *People v. Brophy* (1954) 122 Cal.App.2d 638 at p. 652; *People v. Talle* (1952) 111 Cal.App.2d 650, 677.) As the court has recognized, this is particularly true where, as here, "the prosecutor [does] not adopt or endorse the view expressed by defense counsel," but rather criticizes it. (*People v. Edelbacher* (1989) 47 Cal.3d 983 at p. 1039 [despite defense counsel''s "thorough and forceful explication" of the correct law, prosecutor''s contrary argument and potentially misleading instruction created reasonable likelihood jurors misunderstood the law]; compare *People v. Johnson, supra*, 3 Cal.4th at pp. 1261-1262, conc. opn. of Mosk, J., with Kennard, J., concurring [concurring in majority opinion that refusal to provide lingering doubt instruction was not error in part because defense counsel argued its relevance and "the People made no suggestion that such doubt was in any way immaterial"];

People v. Cox, supra, 53 Cal.3d at p. 675 [holding refusal to provide instruction on lingering doubt as to role was not error in part because "the prosecutor never suggested that it was not a relevant consideration if the jury found it supported by the evidence"].)

Under the circumstances presented here, however, there is a reasonable likelihood that the jurors believed that they were precluded from considering their lingering doubts on the critical issue of moral culpability and thus did not consider or give effect to the evidence that appellant was not actually responsible for the death of Ms. Los. Appellant had an independent due process right to have the jurors consider and give effect to the substantial guilt phase evidence that he was not fully responsible for Ms. Los' death, which necessarily required them to consider their lingering doubts regarding their contrary guilt phase finding. (See, e.g., *Green v. Georgia, supra*, 442 U.S. at p. 97; *Rupe v. Wood, supra*, 93 F.3d at pp. 1440-1441; *Mak v. Blodgett, supra*, 970 F.2d at pp. 622-623; see also *Simmons v. South Carolina, supra*, 512 U.S. at pp. 161-163; *Skipper v. South Carolina, supra*, 476 U.S. at p. 5, n.1.) Thus, appellant's right to have the jurors consider their lingering doubts regarding that vital issue, guaranteed by state law and the Fifth, Sixth, Eighth, and Fourteenth Amendments, was violated. His death sentence, therefore, must be set aside.

XVIII.

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

Introduction

CALJIC 8.85 was given in this case. The instruction is Constitutionally flawed because it fails to tell the jury which factors are mitigating and which are aggravating. This failure to designate allows jurors to make disparate judgments on similar factors and introduces an unacceptable level of arbitrariness in the capital sentencing process.

CALJIC 8.85 is Improper

At the conclusion of the penalty phase, the trial judge instructed the jury pursuant to CALJIC No. 8.85. (55 R.T. 6632-6633.) As discussed below, this instruction is constitutionally flawed. This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 191-192), but it has not adequately addressed the underlying reasoning presented by appellant here. This Court should reconsider its previous rulings in light of the arguments made herein.

A. The Trial Court's Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of Capital Punishment

The instructions given failed to advise 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. (See 55 RT 6632-6633.) This Court has concluded that each of the factors introduced by a prefatory "whether or not"— factors (d), (e), (f), (g), (h), and (j) — are relevant solely as possible mitigators. (See *People v. Hamilton* (1989) 48 Cal.3d 1141, 1184; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034; *People v. Lucero, supra,* 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton, supra,* 44 Cal.3d 713, 769770; *People v. Davenport* (1995) 41 Cal.3d 247, 288-289.)

While the jurors were instructed pursuant to CALJIC 8.85.6 that the absence of a statutory mitigating factor "does not constitute an aggravating factor" (55 R.T. 6634-6635), nevertheless, jurors were still left free to conclude on their own with regard to each "whether or not" sentencing factor that any facts deemed relevant under that factor were actually aggravating. For this reason, appellant could not receive the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85; *Zant v. Stephens, supra,* 462 U.S. at p. 879; *Woodson v. North Carolina, supra,* 428 U.S. 280 at p.280.)

By instructing the jury in this manner, the trial judge ensured that appellant's jury could aggravate his sentence upon the basis of what were, as a matter of state law, mitigating factors. The fact that the jury may have considered these mitigating factors to be aggravating factors infringed appellant's rights under the Eighth Amendment, as well as

state law, by making 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.)

The impact on the sentencing calculus of the trial judge's failure to define mitigating factors as mitigating will differ from case to case depending upon how a particular sentencing jury interprets the "law" conveyed by CALJIC No. 8.85. In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is presented, the evidence must be construed as mitigating. In other cases, the jury may construe the "whether or not" language of CALJIC No. 8.85 as allowing jurors to treat as aggravating any evidence presented by appellant under that factor.

The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different sets of aggravating circumstances because of differing constructions given to CALJIC No. 8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (lead opn. of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is

evenhandedly applied. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Accordingly, the trial court, by reciting the standard CALJIC No. 8.85 violated appellant's Eighth and Fourteenth Amendment rights.

For these reasons, the instructions contained in CALJIC No. 8.85 are constitutionally flawed. Moreover, because CALJIC No. 8.85 fails to comply with constitutional requirements and unnecessarily introduces an unacceptable level of arbitrariness into the capital sentencing process, appellant's death sentence should be reversed.

XIX.

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT''S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Introduction

CAJIC 8.88 is an improper instruction because it fails to describe accurately the weighing process the jury must apply in capital cases. Moreover, by so failing, it deprives a defendant of the individualized consideration that the Eighth Amendment requires. Further, the instruction is improperly weighted toward death and contradicts the requirements of Penal Code section 190.3 by allowing a death judgment if the aggravating circumstances are merely "substantial" instead of requiring the jury to make the proper determination that if the mitigating circumstances outweigh the aggravating circumstances, it must return a verdict of life without parole.

Finally, the critical "so substantial;" language in the instruction that describes the effect of the aggravating factors is unconstitutionally broad. That language would allow a death judgement if the jury found death was authorized under the statutes instead of whether it was appropriate under the circumstances . All of these problems effectively lower the prosecution's burden of proof below that required by the Constitution.

CALJIC 8.88 is Improper

At the penalty phase jury charge, the trial judge instructed the jury pursuant to CALJIC 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant .
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injuries consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the 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.
>
> You shall now retire to deliberate on the penalty. . . . In order to make a determination as to the penalty, all twelve jurors must agree. (55 R.T. 6634-6636.)

This instruction violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the corresponding sections of the state Constitution. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances. For all these reasons, reversal of appellant's death sentence is required.

Appellant recognizes that similar arguments have been rejected by this Court in the past. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955,

978.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered.

A. *In Failing to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation, They Were Required to Impose a Sentence of Life Without Possibility of Parole, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required*

California Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code §§ 190.3.)

The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.) The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language, however, is not included in CALJIC No. 8.88. Instead, the instruction only addresses directly the imposition

of the death penalty, and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violates the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 346-347.)

In addition, the instruction improperly reduced the prosecution''s burden of proof below that required by the applicable statute. An instructional error which misdescribes the burden of proof, and thus "vitiates *all* the jury''s findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281 [emphasis in original].)

This court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) The court reasoned that since the instruction stated

that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-29; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party''s theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)

There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*(1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause 'does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" there

"must be a two-way street" as between the prosecution and the defense. (*Wardius, supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, this court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. (*Id.* at pp. 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See e.g. *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle to appellant in the instant case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, the instruction is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence. Indeed, any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and are as — if not more — entitled as noncapital defendants to the protections the law affords in relation to prosecution-slanted instructions. Appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§§§ 7 and 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff''d and adopted, (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under

the standard of *Chapman v. California, supra,* 386 U.S. at p. 24, reversal is required.

B. By Failing to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

"The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979; *People v. Brown, supra,* 40 Cal.3d at pp. 538-541 [holding jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].) The jurors in this case were never informed of this fact. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was *ipso facto* the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation — and even if they found no mitigation whatever. As framed, then, CALJIC No. 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909; disapproved on other grounds in *People v. Carmen* (1951) 36 Cal.2d 768, 775.)

The decision on whether to impose a life sentence was a major issue during jury deliberations. (See the extensive discussion of this matter in issue XIII.) Thus, the failure to ensure that the jury fully understood the role of mitigating evidence cannot be deemed harmless under any standard.

Clearly, in appellant's case the overall impact of the penalty phase instructions, and in particular CALJIC No. 8.88, the concluding instruction, was to falsely give the jurors the impression (1) that the trial judge wanted the jurors to impose a sentence of death, and (2) that jurors did not have the right to just as easily give life without parole.

