IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

DANIEL SANCHEZ COVARRUBIAS,

Defendant and Appellant.

_____/

Case No. S075136

(Monterey Superior Court No. SC942212(C))

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF MONTEREY

HONORABLE ROBERT MOODY, JUDGE, PRESIDING

APPELLANT'S OPENING BRIEF - VOLUME II

Pages 503-766

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Under Appointment by the Supreme
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PENALTY PHASE: OVERVIEW

The present case stands apart from the vast majority of capital cases which this Court has reviewed.[328]

First, the prosecution failed to prove that appellant knowingly and intentionally participated in the shootings. Rather, appellant's convictions and death sentence appear to be founded on vicarious liability which allowed the acts and intent of Antonio Sanchez and Joaquin Nuñez to be constructively

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[328] Compare e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 967 ["Defendant, 22 years of age and already with a long criminal history at the time of this violent crime spree, brutally robbed and stabbed one man to death; brutally robbed, stabbed and nearly killed another; robbed another victim in an elevator by beating him unconscious with a hard, blunt object; robbed another victim in a gas station by attacking and beating him in the restroom of the business; and violently robbed three taxicab drivers while holding a knife to their throats and threatening to kill them"]; *People v. Rogers* (2006) 39 Cal.4th 826, 895 [" . . . the jury found that defendant, acting alone, shot to death two young women, one of whom was only 15 years of age, in part to save himself from embarrassment and the adverse personal and employment consequences that might have ensued had his involvement with prostitutes become known. Defendant not only was a mature man in his forties at the time of the crimes; he also was a deputy sheriff who was knowledgeable concerning the law and was charged with protecting the public. The jury rejected defendant's mental state defense"]; *People v. Avila* (2006) 38 Cal.4th 491, 615 ["Given the nature of these murders, defendant's conduct and comments thereafter, and his previous criminal activity, his sentence is not grossly disproportionate to his personal culpability. [Citation.]"]; *People v. Chatman* (2006) 38 Cal.4th 344, 410 ["The jury found, on proper and substantial evidence, that the killing involved torture. Defendant committed other crimes of violence, both before and after he murdered [the victim]"]; *People v. Wilson* (2005) 36 Cal.4th 309, 361 ["Defendant robbed and murdered [the victim], who trusted defendant by employing him and allowing him to live in his home for a period of time. Defendant shot [the victim] twice in the head while he was asleep in order to take his money. Later, while in custody, defendant solicited the murder of a key prosecution witness who could place defendant and [the victim] together before the crimes . . ."].)

imputed to appellant. (See pp. 149-50, above, [verdicts demonstrate juror rejection of prosecution theory that appellant and Antonio Sanchez conspired to commit murder], incorporated herein.) And, even if appellant's lack of knowledge was the product of criminal negligence or even implied malice, such a mental state was, as a matter of law, insufficient to trigger death eligibility under California law and the federal constitution.

Second, the judge correctly found that there is "an inexplicable disconnect between the defendant's character and the enormity and monstrosity of the crimes committed." (72 RT 14218.) Appellant had no prior felony convictions or history of criminal violence. And, all the witnesses who knew appellant consistently recounted his generosity and warmth toward other people as well as his love for his wife and four young children. Thus, it would have been totally out of character for appellant to have knowingly participated in such crimes.

Third, three judges who reviewed appellant's case before trial "felt strongly" that a life without parole sentence would be a "fair and prudent disposition of this case." (2 SCT 316; RT 4202-04.) However, the district attorney refused appellant's offer to plead guilty in exchange for a life without parole sentence.

Fourth, none of the other participants in the crimes received the death penalty, including Antonio Sanchez who, as conceded by the prosecutor, "was the one who had the bone to pick here." (RT 10224.)

Nevertheless, the prosecution was able to obtain a death verdict by unduly emphasizing the inflammatory aspects of the case. In particular, the prosecution was allowed – over defense objection – to conduct a large screen audio-video production which highlighted the most emotional and gruesome parts of the case – such as the infant victim, the victims' bloody clothing, the

victims' impact evidence and the victims' gruesome wounds – in a highly prejudicial "audio-video slingshot." This, combined with numerous other errors – including a defective post guilt trial admonition that allowed the jurors to prematurely form opinions as to penalty – resulted in an unfair penalty trial and an unreliable death sentence.

PENALTY PHASE: STATEMENT OF FACTS

A. Penalty Fact Summary

See Guilt Phase: Statement Of Facts § H pp. 46-49 [penalty facts overview] incorporated herein.

B. Penalty Phase: Prosecution Evidence

1. Circumstances Of The Offense Testimony

Greg Avilez, a DOJ Criminalist, testified for the prosecution at the penalty trial about the victims' wounds as follows:

Ramon Morales: The criminalist concluded that there were two different locations from which Ramon was shot: from the front door area and also from somewhere between the living room and kitchen. (62 RT 12225-28.)

Fernando Martinez: Fernando Martinez received a gunshot wound to the back of the head. The gun was fired while several inches away from his head. (62 RT 12237-39.) The criminalist believed this victim was shot while lying down with his head on his hands. (62 RT 12230-33; 12235.) There was no blood spatter. (62 RT 12233-34.)

Martha and Alejandra Morales: There was some blood spatter on the wall directly behind where Martha Morales' body was found. (62 RT 12245-47.) The blood spatter was no higher than 2 feet, indicating that she was most likely in a bent over position, crouched. The wounds to her head also indicated that she was crouched; they had a very steep angle of trajectory, hitting the top of the head and passing through the face, destroying a lot of tissue. Another bullet entered at the bottom of her teeth and exited out the bottom of her jaw on a very steep angle, indicating, according to the witness, that she was bent over. (62 RT 12245-47.) The shots originated between the bed and the entrance to the bathroom (62 RT 12247-48.)

Martha Morales was first shot in the right shoulder while holding the

child, Alejandra, with her right arm. The bullet passed into Martha's chest which caused her to drop Alejandra at her feet where the child was found. The child was most likely shot seconds after Martha was shot. Martha was shot in the head after the child was on the floor. (62 RT 12253-54.)

2. Circumstances Of The Offense: Exhibits

In addition to the guilt phase photos, the mannequins, the demonstration weapons and the wall, the prosecution was allowed to present autopsy photos of each victim at the penalty trial. (Exhibits 32A, 32B [Ramon Morales]; Exhibits 33A-C, 34 [Fernando Martinez]; Exhibit 35 [Martha Morales].)

3. Victim Impact Testimony

Josephina Vicera Vasquez was the first victim impact witness. At the time of her testimony, her oldest daughter, Maria Erma Martinez, was 31. The second oldest child, Sergio Martinez, was 27. Their third child Martha Martinez, one of the victims in the present case, would have been 25. Their fourth child, Fernando Martinez, another of the victims in the present case, would have been 24. Fernando was born on June 1, 1974. Martha was born on January 3, 1973. Ms. Vasquez also had three other children: Patricia Martinez, 22; Juan Romero Martinez, 20; and Pablo, 14. Fernando had a 5 year old daughter named Alejandra Paula Martinez. All the children were raised in Guadalajara and all were good students. (60 RT 11885-89.)

Martha started elementary school when she was 6 years old. She finished junior high at 15½ but didn't go to high school. Martha played a lot with her brothers and got along very well with them. They were a close family. The children were friends with each other and all played together. Martha was closest to Patricia and Sergio. They would go dancing. Martha liked to dance. (60 RT 11889-90.)

When Martha finished junior high she went to work. Her first job was

in a market at a little stand making fruit juices. Patricia used to work with Martha. After Martha started working she would help out buying things for the family home. Martha gave her mother part of her money, and keep some for herself. It helped with the expenses at home. She bought clothes with the money she kept for herself. Every 8 days she liked to wear new clothes. Martha was fun at home. (60 RT 11890-92.)

Martha had dreams of being a model and she went to modeling classes. However, she stopped going because they wanted taller girls. Martha was almost as tall as Patricia but shorter than Ms. Vasquez. Martha was pretty. She had one boyfriend. Martha's father gave her permission to date at 18 but Ms. Vasquez let Martha date one boy at 17 and hid it from her husband. (60 RT 11892-93.)

After the juice store, Martha got another job in a shoe factory at age 18. She liked the job, but didn't like how little she was being paid. During this time Martha was still helping out with the money at home and buying clothes for herself. Martha liked to dress well. Sometimes she would buy clothes for her parents, brothers and sisters. Martha met Ramon at the shoe factory after she had been there about two months. However, Ms. Vasquez didn't know about Ramon until Martha left with him. (60 RT 11893-95.)