Since these defects in the instructions deprived appellant of an important procedural protection that California law affords noncapital defendants, it deprived appellant of due process of law (see *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see also *Hewitt v. Helms* (1983)

459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia* (1972) 408 U.S. 238).

C. The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Is Unconstitutionally Vague and Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3

Under the standard CALJIC instructions, the question of whether to impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole." (55 RT 6635-6636.)

The words "so substantial" provide the jurors with no guidance as to what they have to find in order to impose the death penalty. The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites arbitrary application of the death penalty.

The word "substantial" caused constitutional vagueness problems when used as part of the aggravating circumstances in the Georgia death penalty scheme. In *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, the Georgia Supreme Court considered a void-for-vagueness attack on the following aggravating circumstance: "The offense of murder . . . was

committed by a person . . . who has a substantial history of serious assaultive criminal convictions." The court held that this component of the Georgia death penalty statute did "not provide the sufficiently ''clear and objective standards'' necessary to control the jury''s discretion in imposing the death penalty." (*Id.* at p. 391; see *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.) Regarding the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance"; "valuable." Whether the defendant''s prior history of convictions meets this legislative criterion is highly subjective. [Footnote.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result. We therefore hold that the portion of [the statute] which allows for the death penalty where a "murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions," is unconstitutional and, thereby, unenforceable. (*Arnold v. State, supra*, 224 S.E.2d at p. 392 [brackets in original].)

The United States Supreme Court has specifically praised the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 202.)

There is nothing in the words "so substantial . . . that [the aggravating] evidence warrants death" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 429.) These words do not provide meaningful guidance to a sentencing jury attempting to

determine whether to impose death or life. The words are too amorphous to constitute a clear standard by which to judge whether the penalty is appropriate, and their use in this case rendered the resulting death sentence constitutionally indefensible.

D. By Failing to Convey to the Jury That the Central Decision at the Penalty Phase Is the Determination of the Appropriate Punishment, CALJIC No. 8.88 Improperly Reduced the Prosecution''s Burden and Reversal Is Required

As noted above, CALJIC No. 8.88 informed the jury that "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." (55 R.T. 6635-6636.) Eighth Amendment capital jurisprudence demands that the central determination at the penalty phase be whether death constitutes the appropriate, and not merely a warranted, punishment. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) CALJIC No. 8.88 does not adequately convey this standard; it thus violates the Eighth and Fourteenth Amendments. To "warrant" death more accurately describes that state in the statutory sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for imposition of death.

"Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give

(someone) authorization or sanction to do something; (b) to authorize (the doing of something)." (*Webster's Unabridged Dictionary* (2d ed. 1966) 2062.) In contrast,"appropriate" is defined as, "1. belonging peculiarly; special. 2. Set apart for a particular use or person. [Obs.] 3. Fit or proper; suitable; . . . ." (*Id.* at p. 91.) "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet, fit, apt" (*ibid*), while the verb "warrant" is synonymous with broader terms such as "justify, . . .authorize, . . . support." (*Id.* at p. 2062. Clearly, therefore, just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate.

The instructional deficiency is not cured by passing references in the instructions to a "justified and appropriate" penalty. The trial court instructed that "[i]n 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." (55 R.T. 6635); CALJIC No. 8.88 [emphasis added].) The instructions did not mention the concept of weighing or in any way inform the jury that aggravation must amount to something more than the mitigation before death became appropriate. Thus, the instructions did not inform the jurors of what circumstances render a death sentence "appropriate."

For all the foregoing reasons, appellant's death sentence must be reversed. CALJIC 8.88 fails to describe the capital weighing process accurately thus depriving a defendant of the individualized

consideration that the Eighth Amendment requires. Further, the instruction is improperly weighted toward death and allows a death judgment if the aggravating circumstances are merely "substantial." The proper standard should tell the jury that if the mitigating circumstances outweigh the aggravating circumstances, it must return a verdict of life without parole.

Finally, the critical instruction is unconstitutionally broad because it would allow a death judgement if the jury found death was merely authorized instead of appropriate under the circumstances .

All of these problems effectively lower the prosecution's burden of proof below that required by the Constitution and they are therefore fatal to the sentence imposed in this case.

XX.

THE DEATH PENALTY IS DISPROPORTIONATE TO APPELLANT'S INDIVIDUAL CULPABILITY AND ITS IMPOSITION WOULD THEREFORE VIOLATE THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION.

Introduction

Appellant submits that the death penalty is disproportionate to his personal culpability and that its imposition in this case would violate the state and federal constitutions. Although this court has previously held that proportionality analysis is not required (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), appellant respectfully urges reconsideration of this holding in view of the following analysis and also raises the argument here in order to preserve it for federal review.

Proportionality Review

"The California Constitution (art. 1, section 17) prohibits imposition of a punishment disproportionate to the defendant's individual culpability." (*People v. Crew* (1991) 1 Cal.App.4th 1591, 1602, citing *People v. Hamilton* (1989) 48 Cal.3d1142, 1189) At the federal level, "[t]he cruel and unusual punishments clause of the Eighth Amendment prohibits the imposition of a penalty that is disproportionate to the defendant's personal responsibility and moral guilt." (*People v. Padilla* (1995) 11 Cal.4th 891, 962 [disapproved on a

different point in *People v. Hill* (1998) 17 Cal.4th 800, 823].)

"[Tlrial courts have the discretion to determine intracase proportionality -- i.e., to determine whether the sentence imposed is proportionate to the individual culpability of the defendant, irrespective of the punishment imposed on others." (*People v. Lang* (1989) 49 Cal.3d 991.) In appellant's case, the court obviously found that the sentence imposed was appropriate considering appellant's crime and background. (See, e.g., 64 R.T. 7193-7199 [denial of motion to modify the verdict].) However, the court's ruling "is subject to independent review: it involves a mixed question that implicates constitutional rights and hence must be deemed predominantly legal." (*People v. Marshall* (1990) 50 Cal.3d 907, 938.)

In analyzing a sentence to determine whether it is disproportionate under the circumstances of the individual case, the court should examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*People v. Dillon* (1983) 34 Cal.3d 441, 479, citing *In re Lynch* (1972) 8 Cal.3d 410, 425-429.) With respect to the nature of the offense, the court should consider both the severity of the crime in the abstract and the facts of the crime in question. (*People v. Dillon, supra,* 34 Cal.3d, at p. 479.) With respect to the second factor, the nature of the offender, the court must ask "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) This requirement follows from the principle that "a punishment

which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability." (*Id.*, at p. 480.) This requirement is also mandated by the federal Constitution, because the "individualized considerations [are] a constitutional requirement in imposing the death sentence, which means that we must focus on relevant factors of the character and record of the individual offender." (*Id.*, at p. 481, citing *Enmund v. Florida* (1982) 458 U.S. 782, 798 [73 L.Ed.2d 1140, 102 S.Ct. 33681.)

In *People v. Dillon*, a 17-year-old boy was convicted of murder during an incident in which he and six other youths conducted a well-planned invasion of a marijuana plantation they intended to rob. The defendant fired nine rifle shots into the victim, who was merely attempting to protect his property. The defendant, like appellant, was convicted of first-degree robbery felony murder, and there was little dispute that the crime of which he was convicted was reprehensible. (*Id.*, at p. 483.) Nevertheless, this court reduced *Dillon's* conviction to second degree murder, primarily because of his individual background. The court focused primarily upon the defendant's youth, the fact that he lacked the intellectual and emotional maturity of an average 17-year-old, his lack of a prior record, and the petty chastisements given to the other six youths involved in the incident. (*Id.*, at pp. 483-488.)

Application of the *Dillon* analysis in this case compels the conclusion that the death penalty is a disproportionate punishment for appellant. Appellant does not dispute that the facts of the crimes in this

case were indeed tragic. However, the circumstances of this case are even more compelling than *Dillon*. Here, appellant was barely eighteen and had no prior record. (43 R.T. 6267-6268.) Moreover, as appellant explained at length previously, he was not the perpetrator of the homicide. He not only did not know that a homicide was going to take place, he was not even certain that a crime would take place. The trial judge ruled that as a matter of law the evidence was insufficient to show that appellant ordered the car jacking or commanded the perpetrators to commit a crime. (38 RT 4658-4660.) Moreover, Lyons admitted that the car jacking idea originated with him and Mr. Dearaujo. (20 R.T. 2832.) Further, Dearaujo, the shooter, was a slow witted teenager who panicked when Ms. Los tried to leave the scene. (See Supplemental R.T. Vol. 9 at p. 6998.) In fact, as the prosecutor admitted, the only theory of criminal liability here was as an aider and abetter or conspirator to felony murder. (8 R.T. 813.) Not only is felony murder a particularly harsh legal doctrine, but appellant's personal culpability is about as legally attenuated as it can be under even that broad doctrine. Like *Dillon,* these circumstances show that appellant is hardly the "worst of the worst" for whom the death penalty is reserved.

It should also be noted that in addition to the authority of this court's decisions in *Dillon*, *Lynch*, and numerous other cases cited therein, the statutory law of this state provides both the trial and appellate courts with the power to reduce the punishments imposed on criminal defendants. For example, California Penal Code Section 1181, subdivision (7), provides:

> When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend .or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.
>
> (Pen. Code §1181, subd. (7).)

California Penal Code section 1260 similarly provides:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.
>
> (Pen. Code §1260.)

Under the terms of these statutes, any defendant is entitled to have this court consider reducing his punishment. However, despite the clear language of these statutes, and over repeated dissents, a majority of this court has consistently refused to acknowledge or exercise its power to modify punishments in capital cases. (See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1079-1080 and 1081-1084, and cases cited therein.)

Appellant submits that the foregoing statutes establish a procedural entitlement that is protected by the due process clause. (*Hicks v. Oklahoma, supra*, 447 U.S. 343 [65 L.Ed.2d 175, 100 S.Ct. 2227]; see also, *Ford v. Wainwright* (1986) 477 U.S. 399, 428 [91 L.Ed.2d 335, 358, 106 S.Ct. 2595] (conc. Opinion of O'Connor, J.) ["Where a statute indicates with language of an unmistakable mandatory character that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause."].) Appellant submits that the refusal of this court to acknowledge or employ its power under Penal Code section 1181, subdivision (7), and Penal Code section 1260 constitutes an arbitrary deprivation of that constitutionally-protected expectation in violation of the Due Process Clause of the Fourteenth Amendment.

It should also be noted that capital defendants possess the right, under the Eighth Amendment and the Due Process Clause, to meaningful appellate review. (*Parker v. Dugger* (1991) 498 U. S. 308, 321 [112 L.Ed.2d 812, 821, 1115 S.Ct. 731] ["We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."].) Appellant respectfully submits that this court's refusal to employ its statutory right of review deprives capital defendants of that entitlement, as well as increasing the risk that California's capital charging and sentencing system, already unable to separate defendants deserving of death from those who are not (*Tuilaepa v. California, supra,* 512 U.S.

967 [129 L.Ed.2d 750, 767-774, 114 S.Ct. 2630] (diss. Opinion of Blackmun, J.)), will randomly condemn even more defendants.

For the foregoing reasons, appellant submits that the death sentence imposed in this case is disproportionate. The state and federal constitutions accordingly require this court to conduct proportionality review and to vacate the death penalty.

XXI.

THE VIOLATIONS OF MR. WILLIAMS' RIGHTS ARTICULATED ABOVE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT MR. WILLIAMS' CONVICTIONS AND PENALTY BE SET ASIDE.

Introduction

Mr. Williams was deprived of a fair trial and a reliable penalty in violation of customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. Moreover, the death penalty, as applied in the United States and the State of California, violates customary international law as evidenced by the equal protection provisions of the above-mentioned instruments as well as the International Convention Against All Forms of Racial Discrimination.

International law sets forth minimum standards of human rights that must be followed by states that have signed treaties, accepted covenants, or otherwise accepted the applicability of these standards to their own citizens. This Court has not only the right, but the obligation, to enforce these standards. The acts most violative of these standards are the illegal arrest of Mr. Williams, the process of picking the jurors who would sit in judgment on his life, and the prosecution's knowing refusal to provide him with exculpatory evidence. More general charges include a contention that the United States and the State of California

have effectively institutionalized racism in the process of choosing who will be subject to the death penalty, and how they will be processed.

Background

International law "confers fundamental rights upon all people vis-a-vis their own governments." (*Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876, 885.) International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252; *Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.)

A Sources of International Law

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with federal statutes, that is, they are the "supreme Law of the Land."[126] Customary international

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[126] As article VI, § 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

law, or the "law of nations," is equated with federal common law.[127]

1 Treaty Development

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions appear in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[128] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal

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notwithstanding."

[127] Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580. The United States Constitution, recognizing the existence and force of international law, authorizes Congress to "define and punish . . . offenses against the law of nations," U.S. Const. art. I, § 8.

[128] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere — without regard to race, language or religion — we cannot have permanent peace and security in the world.

Robertson, *Human Rights in Europe* (1985) p. 22, n.22 (quoting President Truman).

Declaration of Human Rights (Universal Declaration)[129] and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[130] The Universal Declaration is part of the International Bill of Human Rights,[131] which also includes the International Covenant on Civil and Political Rights (International Covenant),[132] the Optional Protocol to the International Covenant,[133] the International Covenant on Economic, Social and Cultural Rights,[134] and the human rights provisions of the UN Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought

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[129] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization.

[130] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951. Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Burgenthal, *International Human Rights in a Nutshell*, Vol. 14 (1988) p. 48

[131] See generally, Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[132] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976.

[133] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[134] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of 43 member states, which reviews allegations of human rights violations.

Another critical international instrument is the American Declaration of the Rights and Duties of Man (American Declaration), a resolution introduced at the Ninth International Conference of American States in 1948, and adopted by the Organization of American States (OAS).[135] The OAS, which consists of 32 member states (including the United States), was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines "human rights" as the rights set forth in the American Declaration.[136] Because the Inter-American Commission, which relies on the American

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[135] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[136] In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration. Burgenthal, *International Human Rights*, *supra*.

Mr. Williams notes that this appeal is a step in exhausting his remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations Mr. Williams has suffered are violations of the American Declaration.

Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[137]

The United States and our Bill of Rights was the inspiration of international human rights law. Our government has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As a key participant in drafting the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[138] In the late 1960s and throughout the 1970s, the United States became a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[139]

In the 1990s, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All

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[137] Burgenthal, *International Human Rights*, *supra*.

[138] Sohn and Burgenthal, *International Protection of Human Rights* (1973) pp. 506-509.

[139] Burgenthal, *International Human Rights*, *supra*, p. 230.

Forms of Racial Discrimination (Race Convention),[140] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[141] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[142]

2 Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[143] "Where there is no treaty, and no controlling executive or legislative act or judicial to decision, resort must be had to the customs and usages of civilized nations." (*The Paquete Habana*, 175 U.S. at p.

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[140] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. 60 U.N.T.S. 195 (1994). More than 100 countries are parties to the Race Convention.

[141] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. 1465 U.N.T.S. 85 (1994).

[142] Burgenthal, *International Human Rights*, *supra*, p.4.

[143] Restatement Third of the Foreign Relations Law of the United States, § 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

700.) The formation and existence of customary international law requires a general, but not universal, state practice. That is, a common and widespread practice among many states will have the force of customary international law.[144] "[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." (*Filartiga*, 630 F.2d at p. 881.)

Both domestic and international sources confirm the validity of custom as a source of international law. In fact, our federal law regarding foreign relations provides that:

> the United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the observance of internationally recognized human rights by all countries.

(22 U.S.C. § 2304(a)(1).)

As further evidence that the laws of the United States coexist with

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[144] Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2d Ed. 1997) p. 29.

other national and international laws, the United States Supreme Court has long relied on such law as a basis for its decisions in death penalty cases, and has recently extended its reliance on international law to a variety of issues. (See, e.g., *Atkins v. Virginia, supra,* 122 S.Ct. 2248, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596; *Knight v. Florida* (1999) 120 S.Ct. 461, 462-463 (Breyer, J., dissenting from denial of certiorari; *Lawrence v. Texas* (2003) 123 S.Ct. 2472, 2481; *Grutter v. Bollinger* (2003) 123 S.Ct. 2325.)

Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[145] The norms of contemporary customary international law are established by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions

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[145] *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts & Docs 46. The Statute specifically provides that:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of the general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) . . . judicial decisions and the teachings of the most highly qualified publicist of the various nations, a subsidiary means for the determination of the rules of law.

This statute is generally considered to be an authoritative list of the sources of international law.

recognizing and enforcing that law." (*Filartiga*, 630 F.2d at p. 880; *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232, 238.)