All of the children were close. Martha and Patricia shared confidences. (60 RT 11895-96.) Martha never had any problems in school. She got along very well with her friends. (60 RT 11896-99.)

One day in early February 1992, Martha didn't come home from work. Ms. Vasquez was worried and told the older children to go out and look for her. They went to Martha's place of employment but weren't able to find her. Later that morning, Ms. Vasquez received a message that Martha was alright and would be back the next day. However, it wasn't until eight days later that

Martha came home with Ramon and his mother. Ms. Vasquez had never met Ramon before. Martha asked her mother to forgive her for taking off with Ramon. They came by to tell her that they were going to get married. (60 RT 11897-99.)

Before the wedding Ms. Vasquez saw Martha on a daily basis. Martha seemed happy and said she wanted to get married. (60 RT 11899-901.) However, Ms. Vasquez didn't get to know Ramon very well. (60 RT 11901-02.) Martha and Ramon got married a month or two later. (*Ibid.*)[329] Ms. Vasquez, her husband, and their children all attended the wedding. (60 RT 11901-03.)

Ramon and Martha were happy and planned to go to California. Martha was pregnant and she wanted her baby to be born in California. They went to California in June 1993. (60 RT 11903-04.)

Ms. Vasquez saw Martha frequently after she married Ramon. She saw them the night before they left for California. She said goodbye and blessed both Martha and Ramon. She had to hold back because she didn't want to cry. Her son Sergio was crying. (60 RT 11904-06.)

About eight days after they left Ms. Vasquez heard from Martha who was upset because she didn't feel comfortable in California. 15 days later Martha called again and was calmer. Martha's baby was born on December 29, 1993. Ms. Vasquez was happy about the baby. Martha called Ms. Vasquez to tell her about the baby. Martha called home at least once a month. She didn't like the food in California and didn't like to cook. (60 RT 11906-12.)

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[329] The wedding was March 26, 1993. [People's 45 marriage certificate]; People's 117 [photo of Martha and Ramon and family at wedding]; People's 118 [photo of Martha and her father at wedding]. (RT 11901-03.)

Ms. Vasquez did not have a phone in her home so when Martha called she went to a nearby store where they let her use the phone. Martha told her that the baby was very pretty. (60 RT 11909.) Ms. Vasquez never saw Martha and her baby together; she only saw the pictures that Martha sent. Martha was proud of her baby. (60 RT 11916-19.)

Martha and Ramon weren't planning on staying in California; they were going to save money to buy a house in Durango, Mexico. They went to California so they could save money. They were going to get married again in a church in Guadalajara. (60 RT 11909-10.)

Ms. Vasquez talked with Martha on the phone in November 1994. Ramon and Martha wanted to leave in December to come to Mexico. Sergio was going to have a church wedding and Martha wanted them to have a "double wedding" with Sergio. Martha wanted to make plans for the weddings and to live in Guadalajara. Ms. Vasquez was excited about having Martha come home. (60 RT 11910-12.)

In November of 1994, Fernando was around 19 years old and was living with Martha. He had been working in California for 4 months. Fernando, who only finished junior high, had many friends. He was outgoing and was the joker in the family. Fernando loved to talk to his sisters and play around with them. (61 RT 12014-15.) Fernando and his brother Sergio were close and always together. (60 RT 11916-19.) Fernando went to California to save money to buy a car to help his family. Fernando was sending a little money home from California. (60 RT 11912-13; 11916-19.) Fernando had a daughter, Paula, who was 3½ and lived with Ms. Vasquez. Fernando liked his daughter a lot and played with her. He worked to give his child whatever she needed. Fernando was very happy. (60 RT 11913-19; Exhibit 119, photo of Fernando and his daughter.) Because Paula's mother left her when she was

only a year old, Paula lived with Ms. Vasquez. (60 RT 11916-19; Exhibit 120, photo of Paula.) After Fernando's death, Paula's mother took her back. Ms. Vasquez was attached to Paula because she had taken care of her since she was a little girl. She didn't want to give Paula up. Ms. Vasquez hadn't seen Paula since her mother took her back. (61 RT 12005-06.)

Ms. Vasquez saw Martha and Ramon's daughter, Alejandra, the week prior to her testimony. She had never seen her before. Alejandra was smiling and looked like Martha. However, Alejandra didn't speak, hear or walk very well and Ms. Vasquez thought she needed special care.[330] Also, Ms. Vasquez wanted to baptize her. Ms. Vasquez was happy to see Alejandra; but didn't know if she would see her again. Ms. Vasquez and her husband contacted the Mexican consulate to see if they could get custody of Alejandra. (61 RT 12002-05; Exhibit 121, Photo of Alejandra.)

Ms. Vasquez found out about Martha and Fernando being killed by phone on Thursday, November 17 at about 6:00 p.m. The people at the store said she had a phone call and Patricia went to answer it. Patricia thought Martha was going to be on the phone. The caller was Erma, Ramon's sister-in-law. When Patricia came back she told Mr. and Mrs. Vasquez that an

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[330] Margarita Kistler, a senior social worker for Orange County Family and Children Services, was called by the defense to testify about her care of Alejandra Morales. (64 RT 12703-5.) Ms. Kistler was assigned to care for Alejandra on June 25, 1996 when she was 18 months old. (64 RT 12705.) At the time of Kistler's testimony, Alejandra was in a special medical care foster home. She was diagnosed with RETT Syndrome sometime between May 1995 and June 1996. (64 RT 12707-08.) This is a genetic condition which affects her ability to talk and control hand movements. RETT Syndrome also rendered Alejandra unable to care for herself and caused her to become very thin, but stable, due to difficulty in eating food. (64 RT 12708-11.) She required constant and close supervision because she has no concept of fear or danger and is also self-abusive. (64 RT 12711-12.)

accident had happened. Erma didn't say who was in the accident; Patricia started to cry. Ms. Vasquez thought Ramon had been in an accident with his car. Erma told them that they were in critical condition. Mrs. Vasquez went with her husband to answer the phone. Her husband talked on the phone first and Erma told him Ramon and Martha had been killed. Her husband started to cry. He told Ms. Vasquez that the children were dead. She didn't believe this because Martha had called her recently. (61 RT 12006-10.)

Mr. and Mrs. Vasquez heard a couple of different stories about how and why the children were killed. They heard that it had something to do with weapons or money, or because of cockfighters. They finally heard the truth when they arrived in California. They buried the children in Guadalajara. They had services at the house for Ramon, Martha and Fernando. Their bodies were there. They weren't able to say goodbye because they could not open the casket due to the condition of the bodies. That was hard for Ms. Vasquez. (61 RT 12010 12006-12.)[331]

Ms. Vasquez and her family stayed at that home for about two months after the funeral. Then they moved because Ms. Vasquez' husband continued to cry. The deaths were difficult for him and he began to drink a lot. Once he wanted to jump from a "fence" to kill himself. He didn't want to live anymore because of the loss. He said his daughter was calling him. Martha was saying "come on, dad." (61 RT 12012-13.)

Ms. Vasquez recalled seeing Martha in a video of her older sister's wedding. Martha was happy and dancing in the video. (61 RT 12014-15.)

Martha and Fernando's father, Juan Martinez Gonzalez, testified that

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[331] See also Exhibit 124 [photo of Paula taken at the cemetery; Exhibits 122 and 123 [photos of caskets].

he and his wife Josephina had been married 28 years and had 7 children. The family was happy; the children were close to each other and he had a good relationship with the children. He would take them to the park and to the beach to play. They spent Christmas and holidays together; they were always together. Fernando was the fourth child and the second boy. Fernando worked with him on his jewelry. Fernando lived at home most of the time. Fernando was playful and was a joker. Fernando was close to his cousins, who were a little older. (61 RT 12016-18.)

Fernando went to California to earn money to build a workshop and buy a truck. Fernando also wanted to help his parents and his daughter, who lived with them. (61 RT 12019-20.)

Martha was a little more serious than Fernando. She scolded her brothers and sisters if they left messes. She wanted to have everything very neat and clean. Martha helped her mother in the kitchen and washed the clothes. Martha was close to her brother, Sergio, and her sister, Patricia. (61 RT 12020-21.)

Martha and Sergio had plans for their weddings; they wanted to have the mass in the same church together. It was scheduled to be in Guadalajara sometime in 1995. Sergio was waiting for Martha to come back so they could have their weddings together. When Martha didn't come home Sergio cried and postponed his wedding. Mr. Gonzalez remembered seeing Martha the last time; it was when she said goodbye before going to California. He was sad when she left. It was hard for him to think about Martha. (61 RT 12021-23.)

Martha's sister, Patricia Martinez Becerra, was 21 years old when she testified. She was close to Martha; they worked at the same place of employment and always did things together. They shared the same friends and secrets. Patricia and Martha worked at a market. People told her that she and

Martha looked alike and could tell they were sisters. She shared everything with Martha including clothes and shoes. Patricia didn't take care of clothes as well as Martha did and sometimes Martha would get angry with her for not taking care of her clothes. (61 RT 12024-26.)

Patricia and Martha used to go out dancing. Patricia was always happy when she was with Martha. (61 RT 12026.)

Martha told Patricia about meeting Ramon at a shoe factory. Martha said she liked Ramon. However, Patricia didn't meet Ramon at that time because Martha was working at a different place and Martha would see Ramon after work. Martha didn't tell the rest of the family about Ramon; it was a secret between Patricia and Martha. Martha didn't want her father to know and she didn't have the nerve to tell him. Patricia knew that Martha was seeing Ramon but didn't know that she was going to go off with him. When her family went looking for Martha she didn't say anything. She didn't tell them that Martha was seeing someone. Her family was worried. She didn't tell because it was a secret between herself and Martha. (61 RT 12027-29.)

Patricia didn't meet Ramon until Martha returned. Patricia was happy for Martha but she was also sad and jealous because Martha wasn't going to be with her. She eventually got over it. Martha and Ramon were always happy. The three of them would talk about everything and would joke with their mother. Martha and Ramon seemed good together. (61 RT 12029-30.)

Martha spent almost all of her money on clothes; she liked clothes. Fernando earned money to help his father and for his daughter. Fernando was very warm and loving with his daughter, Paula. He spent time with her when he came home from work. (61 RT 12031.)

Fernando was two years older than Patricia. Fernando was always working. He would work all day and sometimes at night because they would

load trucks to carry machinery. Fernando would get angry about any little thing such as not being able to find his clothes. (61 RT 12030-31.)

The last time Patricia saw Fernando was in May of 1994. She saw him before he left and said good-bye to him. He was going to California to work. (61 RT 12031-33.)

Martha left for California shortly after she got married. Patricia went to Martha and Ramon's wedding. They were very happy. The day Martha left, Martha was kind of sad because they were going to California. Martha, who was pregnant when they left, was excited about having a baby. (61 RT 12031-33.)

Patricia talked to Martha on the phone when she was in California. Martha was not comfortable in California. She didn't like it because it was very different from home. However, after she had the baby, Alejandra, Martha was much happier. Martha told Patricia about her plans to come home to Guadalajara in December. With the money they saved in California they were going to buy a piece of land and build a home. (61 RT 12033-34.)

Patricia remembered getting the phone call from Erma about Martha and Fernando. She was in her house. She and Fernando's daughter went to get the phone. Patricia thought Fernando and Martha would be on the phone. Instead it was Erma who told her the news wasn't good and that her brother-in-law and sister had an accident. Erma didn't say what kind of accident but said they were in very critical condition. Erma was crying. Patricia told Erma that she should talk to her father and went to get him. Patricia was crying. She went back to the phone with her father. (61 RT 12034-37.)

Their family didn't celebrate Christmas that year. Their mother and father took it the hardest and their father was the worst. (61 RT 12034-37.)

Patricia was at home for the funeral. She didn't get to see Martha and Fernando one last time because the caskets were closed since the bodies were deformed. Patricia was pregnant at the time Martha and Fernando were killed. She had her baby February 26, 1995. She named her daughter Martha Fernanda. (61 RT 12037-38.)

Magdalena Diaz lived in Guadalajara. She had 10 children. Ramon Morales, her oldest child, and his brother Guillermo, had the same father. The other 8 children were all girls by a different father. When Ms. Diaz lived in Durango she was alone with her two boys who were 2 and 3 years old. She was alone with them for 5 years. She was close to the boys. After that 5 year period, she remarried and had the 8 girls. Ramon went to school for 6 years but stopped at age 13 and went to work. He worked at a meat market with Ms. Diaz's husband for about 5 years. He gave his mother the money he made and helped out at home. (61 RT 12039-41; Exhibit 125, photo of Ramon at 8 years old at meat market.)

Ramon left home at 18 and went to California to work. (Ms. Diaz had brothers in San Jose, California.) She was sad when Ramon left because she didn't want him to go to California. Ramon's dream was to get married and build a house in Mexico. While Ramon was in California he continued to help his mother with finances. The first time, he was in California for 4 or 5 years. She stayed in touch with him while he was there. (61 RT 12041-42.)

Ramon eventually came back to Guadalajara at age 23 or 24 because Ms. Diaz was ill. She had heart problems and high blood pressure. He cared for her for about 4 months until she got better. Then Ramon went back to California for a while. He again returned to Guadalajara about 4 years later because she was sick again. (61 RT 12043-44.)

Ms. Diaz was very close to Ramon. She loved all her children very

much but he was special because of his love, his tenderness and the attention he gave her. He was very warm and loving. He was always hugging and kissing her. She called him her "beautiful 'negrito'" because he had a darker complexion than her other children. He liked that name. He used to tease her and tell her that she was very young and beautiful. He would carry her in his arms. She was thinner then, and he was very strong. (61 RT 12044-45.)

In 1992 one of Ms. Diaz's daughters, Maria de Carmen, got married and Ramon came to Guadalajara for the wedding. He arrived unexpectedly on his birthday and played a joke on Ms. Diaz. He asked for his "pozole" – his favorite meal. When they were young she celebrated their birthdays by making their favorite meal. She had not made it this time because she didn't know he was going to arrive. (61 RT 12045-47.)

Ramon told his mother that he had met a girl – Martha – and that she was pretty. He was very happy. Ms. Diaz was at Ramon and Martha's wedding as were her husband and two daughters, Magdalena and Antonia. Ms. Diaz had met Martha's family before when Ramon told her to go to their house and ask for forgiveness because Martha had left with him. (61 RT 12047-49; Exhibit 117, photo of Ramon taken at his wedding; Exhibit 128, photo of Antonia and Ramon at the wedding.)

Ramon and Martha lived with Ms. Diaz after they were married and stayed about two months. They were all happy. Ramon worked in the butcher shop. Martha wasn't working at the time. Martha washed their clothes, made meals and went to see her mother in the afternoon. Martha was very reserved, quiet and serious. (61 RT 12049-50.)

When Ramon and Martha left for California they planned to return to Mexico and purchase a house. Ramon wanted his baby to be born in Guadalajara. Ms. Diaz kept in touch with Ramon by phone and letter when he

went to California. Ramon called from her brother's house or Guillermo's house. Exhibit 127, photo of Ramon, Guillermo and their mother]. When she talked with him on the phone he was happy. He called home when his daughter was born and sent home photos of the baby. Every time the baby did something new (crawl, etc.) he called about it. (61 RT 12050-52.)

The last time Ms. Diaz spoke to Ramon was on the Monday before the 16th of November 1994. They talked on the phone. She was feeling sick again. He called to see how she was feeling. She was happy he called. (61 RT 12054-55.)

Ramon was very generous. He always did favors for people. If someone needed help he would gladly help them. (61 RT 12055-56.)

Ms. Diaz found out Ramon was killed from Ramon's brother, Guillermo, who said they killed Ramon, Martha, and Martha's brother. Ms. Diaz couldn't believe it because she had just talked to Ramon on Monday. (61 RT 12056-57.)

The funeral for Ramon was with Martha and Fernando at the Martinez' home. When she remembers Ramon, Ms. Diaz thinks about the coffins arriving. (61 RT 12058-59.)

Ms. Diaz remembered Ramon on his birthday and got very sad. She could not get herself to believe that he was dead because they only saw the casket. She did not see his body. She kept thinking at any moment he was going to arrive. She has happy memories of Ramon because he was always happy, always kidding, always hugging her. (61 RT 12059-60.)

Ms. Diaz had a few letters from Ramon but he didn't like to write too much. He would call more than write. She received a letter from him shortly before he was killed. There were photos of the baby with the letter. She wrote a letter back to him. (61 RT 12060-61; Exhibit 57, letter Ramon's mother

wrote to him in October 1994; Exhibit 57A, English translation.)