Indeed, in the international sphere, treaties and customary international law are accorded equal weight. This is evidenced by, among other things, the Statute of the International Court of Justice, which lists — without hierarchy — both treaties and international custom as valid sources of international law.[146] Because treaties and customary international law are autonomous bodies, their binding force must be identical. Additionally, treaties and customary law may affect each other, such as abrogating or modifying rules of law, equally.[147] International custom is often codified in international instruments. In those instances, however, customary law remains an independent source of legal authority.[148]

Customary international law is "part of our law." (*The Paquete Habana*, *supra*, 175 U.S. at p. 700.) United States courts are "recognizing the emergence of a universal consensus that international law affords substantive rights to individuals and places limits on a State's treatment of its citizens." (*Abebe-Jira v. Negeno* (11th Cir. 1996) 72 F.3d 844; *Filartiga*, *supra*, 630 F.2d at pp. 880-887.)

The United States, by signing and ratifying the International

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[146] *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts & Docs 46; see Villiger, *Customary International Law and Treaties*, pp. 57-58.

[147] Villiger, *Customary International Law and Treaties*, pp. 57-58.

[148] *Ibid.*

Covenant, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. Many of the substantive clauses of these treaties articulate customary international law and thus bind our government.[149]

Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the United Nations Economic and Social Council provides, "[c]apital punishment may only be carried out pursuant to *a final judgement by a competent court after legal process which gives all possible safeguards to ensure a fair trial* . . . including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (emphasis added).[150] The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders endorsed the safeguards in 1988, strengthening them as a source of customary international law.

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[149] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731, 737.

[150] United Nations Economic and Social Council (ECOSOC) Resolution 1984/50 of May 1984. See also, General Assembly Resolution 2200A (XXI), annex.

The Racial Discrimination That Permeates Capital Sentencing in General, and Mr. Williams' Trial in Particular, Violates International Law, and Requires that Mr. Williams' Death Penalty Be Set Aside.

Because the death penalty, as applied throughout the United States, is imposed in a racially discriminatory manner, international law, as evidenced by the International Covenant, the American Declaration, and the Race Convention prohibits its application to Mr. Williams, who is African-American.

Article 26 of the International Covenant provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex. . . ."[151] Again, this protection is found in article 2 of the American Declaration which guarantees the right of equality before the law.[152]

The Race Convention, a signed and recently ratified treaty, contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> [S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the

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[151] International Covenant on Civil and Political Rights, *supra*.

[152] American Declaration of the Rights and Duties of Man, *supra*.

enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution. . . .[153]

Furthermore, "States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial

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[153] International Convention Against All Forms of Racial Discrimination, *supra*. Indeed, long before this Convention, the United States recognized the international obligations to cease state practices that discriminated on the basis of race. See also *Oyama v. California* (1948) 332 U.S. 633, holding that the California Alien Land Law preventing an alien ineligible for citizenship from obtaining land violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion, stated that the UN Charter was a federal law that outlawed racial discrimination and noted:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

(*Id.* at p. 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, and stating that:

> The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (article 55, subd. c, and see article 56): "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." (59 Stat. 1031, 1046.)

(*Id.* at p. 604.)

discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ."[154]

Section 702 of the Restatement Third of the Foreign Relations Law of the United States recognizes that a state violates international law if, as a matter of state policy, it practices, encourages or condones systematic racial discrimination. The right to be free from governmental discrimination on the basis of race is so universally accepted by nations that it constitutes a peremptory norm of international law, or *jus cogens*.[155] As such, the courts ought to consider and weigh the *jus cogens* quality of international norms; if of *jus cogens* quality, these norms should have a stronger influence against, and increase the burden of justification for, contrary state actions.[156] (See, e.g., *Kadic v. Karadzic* (2nd Cir. 1995) 70 F.3d 232, 238 (prohibition against torture has gained status as *jus cogens* because of widespread condemnation of practice).)

The death penalty in the United States continues to be imposed in a racially discriminatory manner. The 1990 report of the United States

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[154] International Convention Against All Forms of Racial Discrimination, *supra*.

[155] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512; Restatement Third of the Foreign Relations Law, *supra*.)

[156] Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society* (1988) 28 Va. J. Int'l L. at 627-628.

General Accounting Office synthesized 28 studies and concluded that there is a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.[157] In 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., "those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[158] The GAO report noted that racism was "found at all stages of the criminal justice system process."[159]

The Baldus study, an empirical analysis accounting for 230 non-racial variables, also found strong evidence of racial bias. The study concluded that killers of whites in Georgia are 4.3 times more likely to be sentenced to death than killers of blacks.[160] Professor Baldus, along with statistician George Woodworth, also conducted a study of race and

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[157] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) GAO/GGD-90-57. (In *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726, the United States Supreme Court held that Georgia and Texas state statutes governing the imposition and carrying out of the death penalty violated the Eighth and Fourteenth Amendments of the Constitution.)

[158] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) *supra*, at p. 5.

[159] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing*, *supra*, p. 6.

[160] Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia* (1998) 83 Cornell L.Rev. 1638.

the death penalty in Philadelphia in 1996-98. They examined a large sample of murders eligible for the death penalty between 1983 and 1993. They found that, even after controlling for levels of crime severity and the defendant's criminal background, blacks in Philadelphia were 3.9 times more likely to receive a death sentence than other similarly situated defendants.[161]

In 1994, a Staff Report by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary concluded that "racial minorities are being prosecuted under federal death penalty law far beyond their proportion in the general population or the proposition of criminal offenders."[162] The report analyzed the application of specific provisions of the Anti-Drug Abuse Act of 1988 (also known as the "drug kingpin law"), which authorize the death penalty for murders committed by those involved in certain drug trafficking activities, to criminal defendants.

Significantly, the staff report found that while three-quarters of those convicted under the provisions of the Anti-Drug Abuse Act have been white and only 24% of the defendants have been black, just the opposite is true for those chosen for death penalty prosecutions: 78% of the defendants have been black and only 11% of the defendants have

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[161] *Ibid.*

[162] *Racial Disparities in Federal Death Penalty Prosecutions 1988-1994*, Staff Report by the Subcomittee on Civil and Constitutional Rights, Committee on the Judiciary, 103 Cong. 2nd Sess., March 1994.

been white.[163] This contrasts sharply with the statistics of federal death penalty prosecutions before the 1972 *Furman* decision: between 1930 and 1972, 85% of those executed under federal law were white and 9% were black.[164] Looking at this information, the staff report concluded that the "dramatic racial turnaround under the drug kingpin law clearly requires remedial action."[165]

The staff report also stated that

> Nearly 40% of those executed since 1976 have been black, even though blacks constitute only 12% of the population. And in almost every death penalty case, the race of the victim is white. Last year alone, 89% of the death sentences carried out involved white victims, even though 50% of the homicides in this country have black victims. Of the 229 executions that have occurred since the death penalty was reinstated, only one has involved a white defendant for the murder of a black person.[166]

These statistics led the staff report to conclude that "Race continues to plague the application of the death penalty in the United States."[167]

In 1995, researchers at the University of Louisville found that

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[163] *Ibid.*

[164] *Ibid.*

[165] *Ibid.*

[166] *Ibid.*

[167] *Ibid.*

blacks convicted for killing whites were more likely to receive the death penalty than any other offender-victim combination.[168] In fact, in 1996 "100% of the inmates [on Kentucky's death row] were there for murdering a white victim, and none were there for the murder of a black victim, despite the fact that there have been over 1,000 African-Americans murdered in Kentucky since the death penalty was reinstated."[169] This evident bias in use of the death penalty led to Kentucky's Racial Justice Act, passed in 1998, which permits race-based challenges to prosecutorial decisions to seek the death penalty.[170] There is no equivalent in California, nor is there even a jury instruction that warns the jurors to avoid race or group prejudice in their deliberations over the appropriate penalty.

In *McCleskey v. Kemp* (1987) 481 U.S. 279, the U.S. Supreme Court rejected a federal Equal Protection challenge to a Georgia death sentence which was shown by statistical evidence to have been imposed pursuant to a statewide pattern of racially disproportionate capital sentencing. Starting from the premise that the federal Equal Protection Clause is concerned only with state action consisting of purposeful discrimination by official decision-makers, the *McCleskey* majority opinion first translated this principle into a requirement that, "to prevail

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[168] Keil and Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991* (1995) 20 Am.J.Crim.Just. 17.

[169] Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Information Center (June 1998).

[170] *Ibid.*

under the Equal Protection Clause, McCleskey must prove that the decision-makers in his case acted with discriminatory purpose" (481 U.S. at p. 292) and then held that "an inference drawn from the general statistics [concerning capital sentencing patterns] to a specific decision in a trial and sentencing is simply not comparable to" statistical proof of racial discrimination in other contexts. (481 U.S. at p. 294.) Hence, the majority held, any claim that a death sentence violates the federal Equal Protection Clause must be established by case-specific proof of subjective racial animus on the part of the prosecutor, jurors, judge or legislature. (481 U.S. at pp. 292-299.)