4. Victim Impact Exhibits

The victim impact exhibits included the following: A marriage certificate for Ramon and Martha Morales (Exhibit 45); wedding photos showing Ramon and Martha Morales with their family (Exhibit 117 and 118); a photo of Ramon and his mother doing laundry at her house (Exhibit 126); a photo of Fernando Martinez and his daughter Paula (Exhibit 119); a letter written by Ramon Morales' mother to him in October 1994 (Exhibit 57A); a doll used by the penalty phase expert to put children's clothing on (Exhibit 116); photos of the surviving infant at age 5. (Exhibits 121, 130 and 131.)[332]

5. Jail Misconduct

On June 30, 1996, during a search of appellant's cell in the Monterey County Jail, deputies found a toothbrush handle and a dismantled razorblade attached to the bottom of appellant's bed frame by a jelly type substance. Additionally, a razorblade, small gauge wire, string, and metal buttons were found inside the bottom of a deodorant container. (59 RT 11670-76; 59 RT 11684-91.)

On July 13, 1996, deputies found a razorblade inside a paper bag in appellant's cell. (59 RT 11691-97.)

On August 18, 1996, Deputy Sheriff Urquidez escorted appellant and another inmate to the Yard. (60 RT 11801-11.) On the way to the yard appellant – who did not have any kind of weapon in his hand (60 RT 11836-38) – punched Deputy Urquidez in the face and in the back of his head. (60 RT 11805-11.) Appellant then jumped over the wood partition into the Work

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[332] Photos of the victims in their caskets at the funeral were shown to the witnesses over objection but not admitted into evidence. (Exhibits 122, 123 and 129; 62 RT 12279; 63 RT 12401, 12437.)

Alternative Program office where he was apprehended without any further struggle. (60 RT 11820-22; 11834.)

The deputies found a 4' x 7' jail issued sheet wrapped around appellant's stomach and tucked into the sheet was a jail issue watch cap and a small jail issue pencil sharpened to a point. (60 RT 11822-24; 11874.)

There is no evidence in the record that criminal charges were ever filed against appellant as a result of the August 18, 1996 incident. The deputy who apprehended appellant said that he arrested him and charged him with escape. (60 RT 11829-30.) However, the defense was precluded from inquiring as to whether criminal charges were actually filed. (6- RT 11877.)

The doors to the outside of the facility require keys but appellant had no key and nothing with which to pick the lock. (60 RT 11830-34.)

When appellant struck the deputy, he did not have any kind of weapon in his hands. (60 RT 11836-38.)

Appellant also had a piece of paper in his pocket with writing in Spanish on it. (60 RT 11875.)

No police report of the incident was filed. (60 RT 11861.) Subsequent to this incident, appellant was a "good inmate." (60 RT 11861-63; 60 RT 11878-79.)

6. Audio-Video "Slingshot" Shown During Prosecutor's Penalty Argument

During the penalty phase, after extensive victim impact testimony from the victims' surviving family members, the prosecutor played a video on a "rather gigantic screen" for the jurors as part of her closing argument. (67 RT

13202.)[333] It was an audio/visual compilation of pieces of evidence and demonstrative aids previously shown to the jury during the guilt and penalty trials.

The presentation included an audio track of the 911 call, video footage of the crime scene which depicted the victims as they were found by the police, as well as gruesome pictures of the victims' wounds. Photographs picturing the Morales' smiling infant daughter were featured more than once in the video, as were images of the infant's wounds and her bloody baby clothing. A picture of Ramon and Martha Morales together before the incident and a shot of their marriage certificate were part of the video as well.

The video also portrayed photos of two semi-automatic rifles and mannequins with bloody clothes and protruding rods showing the alleged trajectory of the bullets.[334]

Appellant's videotaped statement (see Claim 10 § B(2)(b)(i), pp. 144, incorporated herein) was also featured in the prosecutor's video. It was not translated from Spanish into English. Thus, his statement that he had no intent to rob or harm the victims was not conveyed by the video.

C. Penalty Phase: Defense Evidence

1. Evidence That Appellant Was An Accomplice Who (1) Did Not Intend To Rob Or Harm The Victims And (2) Did Not Shoot Any Of The Victims

The defense contended that appellant did not knowingly and

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[333] Though not formally admitted into evidence, the video became Court Exhibit 5. (See 2 SCT 314; 325.)

[334] Neither the rifles, nor the mannequins were admitted into evidence. In fact, the rifles pictured in the video were not the actual ones used in the crime. (RT 14411-14412.)

intentionally aid and abet or conspire with Antonio Sanchez to rob and murder the victims. Evidence that appellant was an unknowing accomplice included the following:

i. As conceded by the prosecution (52 RT 10224: 19-24 [". . . Antonio was the one who had the bone to pick here. He was the one who had it in for Ramon Morales"]), and, as argued by defense counsel, appellant had no motive or stake in robbing and killing Ramon Morales. (52 RT 10268.)

ii. Appellant's video statement explained that he thought Antonio Sanchez was going to get some things he left at Ramon Morales' residence and that the guns were taken only as a precaution. (5 CT 1036-39.) Thus, the defense maintained that appellant did not intend to aid and abet robbery and/or murder. (*Ibid.*)

iii. The physical evidence corroborated appellant's video statement because numerous items of value – including $378 in cash – were not taken. (See Guilt Phase: Statement Of Facts § E(3), pp. 30-31, incorporated herein.)

iv. Appellant was intoxicated at the time of the shootings. (See Guilt Phase: Statement Of Facts § B(8) and (9), p. 26, and § G(2), p. 45, incorporated herein.)

v. The prosecution relied primarily on Jose Luis Ramirez to prove its allegations that appellant intended to rob and kill and personally fired a weapon during the shootings. (See Claim 10 § B(1), pp. 139-40, incorporated herein.) However, the defense extensively discredited Jose Luis Ramirez. (See Claim 10 § B(2), pp.141-46, and § D, pp.147-50, incorporated herein.)

vi. The jurors' inability to agree on the firearm and conspiracy to murder allegations indicated that some jurors concluded that appellant did not intend to rob or kill and did not personally shoot the victims.

vii. The jurors' unanimous rejection of Jose Luis Ramirez' testimony

that appellant used a knife after entering the residence.

In sum, as acknowledged by the prosecutor (67 RT 13229-32), the verdicts[335] suggested that one or more jurors found that appellant did not intend to kill, did not fire the .38 handgun and only intended to take Antonio Sanchez' things from the Ramon Morales residence.

2. Lack Of Involvement In Gangs Or Illegal Drugs

Appellant was not involved with illegal drugs. (41 RT 8063; 62 12426.) Nor did he join or participate in any criminal street gangs as a juvenile or adult. (62 RT 12622.)

3. Positive Character Traits

Appellant's brother-in-law, Robert Reynoso, described appellant as a warm and friendly person who cared about people and his family. (63 RT 12402-03.)[336]

An example of how appellant cared about other people occurred during the earthquake in Watsonville. In response to an announcement on the radio that volunteers were needed, appellant used his truck to deliver food and clothing to the earthquake victims. (63 RT 12404-05.) Another example was how appellant helped Reynoso when Reynoso was ill and had to have a kidney transplant. (63 RT 12405.)

If appellant's life was to be spared, Reynoso would remain his friend and be supportive of him. He wouldn't abandon appellant because appellant never abandoned him. (63 RT 12405.)

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[335] The prosecutor's conclusion was based on the fact that the jurors did not find the firearm use and conspiracy to murder special verdicts. (See Statement Of Case § C, p. 11, incorporated herein.)

[336] Reynoso had known appellant since 1987 and they saw each other frequently. (RT 12402-03.)

Moises Diaz knew appellant very well for 11 years. He met appellant at appellant's sister's house and saw him every day of the week. Diaz testified that appellant was a good person who was warm and friendly toward other people. (63 RT 12407-08.) Diaz also remembered that appellant delivered food and clothing to the victims of the earthquake. (63 RT 12408-09.) Appellant was also warm and tender towards his family. (63 RT 12409.)

Luis Covarrubias, defendant's brother, testified that appellant was a good brother and a good son to his mother. He had a good friendship with his neighbors and the rest of his family. (63 RT 12412.) Appellant was also kind toward animals. (63 RT 12412-13.) At school, appellant was a good student and had good grades. He got along well with everyone including the teachers and staff. (63 RT 12413.) Appellant has three other brothers: Sergio, Juan, and Rosendo. (63 RT 12417-18.) Of all his brothers, appellant was the smartest in school. (63 RT 12419.)

Appellant visited his mother often until her death. (63 RT 12413-14.)

Appellant's sister, Bertha Sanchez testified that appellant was a good brother to her. Appellant was friendly with everyone, including the neighbors, his friends, and his family. (63 RT 12421-22.)

Appellant had four young children – Benny (11 years), Daniela (10), Daniel (8), and William (6). (63 RT 12424-25.)[337] Everyone agreed that appellant always treated his children with love and warmth. (63 RT 12414-15 [Luis]; 12423-25 [Bertha]; see also 12409 [Moises Diaz]; 12430-31 [Elvia].)

Appellant was always a hard worker. (63 RT 12426.)

Appellant's sister, Elvia Covarrubias, grew up with him in Mexicali and remembered him as a very good brother. (63 RT 12430-31.) Appellant was

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[337] Ages as of September 1998.

friendly with the other children and was loving and respectful to his family. (63 RT 12430-31.) Elvia testified that she loved her brother very much and has strong feelings for him. She would support him and would not abandon him. (63 RT 12434-35.)

In sum, appellant was a "caring, thoughtful" person who "went out of his way to help others" and who was not inherently "aggressive or violent." (64 RT 12631.)

4. Lack Of Prior Felony Convictions

As a juvenile, appellant had no arrests and was never in trouble with the law. He had no gang involvement. (64 RT 12622.) As an adult he had no felony convictions. (64 RT 12623; 13428 [argument of counsel].)

5. Lack Of Prior Violent Criminal Conduct

Appellant did not have a history of criminal violence. (64 RT 12634; see also 12631; 12688-91.) As a youngster appellant was in a few fights in elementary school. However, those were isolated situations such as defense of a sibling or dealing with a bully. (64 RT 12690.) As a youth appellant was generally congenial and not aggressive. (64 RT 12690-91.)

As an adult appellant was involved in three fights all of which were alcohol related. (64 RT 12690.) Appellant also admitted to Thomas Reidy, the forensic psychologist who examined him, that he had slapped his wife on one occasion. (64 RT 12689-90.) However, this was a single, isolated incident early in the relationship. (*Ibid.*) Appellant's relatives, including his wife, mentioned only positive things about appellant's marital relationship. (*Ibid.*)

Nor did appellant ever abuse his children. (64 RT 12694.) Appellant was always a good father who treated his children with love and warmth. (See Penalty Statement of Facts § C(3), pp. 523-24, incorporated herein.)

6. Early Childhood Trauma

Dr. Reidy reviewed appellant's police reports, jail records, background records, preliminary hearing transcript, criminal history, and school records. He met with appellant five times and spent 9 to 10 hours with him. (64 RT 12609-11.) He also spoke with appellant's family and friends, his wife, his brother, two sisters, and two friends. (64 RT 12609-11.)

Dr. Reidy identified several traumatic conditions and events in appellant's early childhood. First, appellant grew up in a small town surrounded by poverty. He had to work from age 10, washing cars and helping neighbors to earn some money. (64 RT 12612-15.) Second, appellant's father was very intolerant and not a good father figure. His father left when appellant was a young child and appellant had to rely on his older brothers as role models. Third, appellant's mother – who was an important figure in appellant's life (64 RT 12616) – was frequently absent from the home. She spent six months at a time in the United States, working in the fields and appellant was raised by his siblings. Fourth, appellant's older brother, Jesus, who was the key father figure in appellant's life, was murdered when appellant was 7 or 8 years old.

In sum, appellant was the victim of emotional neglect and disrupted attachments which started early in life. (64 RT 12615.) Appellant did not have maternal and paternal support he needed and he experienced two separate losses of prominent male figures in his early childhood. He simply did not have a lot of love, care, or stability in his life. (64 RT 12612-15.)

Yet another traumatic event happened when appellant, as a young adult, lost his mother. She had become so depressed over the death of appellant's brother that she was unable to function. (64 RT 12615-17.) When his mother died appellant cried and became very upset. (64 RT 12630.)

7. Appellant's Alcoholism

Appellant began drinking with his mother and siblings around age 14. (64 RT 12616-17.) Appellant was genetically vulnerable to alcoholism and by age 18, he was an alcoholic. (64 RT 12617-19.) Alcoholism had an adverse impact on his life. Appellant hid his drinking from his wife. He also lied about how much money he made and kept some of it so he could drink. He had marital arguments over his drinking. At times, he would drink at work. Appellant had two DUIs and related charges, including a suspended license. (64 RT 12616-20.)

The trauma in appellant's early development played a role in his alcohol abuse problem. The insecurity and lack of trust appellant experienced in his early development impaired his decision making judgment and contributed to his long-standing abuse of alcohol. (64 RT 12635.) Genetic predisposition also contributed to appellant's alcoholism. (RT 12618.)

8. Alcohol Promotes Poor Judgment And Impulsiveness

Alcohol abuse impairs a person's judgment and ability to control impulses. Due to his alcohol abuse, appellant sometimes was prone to act impulsively without considering the consequences of his actions. (64 RT 12653.)

9. Positive Performance In School

Appellant attempted to build a positive life structure for himself and was compliant and responsible in childhood and adolescence (other than with alcohol). (64 RT 12620-21.) Appellant adjusted well in school and his grades were good. He finished secondary school in Mexico at age 15 and then went into a special two-year experimental program for continuing education in a technical school. He took courses such as computer science and statistics. These were high level courses and he did well in them. However, he had to

drop out because many of the books were in English and he couldn't understand them. (64 RT 12620-22.) He ultimately ended up working in the fields. (64 RT 12622.)

10. Appellant Strived To Provide For His Family And Mother

Appellant was responsible for supporting his family. He worked seasonally when work was available; he provided for his own family and also supported his mother. About 18 months before his mother died, appellant was sending $50 a month to help her. (64 RT 12624.)

11. Willingness To Help Others

Appellant demonstrated a pattern of unselfishness and considerate behavior towards others throughout his life. (64 RT 12624.) For example, appellant fixed cars for other people without pay and gave other people rides when they needed transportation. (64 RT 12624-25.)

For a couple of years, appellant engaged in coyote behavior, by bringing people from Mexico into the United States. But this wasn't a business in which he was trying to make money. He did it for family and friends. (64 RT 12625.)

The penalty phase witnesses consistently described appellant as a caring, thoughtful person who went out of his way to help others, and who was not aggressive or violent. (64 RT 12630-31; see also 63 RT 12402-03; 12407-08; 12412-13; 12426; 12430-31.)

12. Absence Of Antisocial Personality Or Psychopath Diagnoses

In his interviews with appellant, Dr. Reidy noted that appellant didn't display any mental health problems other than alcohol abuse and related behaviors. (64 RT 12625.)

He did not have antisocial personality disorder; there was no childhood or adolescent conduct which satisfied the criteria for such a disorder. (64 RT

12625-27; see also 64 RT 12629-30 [no psychiatric history other than alcohol abuse].)[338] Nor was he a psychopath. (64 RT 12627-29.)

13. Expression Of Remorse About The Shootings

Appellant expressed great remorse regarding what happened in the present case. When he talked about it, his head was down, he looked very sad, and he talked about being sad. He had trouble eating and sleeping afterwards. He did not come across as a callous, indifferent individual. (64 RT 12630; see also 2 SCT 355 [appellant wanted to turn himself in (excluded hearsay)]; 2 SCT 359 [appellant's "eyes welled up with tears" when discussing the shootings (excluded hearsay)].)[339]

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[338] Appellant also was able to express sympathy, remorse, and sorrow, which was not consistent with such a diagnosis. (64 RT 12630.)

[339] Appellant contends in Claim 68 that the hearsay statements should not have been excluded.

CLAIM 58: GUILT-PENALTY PHASE RECESS ERROR

CLAIM 58

THE JURORS WERE IMPROPERLY ALLOWED TO MAKE UP THEIR MINDS AS TO PENALTY BEFORE HEARING THE EVIDENCE, ARGUMENTS AND INSTRUCTIONS

A. The Judge's Admonition Permitted Premature Consideration By Implication

During the guilt trial the jury was repeatedly admonished not to "form or express any opinion" on the case until the matter is finally submitted to you." (e.g., 37 RT 7240.) However, after the guilt verdicts were returned on September 8, 1998, this restriction was dropped.[340] Notwithstanding the danger that jurors would prematurely form opinions about penalty; the jurors were not warned against forming opinions as to penalty before commencement of the penalty deliberations.[341]

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[340] Empirical studies of actual capital jurors have demonstrated a strong tendency for such premature consideration; thus such an explicit warning was all the more necessary. (See W. Bowers et al, *How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System*, 83 Cornell L. Rev. 1476 (1998) ["interviews with 916 capital jurors in eleven states reveal, however, that many jurors reached a personal decision concerning punishment before the sentencing stage of the trial"]; Foglia 2003 [same].)

[341] Immediately after receiving the guilt verdicts the judge gave the following explanation and admonition:

> As this jury has deliberated diligently for three days in this case, I don't believe I have been associated with a jury that has worked harder or more responsibly on a case. The foreperson having informed the court that further deliberation on that particular special finding would not be productive, all members of the panel having agreed with that opinion, the court

(continued...)