Thus, the *McCleskey* majority limited the federal Equal Protection Clause to treating "the superficial, short-lived situation where we can point to one or another specific decision-maker and show that his decisions were the product of conscious bigotry," while leaving untreated "the far more basic, more intractable, and more destructive situation where hundreds upon hundreds of different public decision-makers, acting like Georgia's prosecutors and judges and juries — without collusion and in many cases without consciousness of their own racial biases — combine to produce a pattern that bespeaks the profound prejudice of an entire population."[171]

There are signs that the *McCleskey* decision was driven by a realization that racial discrimination in capital sentencing was neither

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[171] Amsterdam, *Race and the Death Penalty* (1988) 7 Criminal Justice Ethics 2, at p. 86.

peculiar to Georgia nor transitory, but was inevitable under any modern-day American procedure for imposing the death penalty.[172] Thus, the Court saw that its only real choices were to outlaw capital punishment entirely or to tolerate racial bias in the dispensing of death sentences. It chose the latter. However legal at present in the United States, this choice clearly violates the Race Convention.

The discretion that is now a mandatory part of California's death penalty sentencing scheme guarantees that racism will have an opportunity to flourish throughout the process. The Supreme Court of

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[172] The *McCleskey* majority says repeatedly that the death penalty in the United States would be abolished de facto if the Court were to hold that a statistical showing of state-wide racially discriminatory capital-sentencing practices sufficed to invalidate death sentences imposed under those practices. (See, e.g., 481 U.S. at p. 319 ("McCleskey's wide-ranging arguments . . . basically challenge the validity of capital punishment in our multiracial society"); *id.* at pp. 312-313 ("At most, the . . . [empirical study presented by McCleskey] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . . As this Court has recognized, any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'. . . Specifically, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."'"); *id.* at p. 312 n. 35 ("No one contends that all sentencing disparities can be eliminated."); *id.* at p. 315 n. 37 ("The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. . . . Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution. As we reiterate . . . , the requirement of heightened rationality in the imposition of capital punishment does not 'plac[e] totally unrealistic conditions on its use.'"); *id.* at p. 319 ("The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor [this is a euphemism for race — the only "factor" at issue in *McCleskey*] in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'"); and see *id.* at pp. 310-311.)

the United States recognizes that any "process that . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" is intolerably inhumane. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304.)

The problem with this now-constitutionally-required discretion, though, is that — as the Supreme Court was compelled to concede in *McCleskey*, 481 U.S. at 312 — "'the power to be lenient [also] is the power to discriminate.'" The same reluctance to impose the death penalty regularly which had put an end to mandatory capital sentencing sways jurors, and often prosecutors as well, to forgo the extreme punishment of annihilation unless their outrage at a crime overwhelms their empathy for the defendant. Neither outrage nor empathy are dispassionate, rational processes. They are impressionistic and impulsive and are strongly moved by racial, caste, and class biases. Capital sentencing procedures conferring broad discretion on prosecutors to seek and jurors to choose a death sentence provide "a unique opportunity for racial prejudice" (*Turner v. Murray* (1986) 476 U.S. 28, 35) to operate in ways that courts cannot effectively restrain.

The Supreme Court attempted to deal with this problem in *Furman v. Georgia* (1972) 408 U.S. 238. "*Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

Therefore, *Furman* introduced an Eighth Amendment rule that "if a State wishes to authorize capital punishment it . . . must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" (*Godfrey v. Georgia, supra,* 446 U.S. 420, 428 (plur. opn.).) But the rule has proved cosmetic; the quest to rationalize capital sentencing, illusory.

This Court has apparently allowed racism to be part of the process of exercising peremptory challenges of potential jurors, provided that it is not the only reason for such challenges. In *People v. Montiel* (1993) 5 Cal.4th 877, the Court wrote, "To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror. (Citations omitted.)" (*People v. Montiel, supra*, 5 Cal.4th at 910, fn. 9; emphases in original.)

To say that "race or group prejudice alone" is an impermissible basis of a peremptory challenge must mean that race bias is permissible if it is not the only basis for the exercise of a peremptory challenge. Otherwise, the word "alone" would be superfluous. It cannot have been accidentally included as part of the standard's delineation; not only do principles of judicial interpretation require us to give significance to each word, but the Court's emphasizing the word "alone" must mean that the word was an integral part of the standard's formulation — a part

worth emphasizing.

Mr. Williams can discern no other contribution of the word "alone" to this formulation than a recognition that *some* racism, or purposeful discrimination, is permissible, so long as it is not the only basis for the exercise of a peremptory challenge. By allowing purposeful discrimination provided that it is not the sole basis for the removal of a juror, this Court institutionalizes the practice of racism.

Elsewhere, this Court has recognized that destructive behavior may be motivated by various reasons in addition to race bias, and nevertheless condemned such behavior. (See *In re Sassounian, supra,* 9 Cal.4th 535, 549, fn. 11 [to satisfy national origin special circumstance, § 190.2, subd. (a)(16), killing need not have been *solely* because of victim's "nationality or country of origin"]; *In re M.S.* (1995) 10 Cal.4th 698, 716 [the words "because of" construed as found in the similarly worded statutes, §§ 422.6 and 422.7, to only require that the prohibited bias be a substantial factor in the commission of the crime].)

The language in *Montiel*, however, means that racism is permissible, provided it is not the only factor — indeed, there is nothing in this Court's pronouncements that would prevent it from being a substantial factor in the decision to excuse a potential juror. This Court has left open the possibility that prohibited intent may coexist with permissible intent in the exercise of peremptory challenges. (*People v.*

Alvarez (1996) 14 Cal.4th 155, 197.)[173]

Race discrimination is both the most detectable symptom and the most invidious consequence of the inability to rationally regulate life-and-death sentencing choices. It has persisted unchecked under every form of post-*Furman* capital-sentencing procedure. None of the statutes upheld by *Gregg v. Georgia* (1976) 428 U.S. 153, and its progeny are formally sufficient to cure the *Furman* arbitrariness/discrimination problem or have come close to eliminating it. To the contrary, capital sentencing decisions under the so-called "guided discretion" type of statute sustained in *Gregg* have consistently been found to turn primarily on the race of the victim and secondarily on the race of the defendant, usually in combination. One ingredient of such results is a juror-selection process that tolerates elements of racism.

The protections of the Race Convention, International Covenant and American Declaration establish an affirmative obligation of the

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[173] "But we believe that substantial evidence also supports the superior court's subsequent determination that the prosecutor made a showing of the absence of purposeful discrimination in this regard. Looking to the prospective jurors themselves, including the seven identified above, and also to the timing of the prosecutor's peremptory challenges, including the seven strikes at issue here. Our review of the record on appeal allows the following conclusion: The appearance of prohibited intent in this cause arose solely from the bare pattern of the strikes. It was dissipated by the reality of permissible intent. In making the seven strikes, the prosecutor simply sought to obtain a jury that was as favorable to his position as possible, especially as to the death penalty, regardless of the group membership of individual jurors. *We do not mean to assert that prohibited intent may not coexist with permissible intent. But, unless we indulge in speculation, we cannot say that it did so here.*" (*People v. Alvarez*, *supra*, 14 Cal.4th at 197; emphasis added.)

United States to redress racial discrimination and to proceed with vigor and deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. It is incumbent upon the Court to view the application of the death penalty in this case both in light of the recent international commitments the United States has made to the protection of individuals against racial discrimination, and in acceptance of the overwhelming evidence that race discrimination is an inextricable part of our death penalty scheme. Because the death penalty as applied in California is fraught with intractable discrimination and racism, it violates international norms of *jus cogens* quality. Mr. Williams's death sentence must be reversed.

Mr. Williams' Deprivation of a Fair Trial And a Reliable Penalty Phase Constitute Violations of The International Covenant on Civil and Political Rights.

The factual and legal issues presented in this brief demonstrate that Mr. Williams was denied his right to a fair and impartial trial in violation of articles 6 and 14 of the International Covenant on Civil and Political Rights. These violations require reversal of Mr. Williams' conviction and sentence of death.

The United States ratified the International Covenant in 1992.[174] The International Covenant imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. Article 14 of the

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[174] Sen. Res. 49, 138 Cong. Rec. pp. 4781-4784 (April 2, 1992).

International Covenant provides, inter alia, that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[175] Article 6 of the International Covenant expressly provides that "No one shall be arbitrarily deprived of his life" and that "[the death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[176]

The facts that operated to deprive Mr. Williams of a fair trial and penalty phase in violation of state and federal law also operate to deprive Mr. Williams of his rights under this international instrument. All of the errors identified in this brief throughout the course of Mr. Williams's trial and penalty phase operated to deprive him of a fair trial and penalty phase by a competent court, and therefore operate now to arbitrarily deprive Mr. Williams of his life. Whether or not they constitute violations of state or federal law, these deprivations constitute violations of articles 6 and 14 of the International Covenant and warrant reversal of his conviction and death sentence.

The United States has declared that the articles of the International Covenant are not self-executing, and no legislation has implemented its provisions.[177] In commenting on the "non-self-executing" declaration attached to the International Covenant, the first

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[175] International Covenant on Civil and Political Rights, *supra.*

[176] *Ibid.*

[177] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess.

Bush Administration stated that "existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."[178] Principles of international law, however, mandate that the United States abide by the International Covenant's substantive provisions; it cannot avoid these obligations by declaring the treaty non-self-executing. By signing and ratifying the International Covenant, the United States assumed international legal obligations to respect and ensure the rights of its own inhabitants in accordance with international standards.[179]

First, under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (*Asakura v. Seattle* (1924) 265 U.S. 332, 341.) A declaration that a treaty is non-self-executing contravenes the intentions of the Constitution.[180] Indeed, the distinction between self-executing and non-self-executing treaties is patently inconsistent with express language in article 6, § 2 of the United States Constitution that all

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[178] *Id.* at p. 19.

[179] Henkin, *International Human Rights Standards in National Law: the Jurisprudence of the United States* in Conforti and Francioni, Enforcing International Human Rights in Domestic Courts (1997) p. 189.

[180] In fact, a declaration to an international treaty (as opposed to a reservation) generally implies that the declaring State has no intent to derogate from the substantive rights or obligations stipulated in the treaty. Newman and Weissbrodt, *International Human Rights: Law, Policy and Process* (1990) p. 589.

treaties shall be the supreme law of the land.[181]

Second, the Bush Administration's declaration that the International Covenant is not self-executing does not make it so. Indeed, it would deeply undermine the authority of the judiciary were the executive branch left to interpret how the International Covenant operates in United States courts.[182] Instead, whether a treaty is self-executing and establishes affirmative and judicially enforceable obligations without implementing legislation is determined by the language of the treaty itself and by the contextual factors surrounding the treaty, such as the purpose and objectives of the treaty and the availability and feasibility of implementation and enforcement. (*People of Saipan v. United States Department of Interior* (9th Cir. 1974) 502 F.2d 90, 97.)

Review of the substantive provisions of the treaty makes plain that the International Covenant is self-executing. A declaration that this binding treaty is not self-executing is an attempt to vitiate the essential purpose and goal of the treaty, which is prohibited by the treaty itself, and by other sources of international law. Article 2 of the International Covenant states:

> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with

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[181] See generally, Paust, *Self-Executing Treaties* (1988) 82 Am. J. Int'l L. 760.

[182] See Newman and Weissbrodt, *International Human Rights: Law, Policy and Process*, *supra*, p. 591.

its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies would granted.[183]

The executive branch's statement that "U.S. law generally complies with the Covenant" cannot transcend the clear mandate of the International Covenant not only to recognize the substantive rights therein, but to provide effective remedies and avenues of redress.[184] Articles 6 and 14 of the International Covenant are substantive

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[183] International Covenant of Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

[184] Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound." Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L.Rev. 1241, 1242. Justice Newman discusses the United States' resistance to treatment of human rights treaties as United States law.

provisions mandating that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" and that the death penalty may "only be carried out pursuant to a final judgment rendered by a competent court."[185] These provisions are designed to protect individual rights and are sufficiently precise to create obligations of the United States to redress violations of this supreme Law of the Land. (See *In re Alien Children Litigation* (S.D. Tex. 1980) 501 F.Supp 544, aff'd sub nom., *Plyler v. Doe* (1982) 457 U.S. 202 (language in the OAS Charter that elementary education "shall be offered to all others who can benefit from it" is "no doubt sufficiently direct to apply the intention to create affirmative judicially enforceable rights."); *United States v. Noriega* (1992) 808 F.Supp. 791, 798 (stating that "It is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. . . . It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."); but see *Sei Fujii v. State of California* (1952) 38 Cal.2d 718 (holding that articles 55(c) and 56 of the UN Charter are not self-executing).)

In cases where the UN Human Rights Committee has found that a State party violated article 14 of the International Covenant, in that a defendant had been denied a fair trial and appeal, the Committee has

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[185] International Covenant on Civil and Political Rights, *supra*.

held that the imposition of the sentence of death also was a violation of article 6 of the International Covenant.[186] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.'"[187]

Further, article 4(2) of the International Covenant makes clear that no derogation from article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[188] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[189] (See *United*

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[186] *Report of the Human Rights Committee*, p. 72, 49 UN GAOR Supp. (No. 40) p. 72, UN Doc. A/49/40 (1994).

[187] *Ibid.*

[188] International Covenant on Civil and Political Rights, *supra*.

[189] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320,

States v. Balsys (1998) 524 U.S. 666, n. 16 (noting, with respect to a separate nonderogable provision of the International Covenant, that the "significance of being bound by the Covenant . . . is limited by its provision that the privilege is 'nonderogable' and accordingly may be infringed if public emergency necessitates").)

Accordingly, articles 6 and 14 confer the rights upon Mr. Williams to a fair and impartial trial and a sentence rendered by a competent court. Because the errors throughout the trial and penalty phase deprived Mr. Williams of such rights, the International Covenant has been violated. In redress for violation of these critical international rights, Mr. Williams's conviction and death sentence must be reversed.

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341 (1984).

See also Sherman, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation* (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the

> [P]rotection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction.

Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No.2, para.29 (1982), reprinted in 22 I.L.M. 37, 47 (1983). These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible with that law.

Mr. Williams's Deprivation of a Fair Trial and a Reliable Penalty Phase Constitute Violations of Customary International Law.

The factual and legal issues presented in this brief also demonstrate that Mr. Williams was denied his right to a fair and impartial trial in violation of customary international law as evidenced by articles 6 and 14 of the International Covenant and the substantive provisions of the Universal Declaration,[190] as well as articles 1 and 26 of the American Declaration. These violations of international law require reversal of Mr. Williams's conviction and death penalty sentence.

Even if this Court were to find that the International Covenant does not apply, the customary international rules of the right to a fair and impartial trial and the right to a death sentence rendered by a competent and impartial court provide an independent basis for Mr. Williams's claims under international law.

As detailed above, customary international law is formed from the generally accepted rules of nations. Treaties and customary international law are equal in weight and force.[191] The customary rules need not be universal; that is, not every country must subscribe to them. However, they must have widespread international acceptance. This is

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[190] The substantive provisions of the Universal Declaration have been incorporated into the International Covenant, so these are incorporated by reference in the discussion above.

[191] See *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts & Docs 46; Villiger, *Customary International Law and Treaties*, pp. 57-58.

plainly the case with the right to a fair and impartial trial and the right to a death sentence rendered by a competent court.

These rights are firmly rooted in international jurisprudence. Several international instruments incorporate these rights. Courts consult such international instruments as a forceful source of customary international law.[192] The Second Circuit has stated that the Universal Declaration is "an authoritative statement of the international community" and that "commentators have concluded that the Universal Declaration has become, *in toto*, a part of customary international law." (*Filartiga v. Pena-Irala supra* 630 F.2d at p. 883.)

The International Covenant incorporates the substantive protections of the Universal Declaration. Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and article 26 protects the right of due process of law.[193] Each of these instruments conveys the right to a fair and impartial trial and sentence. In so doing, they evidence the strength of these rights as customary norms, which are binding upon all nations.

Courts in the United States have found and applied customary international law as evidenced by international instruments. *In Martinez v. City of Los Angeles* (9th Cir. 1998) 141 F.3d 1373, 1384,

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[192] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. at p. 737.

[193] American Declaration of the Rights and Duties of Man, *supra*.

the court found a "clear international prohibition against arbitrary arrest and detention" as evidenced by the Universal Declaration, the International Covenant, and 119 national constitutions. In *Filartiga v. Pena-Irala supra* 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights. . . ." (*Id.* at p. 882.) In *Kadic v. Karadzic, supra,* 70 F.3d 232, the court found that plaintiff had stated claims under the Alien Tort Claims Act because defendant's conduct violated well-established norms of customary international law. In *Xuncax v. Gramajo* (D. Mass. 1995) 886 F.Supp. 162, 184-185, the court concluded that plaintiffs' claims for violations of international law for torture, summary execution, disappearance, and arbitrary detention are "fully recognizable" as claims in United States courts.