[341](...continued)

declares a mistrial as to that finding and that finding only. The other verdicts, findings and special findings, will all be recorded. And that completes your service as to the guilt phase of this particular case.

By previous arrangement, should we go to a penalty phase, which we now are going to do, the penalty phase will begin on Monday, September 14th. The panel in just a moment is going to be excused until Monday morning, the 14th of September, at 9:00 o'clock to commence the penalty phase of the trial.

In the interim, I want to congratulate you and to thank you for your diligent service to date, and to point out, obviously, that there is going to be extensive media coverage of your verdict today, and possibly other aspects of the case. It's now more important than ever that you not monitor the media. If anyone were to ask you any questions about your jury deliberations, you are instructed to ignore any inquiries and to not answer any questions that anybody puts to you concerning any aspect of your deliberations, your past deliberations or your future deliberations. You're to have no contact or no discussion with anyone concerning this case until it is finally completed. I'll have further instructions for you at that point.

But should anybody ask, you are to not have any comment, and of course, you're not to discuss the case yet with family members, friends, counsel, or anyone. That means everyone and anyone, no discussions of any kind.

Please keep to the admonition and continue keeping to the admonition not to visit the crime scene or to attempt to gather any outside information about the case of any kind. In no way are you to seek outside information either on the law or on the facts.

So for now, the jury is excused with the thanks of the Court for a very, I know, difficult and demanding three weeks of hard work. You are free to leave. Have a pleasant week. We'll see you 9:00 o'clock sharp, Monday morning, September 14th, to begin the penalty phase of the trial. You're now

(continued...)

Thus, the admonition allowed the jurors to think about the penalty question and to form opinions about it. This was a reasonable interpretation of the admonition, since the prohibition against forming opinions was included in the guilt phase admonition but not in the penalty phase admonition.[342] Hence, the jurors had a six day period between the guilt and penalty trials during which they could form opinions about appellant's penalty.

Moreover, even after the penalty trial commenced the judge continued to omit any admonition that the jurors were not to form or express opinions about penalty. (59 RT 11615-13444.)

B. Allowing Premature Consideration Of Penalty Violated The State And Federal Constitutions

The denial of a fair and impartial jury at the penalty phase of a capital trial violates the defendant's federal constitutional rights (6th, 8th and 14th Amendments) to due process, fair trial by jury and verdict reliability. (See *Monge v. California* (1989) 524 U.S. 721, 731-32; see also Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51, incorporated herein.)

A juror's premature formulation of an opinion may skew the trial in favor of death over life. (See Bowers et al, *supra*; Foglia, *supra*; Haney, *Death by Design*.) Such skewing violates the defendant's constitutional rights to trial by jury and due process. (Calif. Const., Article I, sections 7 and 15; U.S. Const. 6th and 14th Amendments.) (See *Winebrenner v. United States* (8th

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[341](...continued)
excused. (56 RT 11048-49.)

[342] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See Claim 18 § C, p. 259, fn. 231, incorporated herein.

Cir. 1945) 147 F.2d 322, 328; *Herring v. New York* (1975) 422 U.S. 853, 858.) This problem is all the more acute when the juror expresses his or her opinion. (See *People v. Purvis* (1963) 60 Cal.2d 323, 340, fn. 14 ["The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man . . ."]; see also *Delaney v. United States* (1st Cir. 1952) 199 F.2d 107, 113; *People v. Brown* (1976) 61 Cal.App.3d 476 [expression of an opinion as to the guilt of the defendant before hearing all of the evidence was prejudicial misconduct].)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[343] The judge's

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[343] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 (continued...)

erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. The Error Was Structural

Because the error fundamentally undermined the fairness and reliability of the penalty trial it should be reversible per se as structural error. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism which defy analysis by "harmless-error" standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

D. Alternatively, The Prosecution Cannot Meet Its Burden Of Demonstrating Beyond A Reasonable Doubt That The Error Was Harmless

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Claim 59 § G(1), pp.548-50, incorporated herein.) Respondent cannot do so. The error was substantial and the penalty deliberations were closely balanced, thus, the prosecution cannot meet its burden of demonstrating that the error

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[343](...continued)
Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

was harmless.[344]

The premature consideration of penalty was especially prejudicial to appellant because the jurors did not hear his mitigating evidence until the latter portion of the penalty trial. The circumstances of the offenses, upon which the prosecution relied heavily in arguing for aggravation at the penalty trial (see Guilt Phase: Statement Of Facts §H(1), pp.46-47[overview of penalty facts] incorporated herein), were known to the jurors before the penalty trial commenced and emphasized during presentation of evidence by the prosecution at penalty. However, it was not until the defense began presenting its penalty evidence that the jurors heard most of the mitigating evidence, including evidence of appellant's redeeming qualities and his traumatic childhood. (See Penalty Phase: Statement Of Facts § C, pp. 521-29, incorporated herein.) Particularly, in a case such as the present one – in which the defendant had no history of felony convictions or criminal violence – the failure to balance aggravation and mitigation before deciding penalty was improper and one-sided. Premature decision-making, – without consideration of such critical mitigating evidence – was extremely prejudicial to appellant because he did not have impartial and open-minded jurors at his penalty trial.[345]

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[344] See Claim 17 § C, p. 252, incorporated herein [any substantial error at penalty should be considered prejudicial because the penalty evidence was closely balanced].)

[345] The jury must be fair and impartial at both the guilt and penalty phases of the trial. (See *People v. Cash* (2002) 28 Cal.4th 703; *People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Sanchez* (1995) 12 Cal.4th 1, 62; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1083-87.) The Sixth and Fourteenth Amendment requirement that a defendant be tried by a fair and impartial jury dictates that a capital jury be comprised of members who will *not*

(continued...)

Moreover, the jury instructions did not preclude the jury from putting the burden on appellant during the penalty deliberations. (See Claim 81, pp.650-52 and Claim 88 §C(2), pp. 697-99, incorporated herein.)

In sum, the death judgment should be reversed.

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[345](...continued)
automatically vote for the death penalty, but will fairly and genuinely consider the mitigating evidence presented. (*Morgan* v. *Illinois* (1992) 504 U.S. 719; accord, *Ross* v. *Oklahoma* (1988) 487 U.S. 81, 85.) This same requirement similarly mandates that jury members hold no biases or prejudices which would automatically work against the defendant. "A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.]" (*People* v. *Nessler* (1997) 16 Cal.4th 561, 578; see also, *Glasser* v. *United States* (1942) 315 U.S. 60 and former Code of Civ. Pro. §§ 601 & 602; Pen. Code §§ 1073 & 1074.) Such biases or prejudices may be actual or implied. (Code of Civ. Pro. §§ 601 and 602; former Pen. Code §§ 1073 and 1074.)

CLAIMS 59-66: AGGRAVATION ERRORS

CLAIM 59

THE PROSECUTION'S "AUDIO-VIDEO SLINGSHOT" – WHICH UNDULY EMPHASIZED THE MOST INFLAMMATORY ASPECTS OF THE CASE – SHOULD HAVE BEEN EXCLUDED

A. Introduction

During the penalty phase, after extensive victim impact testimony from the victims' surviving family members, the prosecutor played a video on a "rather gigantic screen" for the jurors as part of her closing argument. (67 RT 13202.)[346] It was an audio/visual compilation of pieces of evidence and demonstrative aids previously shown to the jury during the guilt trial and penalty trials.

This "audio-video slingshot" included an audio track of the 911 call as well as gruesome pictures of the victims' wounds, photographs of the Morales' smiling infant daughter, images of the infant's wounds and her bloody baby clothing, a picture of Ramon and Martha Morales together before the incident and a shot of their marriage certificate.

Pictures of two rifles – one a .30/.30 and the other an AR-15 – and gruesome mannequins, dressed in the victims' bloody clothes with rods protruding from the numerous bullet holes, also appeared in the video. Neither the rifles, nor the mannequins – which were used for demonstration purposes during the testimony – were formally admitted into evidence. In fact, the rifles pictured in the video were not the actual ones used in the crime. (73 RT

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[346] Though not formally admitted into evidence, the video became Court Exhibit 5. (See 2 SCT 314; 325.)

14411-14412.)[347]

Appellant's videotaped statement (see Claim 10 §B(2)(b)(i), pp. 144, incorporated herein) was also shown in the prosecutor's video. It was not translated from Spanish into English. Thus, his statement that he had no intent to rob or harm the victims was not conveyed by the video.

The prosecutor characterized the contents of the video as "items of evidence." (67 RT 13203.) The defense objected to the use of the video as inflammatory and geared to arouse the anger and passions of the jury. (67 RT 13202.)