Further, the United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[194] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member

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[194] American Declaration, *supra.*

of the OAS, is bound to recognize its authority over human rights issues.[195]

In sum, courts in the United States are bound to recognize obligations under customary international law and international instruments. (*The Paquete Habana, supra* 175 U.S. at p. 700; *Filartiga v. Pena-Irala, supra*, 630 F.2d at p. 885; see *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1442-1443 (treaty of cooperation between United States and Mexico informed court's determination that witness residing in Mexico was not "unavailable" and presentation of witness's out-of-court statements instead of witness's appearance at trial violated defendant's constitutional right to confront witnesses).) This is so even where the provisions of international law reach beyond the provisions in domestic law. (See *Sandoval*, 87 Cal.App.4th at 1442-1443.)

In *People v. Jenkins* (2000) 22 Cal.4th 900, 1055, this Court "rejected" the international law claims, because the defendant predicated his claims of international law violations on his claims of constitutional and statutory violations, and because no violations under domestic law were found. (*Jenkins*, 22 Cal.4th at 1055.) Here, numerous state and federal constitutional violations took place; Mr. Williams has also articulated independent violations of international law which are separate and distinct from the domestic law violations. United States courts have recognized that "international law affords

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[195] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

substantive rights to individuals and places limits on a State's treatment of its citizens." (*Abebe-Jira v. Negeno* (11th Cir. 1996) 72 F.3d 844; *Filartiga, supra*, 630 F.2d at pp. 880-887.)

First, the factual and legal issues presented demonstrate that Mr. Williams was denied his right to a fair and impartial trial in violation of articles 6 and 14 of the International Covenant on Civil and Political Rights. (See *Ma v. Ashcroft* (9th Cir. 2001) 257 F.3d 1095, 1114 (recognizing the force and effect of the International Covenant in courts in the United States).)

Second, the factual and legal issues presented also demonstrate that Mr. Williams was denied his right to a fair and impartial trial in violation of customary international law as evidenced by articles 6 and 14 of the International Covenant and the substantive provisions of the Universal Declaration, as well as articles 1 and 26 of the American Declaration. These violations of international law require reversal of Mr. Williams's conviction and death penalty sentence.

Third, the application of the death penalty to racial minorities in the United States violates the protections of the Race Convention, International Covenant and American Declaration, which establish an affirmative obligation of the United States to redress racial discrimination. Under *McCleskey*, racism is accepted as an inevitable part of any death sentencing scheme. This Court has likewise endorsed racism in the jury selection process These practices and policies, however acceptable under American law, violate our country's

international commitments and obligations.

This Court must view the application of the death penalty in this case in light of the recent international commitments the United States has made in the protection of individuals against racial discrimination. Because the death penalty as applied in the United States — with discrimination and racism — violates international law, Mr. Williams's death sentence must be reversed.

Finally, to the extent that the *Jenkins* case can be read as precluding relief under international law in this case, Mr. Williams respectfully requests that the Court reconsider *Jenkins*. If *Jenkins* concludes that international law need not be considered as long as standards of domestic law are met, then the opinion in *Jenkins* effectively relegates international legal principles to irrelevance, holding that international law is effectively no broader than the law of a sovereign state. If this were the case, then every nation on earth could claim that international law is only binding to the extent it reiterates domestic law. International law would be meaningless. As the United States Constitution and Supreme Court jurisprudence recognize, international law is part of the law of this land. International treaties have supremacy in this country. (U.S. Const. art. VI, § 2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; see *Eyde v. Robertson* (1884) 112 U.S. 580; U.S. Const. art. I, § 8 (Congress has authority to "define and punish . . . offenses against the law of nations").) This Court therefore

has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law.

XXII.

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

Introduction

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 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.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few defendants 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.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

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 457, 468.)

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 thirty special circumstances[196] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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

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[196]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.

p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See *People v. Hillhouse, supra*, 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283,

1324-26 (1997).)[197] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. 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

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[197]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.*)

inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See section E. of this Argument, *post*).

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

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed

supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[198] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[199] or having had a "hatred of religion,"[200] or threatened witnesses after his arrest,[201] or disposed of the victim's body in a manner that precluded its recovery[202].

The purpose of section 190.3, according to its language and

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[198]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[199]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[200]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S.Ct. 3040 (1992).

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

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

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

a. That the defendant struck many blows and inflicted multiple wounds[203] or that the defendant killed with a single execution-style wound.[204]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination,

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

[204]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).

avoiding arrest, sexual gratification)[205] or that the defendant killed the victim without any motive at all.[206]

c. That the defendant killed the victim in cold blood[207] or that the defendant killed the victim during a savage frenzy.[208]

d. That the defendant engaged in a cover-up to conceal his crime[209] or that the defendant did not engage in a cover-up and so must have been proud of it.[210]

e. That the defendant made the victim endure the terror of

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[205]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).

[206]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).

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

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

[209]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).

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

anticipating a violent death[211] or that the defendant killed instantly without any warning.[212]

f. That the victim had children[213] or that the victim had not yet had a chance to have children.[214]

g. That the victim struggled prior to death[215] or that the victim did not struggle.[216]

h. That the defendant had a prior relationship with the victim[217] or that the victim was a complete stranger to the defendant.[218]

These examples show that absent any limitation on factor (a)

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[211]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.

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

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

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

[215]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).

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

[217]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 648, 717 (same).

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

("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) 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, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[219]

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[220]

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[219]See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips* (1985) 41 Cal.3d 29, 63, 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").

[220]See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[221]

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[222]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[223]

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of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

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

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

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

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors 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.[224]

In practice, section 190.3's broad "circumstances of the crime" provision 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 principle 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].)

C. 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 FACTUAL

S017116, RT 2970 (remote, isolated location).

[224]The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

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

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 124 S.Ct. 2531 [hereinafter *Blakely*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt

unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* 536 U.S. at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Recently, in *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct

manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the supreme court stated that the governing rule since Apprendi is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant `statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.[225]

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

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the

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[225] Appellant is aware that this court has held that Blakey does not apply to the California sentencing scheme, at least in a non capital context. (See *People v. Black* (2005) 35 Cal.4th 1238.) For the reason set forth in this issue, the *Black* holding should be reconsidered.

prosecution, and three additional states have related provisions.[226] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also

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[226]See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumtances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[227] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (56 R.T. 6635.),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating

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[227]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

factors substantially outweigh mitigating factors.[228] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[229]

In *People v. Anderson*, *supra*, 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at 263.) This holding is based on a truncated

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[228]In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460)

[229]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

view of California law. As section 190, subd. (a),[230] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorised by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25

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[230]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances (1) exist and (2) substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a **fact**, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[231]

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[231]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[232] There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring*

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[232]Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.) The Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely*

weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra,* 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan, supra,* 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002)

59 P.3d 450.[233])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S.Ct. at 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the

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[233]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

finding must be made by a jury and must be made beyond a reasonable doubt.[234]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without

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[234]In *People v. Griffin* (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [hereinafter *Leatherman*], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (*Griffin*, *supra*, 33 Cal.4th at 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"

Leatherman, *supra*, 532 U.S. at 429. This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *Id.*, 532 U.S. at 437, 440. *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring*, *supra*, 536 U.S. at 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.)

No greater interest is ever at stake than in the penalty phase of a

capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in both its severity and its finality"].)[235] As the high court stated in *Ring*, *supra*, 536 U.S. at 608, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase

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[235]The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at 732 (emphasis added).)

violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. *The Requirements of Jury Agreement and Unanimity*

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

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth

Amendments.[236] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra*; *Blakely, supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].[237]) Particularly given

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[236]See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

[237]In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 732;[238] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring,* 536 U.S. at 609).[239] See section D, *post.*

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[238]The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 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.)

[239]Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

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.[240] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating*

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[240]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].)

> *violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson, supra*, 526 U.S. at 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*; *People v. Hayes, supra,* 52 Cal.3d 577, 643.) However, *Ring* and

Blakely make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

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

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of

the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship, supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is

accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

The final *Santosky* benchmark, "the countervailing governmental

interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California* (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 applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for

its decision are true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin*, *supra*, 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a

> particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

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

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief

that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States, supra,* 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co., supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes, supra* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. 275.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra*, 52 Cal.3d at 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. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 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.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra.*) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not

so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at 543; *Gregg v. Georgia*, *supra*, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the

findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 269.)[241] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437,

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[241] 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.)

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.*; Penal Code 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 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* 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., 486 U.S. at 383, fn. 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, supra,* 4 Cal.4th at 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.[242]

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 the finding that these aggravators outweigh any and all mitigating circumstances. Absent a

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[242]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).

requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by 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* (1976) 428 U.S. 242, 251 (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, supra,* 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*, 465 U.S. at 52, fn. 14.)

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

scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra,* 428 U.S. at 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, supra,* 536 U.S. 304, 316 fn. 21; *Thompson v. Oklahoma, supra,* 487 U.S. 815, 821, 830-831; *Enmund v. Florida, supra,* 458 U.S. 782, 796, fn. 22; *Coker v. Georgia, supra,* 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight 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, supra,* 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia, supra,* 428 U.S. 153, 198.)

Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida, supra,* 428 U.S. 242, 259, 96 S.Ct. 2960, 49 L.Ed.2d 913.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[243]

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 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

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[243]See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (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.

creation of this Court. (See, e.g., *People v. Marshall, supra,* 50 Cal.3d 907, 946-947.)

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

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at 192, citing *Furman v. Georgia, supra,* 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

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

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 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*, *supra,* 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) As set forth extensively in the statement of facts, here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant including numerous assaults and thefts in jail while awaiting trial. Moreover, the prosecutor devoted more than a third of her closing argument to the proposition that these alleged jail offenses supported a death judgment. (55 R.T. 6583-6590.)

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, 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. The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death

sentence be found beyond a reasonable doubt by a unanimous jury. 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.

9. 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.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure

procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

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

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

In *Prieto*,[244] as in *Snow*,[245] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158,

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[244]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at 275; emphasis added.)

[245]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; emphasis added.)

1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen, supra,* 42 Cal.3d 1222, 1286-

1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp, supra,* 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida, supra,* 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42

Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal.3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida, supra,* 430 U.S. 349, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at 605 [plur. opn.]; *Beck v. Alabama, supra,* 447 U.S. 625, 637; *Zant v.*

Stephens, supra, 462 U.S. at 884-885; *Turner v. Murray, supra,* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan, supra,* 501 U.S. at 994; *Monge v. California, supra,* 524 U.S. at 732.)[246] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra,* at 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice

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[246]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.)

under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by

the jury (considered by this Court to be the sentencer in death penalty cases [*People v. Allen*, *supra*, 42 Cal.3d at 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[247]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst, supra,* 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not

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[247]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at 609.)

withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

For these reasons, the California death penalty process is fundamentally flawed. Appellant's sentence to death must be set aside.

XXIII.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRE THAT APPELLANT'S CONVICTIONS AND DEATH SENTENCE BE REVERSED

Even if the errors in appellant's case standing alone do not warrant reversal, the court should assess the combined effect of all the errors. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.)

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of his right to be informed of the nature and cause of the accusation against him, of his right to trial by a fair and impartial jury and to a unanimous jury verdict, of his right not to be subjected to unreasonable searches and seizures or convicted upon the basis of illegally seized evidence, and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the

cumulative impact of the errors.

The prosecution's case against appellant on the homicide was based solely on vicarious liability and a tenuous liability at that. Appellant was not present at the shooting and did not know that a homicide - or even a crime would take place. The idea to do a carjacking originated with the actual perpetrators Lyons and Dearaujo. Lyons was in his early teens and Dearaujo was a slow-witted teenager who panicked when confronted with a volatile situation. This was also a cross racial situation where the decedent was an attractive white female of considerable achievement and the defendant was a black male of modest accomplishment. The trial judge erred significantly in improperly dismissing the only black holdout juror after she tried (and failed) to explain the racial and cultural factors affecting this case to the white majority. Moreover, by substituting in another juror and failing to properly ensure that deliberations began anew - even after allegations of misconduct on that point - the trial judge allowed the majority to coerce a verdict.

The trial court also made significant errors when instructing the jury. The court failed to properly respond to several juror inquiries concerning the nature and extent of both aider and abetter liability as well as conspirator liability. It also referred jurors to pattern instructions when the jurors plainly indicated that they did not understand the pattern jury instructions.

Additionally, the evidence was insufficient to support the felony murder (robbery) special circumstance and the judge erred in requiring

the defendant to be shackled when there were no outbursts or displays of violence in the courtroom during the five years of proceedings before this case came to trial.

The errors in the penalty phase of appellant's trial were equally grave. The trial court improperly required the defense to proceed in an obvious conflict situation. Moreover, it failed to properly correct the jury's misunderstanding of a sentence of life without parole. Additionally, the court allowed grossly improper victim impact evidence and then failed to properly instruct the jury on how to consider it. The court also refused to instruct on lingering doubt, and then improperly instructed on CALJIC 8.85 and 8.88. All of these errors tainted appellant's penalty phase trial.

Finally, there were systemic errors that affected the penalty phase. The evidence shows that appellant's personal culpability was disproportionate to the sentence imposed yet there is no requirement for proportionality review in California. Additionally the death penalty statute in California has multiple deficiencies and is unconstitutional in both its construct and as applied.

Prejudicial Federal Constitutional Errors

The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment requires heightened reliability in a capital case. (*Johnson v. Mississippi, supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens, supra*, 462 U.S. at p. 885.) The Fourteenth Amendment also protects a criminal defendant's rights to the proper operation of the

procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) In a death penalty case, the state-created liberty interest described in *Hicks* means the right to due process in accordance with state law.

In a capital case, the principles of the *Hicks* rule also implicate the Eighth Amendment. Just as *Hicks* guards against arbitrary deprivations of liberty or life, so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321.)

When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not those of the reviewing court. A reasonable possibility that an error may have affected even a single juror's view of the case compels reversal. (See, e.g., *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669.) It certainly cannot be said that the errors in this case had "no effect" on at least one juror. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.)

Prejudicial Errors Under State Law

The combined errors in this case also compel reversal of appellant's death sentence under state law. In *People v. Brown, supra,* 46 Cal.3d 432, 446-448, this court held that the standard for penalty phase error in a capital case is the "reasonable possibility" harmless

error standard. It is "the same in substance and effect" as the *Chapman* [248]"reasonable doubt" standard. (*People v. Ashmus, supra,* 54 Cal.3d 932, 965.) It is a more exacting standard than that used for assessing prejudice for guilt phase error under *People v. Watson, supra,* 46 Cal.2d 818, 836. (*People v. Brown, supra,* 46 Cal.3d at p. 447.)

The decision of whether to sentence a defendant to death or to life without the possibility of parole requires the personal moral judgment of each juror. (*People v. (Albert) Brown (Brown I), supra,* 40 Cal.3d 512, 541.) In a death penalty case, "individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp, supra,* 481 U.S. 279, 311; internal citation omitted.) Different jurors will have different interpretations of and assign different weights to the same evidence. (*United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.) These differences in the decision-making process in the penalty phase of a capital case necessarily complicate the task of an appellate court in assessing the effect of trial error.

Given the interrelationship and the severity of the trial court errors in this case, their cumulative effect was to deny appellant fair and reliable guilt and penalty determinations. Appellant's convictions and

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[248]*Chapman v. California, supra*, 386 U.S. p. 24, held that the test for prejudice for federal constitutional error is that reversal is required unless the prosecution can demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained."

death sentence, therefore, must be reversed.

CONCLUSION

For the reasons set forth herein, the multiple guilt phase errors involving jurors deliberations, the failure to properly respond to jurors' inquiries about the reach of vicarious liability, the multiple instructional errors defining vicarious liability, the failure of the evidence to support the felony murder (robbery) special circumstance and the improper shackling of the defendant all compel reversal of appellant's convictions.

The penalty phase errors, including the refusal to correct a conflict situation, the failure to ensure the jury understood the meaning of the sentencing alternatives, the voluminous, emotional and improper victim impact evidence, the erroneous penalty phase jury instructions and the constitutional infirmities of the death penalty statue itself combined to undermine confidence that the sentence of death was appropriate. Therefore, the sentence, as well as the convictions must be set aside.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I am the attorney for appellant Jack Emmit Williams. Based upon the word-count of the Word Perfect 12.0 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 160,980 words. (California Rules of Court, rule 36(1)(A).

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: June 8, 2006

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Appellant Williams' Opening Brief

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