The trial judge viewed the video and described the presentation as "theatrical to some degree." (67 RT 13203.) However, the judge allowed the video because it included items which had been admitted into evidence. (67 RT 13203.)

B. The Trial Judge Has Discretion To Control The Content Of Closing Argument

This Court has recognized that there are limits to emotional evidence and argument in the penalty phase of a capital case. (*People v. Robinson* (2005) 37 Cal.4th 592, 651; see also generally *People v. Corrigan* (1957) 48 Cal.2d 551, 559 ["it is the right and the duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence."]; Penal Code § 1044.) The Court emphasized that (1) "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason," and that (2) although a court should "allow evidence and argument on emotional though relevant subjects

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[347] Appellant objected at trial when the prosecutor attempted to have a witness identify the demonstration rifles. (41 RT 8009-8010.)

that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction, still, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." [Internal citations and quotation marks omitted.] (*People v. Robinson*, *supra*, 37 Cal.4th at pp. 651-652.)

Furthermore, during the penalty phase of a capital case, "the trial court retains a limited discretion to exclude unduly inflammatory evidence." (*People v. Michaels* (2002) 28 Cal.4th 486, 534.) While the trial court cannot exclude *all* evidence of the circumstances of the crime under factor (a) of Penal Code § 190.3, "It retains, however, its traditional discretion to exclude particular items of evidence by which the prosecution seeks to demonstrate either the circumstances of the crime (factor (a)), or violent criminal activity (factor (b)), in a manner that is misleading, cumulative, or unduly inflammatory." [Internal citations and quotation marks omitted.] (*Id.* at pp. 534-535.)

Here, the trial judge acknowledged that the video was "theatrical to some degree" but merely found that "the People are entitled to summarize the evidence and confront the jury with the evidence. All of these items could be brought up one at a time and played or presented to the jury, so I see no reason why the tape, as it has been composed, cannot be utilized in penalty-phase argument." (67 RT 13203.)

Thus, the trial judge did not exercise his discretion or fulfill his duty to restrict closing argument to relevant non-prejudicial matters because he assumed the prosecution was entitled to summarize the evidence in an audio-video presentation as long as the individual items portrayed in the video were in evidence. This failure of the judge to exercise his discretion was error. (See *People v. Ford* (1964) 60 Cal.2d 772, 801 [Failure of trial court to weigh the

probative value in relation to the prejudicial effect: "Misapprehension of the law in this respect appears to be indicated by rulings on several of the challenged photographs: As to one (Ex. 23) the court recognized that 'it might tend to be prejudicial' but nevertheless ruled that 'as long as it is material and shows the deceased after the incident, *it is material and will go in on that basis*'; as to another (Ex. 24) the court reiterated, 'Different angle, it is material; *as long as it is material it can go in.*' (Italics added.)"].)

Moreover, had the judge properly exercised his discretion the video would have been excluded because it prejudicially dramatized the prosecution's evidence and non-evidentiary demonstration aids allowing those items to dominate the other evidence. As the following demonstrates, the visual imagery itself was cumulative, provided undue emphasis and lent the video contents unsubstantiated credibility.[348]

C. While The Dramatic Impact Of Visual Media Is Recognized As Potentially Prejudicial, The Trial Court Erroneously Failed To Consider That Factor

It has long been recognized that jurors are impressionable when it

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[348] See e.g., *Roll Tape – Admissibility of Videotape Evidence in the Courtroom*, 26 U. Mem. L. Rev. 1445, 1478-1479 (1996) ["[C]onsider the presentation of the demonstrative videotape evidence. By putting a reenactment or a test on videotape, the presentation alone may overemphasize the importance of the evidence. Some researchers suggest that placing evidence on videotape and showing it to a jury could heighten the evidence's credibility and possibly make it more persuasive."

Moreover, even "The physical alteration of the courtroom, the interruption of the routine presentation of evidence, and jurors' increased anticipation of something different could suggest to the jury that greater significance should be attributed to the evidence. Compare that activity with the mere passing of a photograph from juror to juror." (26 U. Mem. L. Rev. at p. 1463 [citations omitted]).]

comes to motion picture reenactments at trial.[349] In *People v. Dabb* (1948) 32 Cal.2d 491, 498, this Court noted that, "A motion picture of the artificial recreation of an event may unduly accentuate certain phases of the happening, and because of the forceful impression made upon the minds of the jurors by this kind of evidence, it should be received with caution. As pointed out by Wigmore, such a portrayal of an event is apt to cause a person to forget that 'it is merely what certain witnesses say was the thing that happened' and may 'impress the jury with the convincing impartiality of Nature herself.' (3 Wigmore, *Evidence* [3d ed.], § 798a, p. 203.)"

Similarly, the admission of video footage of crime scenes is subject to challenge if deemed unduly prejudicial. In *People v. Sims* (1993) 5 Cal.4th 405, the trial court allowed a video showing the removal of the victim's body from the bathtub. The defense objected, arguing the video was unduly prejudicial and cumulative of other photographic evidence. Although ultimately concluding the trial court did not abuse its discretion in *Sims*, this Court stated, "We observe, however, that in other circumstances, a videotape may present a far more graphic, gruesome, and potentially prejudicial depiction than static photographs and thus, under such circumstances, should be excluded from evidence." (*Ibid.*)

"Day in the Life" videos are another area in which the power of media presentations calls for caution. The admissibility of such videos showing how an injury has affected the daily life of the victim has been questioned. In

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[349] See *Persley v. N.J. Transit Bus Operations* (App. Div. 2003) 357 N.J. Super. 1, 14-15 ["Notably, the danger of undue prejudice as a result of the jury's placing inordinate weight on a motion picture is always present due to the tremendous dramatic impact of motion pictures and the fact that the presentation of a motion picture is generally cumulative to the testimony of the expert who oversaw its production."]

Bolstridge v. Central Maine Power Co. (D. Me.1985) 621 F.Supp.1202, the court explained,

> Almost always an edited tape necessarily raises issues as to every sequence portrayed of whether the event shown is fairly representational of fact, after the editing process, and whether it is unduly prejudicial because of the manner of presentation. Further, the fact that a plaintiff is aware of being videotaped for such a purpose is likely to cause self-serving behavior, consciously or otherwise. Next, use of a videotape for such purposes is troublesome because it dominates evidence more conventionally adduced simply because of the nature of its presentation. "The very obvious impact of these films would have been to create a sympathy for the plaintiff out of proportion to the real relevancy of the evidence." Finally, such a videotape may serve to distract the jury from other cogent issues which properly must be considered to produce a fair verdict conscientiously derived from an impartial consideration of the evidence with strict attention to applicable principles of law.

(*Id.* at pp. 1203-1204, citations omitted.)

Thus, the potentially prejudicial impact of motion pictures on the jury is not a novel concept. Nonetheless the judge in the present case – apparently believing that the prosecution had carte blanche to summarize the evidence however it chose – failed to evaluate the unduly prejudicial impact of the media presentation itself.

D. The "Audio-Video Slingshot" Improperly Appealed Primarily To The Jury's Passion And Prejudice

"[C]ounsel may not use arguments calculated to mislead the jury or that appeal primarily to passion or prejudice." (*People v. Love* (1961) 56 Cal.2d 720, 730-731 [citations omitted].) "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) "Defense

counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823.) "A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (*Ibid.*, citing *People v. Purvis* (1963) 60 Cal.2d 323, 343.) "The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such, it does, and it should, carry great weight. It must, therefore, be reasonably objective." (*People v. Talle, supra,* 111 Cal.App.2d 650, 677.)

The "audio-video slingshot" used by the prosecution here was not reasonably objective. On the contrary, it was geared to inflame the passion and prejudice of the jury based on the images and themes selected. Not only was the method of delivery suspect, the content was as well. Both operated in tandem to prejudice the jury. The video compilation over-emphasized some of the evidence while impliedly discrediting the rest and presenting hypotheses as fact. The prosecution chose which images to include based on their pathos – such as the photos of the smiling child. The DA determined the sequence of those images. Similarly, the prosecution coordinated the timing of the 911 audio track for greatest dramatic effect. The surviving infant victim was shown more than once. The prosecutor played the film on a large screen. (67 RT 13202.) Included in the film was a clip of appellant's video statement in Spanish only. And, as established earlier, it used a medium particularly

influential to the modern jury.[350] In short, it gave the evidence a meaning the use of still photographs or verbal argument could never have achieved.[351] This selective portrayal of the evidence and demonstrative aids not only unduly emphasized those items most likely to inflame the jury, it mischaracterized the role appellant played in the crime. The prosecution didn't even allege that appellant ever fired either the .30/.30 or the semi-automatic rifle, yet the video included menacing views of such weapons and numerous graphic images of the wounds they inflicted. Thus, the value to the prosecution of the gruesome video of the wounds was in its suggestion that appellant was the one who directly inflicted them, when that fact had not been proved by evidence.

Furthermore, the video was not a fair representation of the evidence because it showed appellant giving his video statement in Spanish. By showing but not translating appellant's statements in the closing argument video, the prosecutor avoided repetition of key exculpatory details – such as appellant's statements demonstrating he lacked the intent to rob or hurt the Morales – but still retained the visual impact of appellant admitting that he was involved.

Apart from the dramatic manner in which the evidence was re-

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[350] "Jurors' most frequent encounters with packaged visual information occurs through television and movies. Experts describe television viewing as a passive activity because of the lack of opportunity for viewer participation. Dr. Stanley Baran explains in *The Viewer's Television Book* that individuals typically are critical and analytical with regard to their interpersonal communications by questioning the motives and meanings of what others say. These individuals fail to apply the same analysis to watching television. Instead, 'we routinely accept [television's] communication without question.' ."(26 U. Mem. L. Rev. at p. 1448-1449.[citations omitted])

[351] See e.g., Jessica M. Silbey, Suffolk University Law School Faculty Publications: *Judges as Film Critics: New Approaches to Filmic Evidence* (2004) at p. 539 ["The case law's analogy of photographs to moving pictures is inapt."]

packaged, the very fact that it was compiled and presented by the prosecutor – weighted as she was with the prestige of a government officer – lent it undue credibility. (*People v. Talle, supra,* 111 Cal.App.2d 650, 677.) While this video was not substantive evidence, its selective emphasis and dramatic imagery suggested the jury would treat it as such.

Thus, the theatrical video, imbued with a false sense of credibility, distorted the evidence while simultaneously increasing its force for jurors. The trial judge erred by allowing the prosecution to use an item so calculated to play upon the jurors' passions rather than their reason in making their life or death decision.

E. The Trial Court Erroneously Allowed Inflammatory Items Not Admitted Into Evidence To Be Included In The Prosecution's Video Montage

The trial judge further erred by allowing the prosecution to include images of items not in evidence in the closing argument video. "Counsel's summation may be based on matters in evidence or subject to judicial notice. It may also refer to matters of common knowledge or illustrations drawn from experience, history, or literature." (*People v. Farmer* (1989) 47 Cal.3d 888, overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, footnote 6.) "He may not, however, under the guise of argument, assert as facts matters not in evidence or excluded because inadmissible." (*People v. Love, supra,* 56 Cal.2d 720, 730-731 [citations omitted].)

"Weapons or other articles which might have been used in the commission of a crime are inadmissible in the absence of a showing the weapon or article was in the possession of the defendant. [Citations.]" (*People v. Nelson* (1976) 63 Cal.App.3d 11, 23-24.) In *Nelson*, the court concluded that "It was also error for the prosecution to use, display and offer into

evidence the borrowed dry-wall hammer, and for the court to receive it." (*Id.* at p. 23.) This was so "even though the jury was informed of the source of the hammer." (*Id.* at p. 24.) Likewise, here, it was error for the prosecution to display in the video assault rifles not connected to the crime or shown to have been in the appellant's possession.

The rifles and the mannequins appearing in the video were demonstrative aids used merely to illustrate testimony during the guilt trial.[352] These items were never formally admitted into evidence. Moreover, the prosecution was not even required to specifically establish that the contents of the video were a fair representation of the items it depicted. The prosecutor simply gave the trial court a list of the pieces of "evidence" included in the video. (67 RT 13203; 3 SCT 880-81.)

In sum, under the guise of argument, the "audio-video slingshot" improperly elevated those demonstrative aids to the level of evidence. And, the jury was likely to give undue emphasis to such evidence based on the dramatic method of delivery.

F. The Error Violated State Law And The Federal Constitution

The prosecutor's improper argument to the jury via the video deprived

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[352] Over defense objection (see 41 RT 8009-10), the rifles were shown to witness Jose Luis Ramirez who said that the .30/.30 looked similar to the rifle Joaquin Nuñez had (41 RT 8010) and that the AR-15 looked "a little bit like" the weapon Antonio Sanchez had. (41 RT 8010-11.)

The mannequins , with protruding rods showing the path of the bullets and dressed in the victims' bloody clothing, were originally used as demonstrative aids during the testimony of crime scene investigator Daniel Lewtshuk, who identified the bloody clothing on the mannequins and Dr. Hain who also identified the bloody clothing and described the rods which had been put in the mannequins to show the approximate trajectory of the bullets. (48 RT 9401-11; 9440.) However, the mannequins were not admitted into evidence. (48 RT 9456-57.)

appellant of his rights to due process of law, a fair trial, trial by jury, confrontation and cross-examination, presentation of a defense, effective assistance of counsel, equal protection, and reliable guilt and penalty phase verdicts in a capital case, guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and under the California Constitution, article I, §§7, 15, and 17. (See generally *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.) And specifically, appellant's right to trial by an impartial jury was taken away because the prosecutor's misconduct negatively affected the ability of the jurors to remain neutral. (*People v. Chapman* (1993) 15 Cal.App.4th 136.)

Due process also entitles a criminal defendant to a trial that conforms with the rules of the jurisdiction in which he is tried. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) And due process and the heightened reliability required for capital judgments are violated when a jury reaches a judgment of death based upon unreliable evidence. (See *Furman v. Georgia* (1972) 408 U.S. 238.)

Moreover, the prejudicial impact of the video presented an unacceptable risk that the jury's decision to impose a death sentence was based on emotion rather than reason, and violated the Eighth Amendment requirement of reliability and lack of arbitrariness in capital sentencing and the Fourteenth Amendment requirement of due process. For that reason, as well, the death judgment may not stand. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Gardner v. Florida* (1977) 430 U.S. 349; *Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Mills v. Maryland, supra,* 486 U.S. at p. 377; *Zant v. Stephens, supra,* 462 U.S. at p. 879; *Beck v. Alabama, supra,* 447 U.S. 625; *Woodson v. North Carolina, supra,* 428 U.S. 280.)

G. The Error Was Prejudicial

1. Standard Of Prejudice

The test for prejudice from federal constitutional errors is familiar: reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at 24; see generally *Yates v. Evatt* (1991) 500 U.S. 391, 402-406.) "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at 279.)

In the capital penalty context, the *Chapman* standard for harmlessness can only be met if the State can show no reasonable juror could have struck a different balance between aggravating and mitigating factors without the error; i.e., there is no reasonable possibility that the error would have had any effect on the penalty decision-making of the jurors. (See, e.g., *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *State v. Lee* (La. 1988) 524 So.2d 1176, 1191-1192.) As noted above, *Chapman* requires an inquiry into whether there is a reasonable possibility the jury's actual verdict was affected by the error; *Chapman* does not permit inquiry into what an appellate court might believe a hypothetical jury, unaffected by the error, would have done. (*Sullivan v. Louisiana, supra*, 508 U.S. at 279-281; *Satterwhite v. Texas, supra*, 486 U.S. at 258-259.)

Moreover, the penalty determination is a personal and moral one, and it is exceedingly difficult to determine what factors might affect individual jurors in that personal decision. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044; *State v. Hightower* (1996) 146 N.J. 239 [680 A.2d 649, 662];

see *Clemons v. Mississippi* (1990) 494 U.S. 738, 754 [recognizing that harmless-error analysis of capital penalty error will in some cases be "extremely speculative or impossible"]; *Caldwell v. Mississippi*, *supra*, 472 U.S. at 330 [intangibles considered by jury in capital jury sentencing are rarely discernible from appellate record].) As a result, any error that could have an effect on a rational juror's penalty determination – keeping in mind the very broad and subjective nature of that determination – will almost certainly be prejudicial under *Chapman*, due to the difficulty of demonstrating that there is no reasonable possibility that the error did not affect even a single juror's highly normative penalty determination. (*Ibid.*)

Further, in capital proceedings, harmless-error review must include the requirement of heightened reliability. (*People v. Horton* (1995) 11 Cal.4th 1068, 1134-35 [citing *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) Thus, all bona fide doubts should be resolved in favor of the accused because "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Balfour v. State* (Miss. 1992) 598 So.2d 731, 739.)

In applying the state standard of prejudice, this Court has observed that the jurors' penalty decision is "normative and moral" (see *People v. Holt* (1997) 15 Cal.4th 619, 684), and is "inherently subjective" (see *People v. Lucas* (1995) 12 Cal.4th 415, 494), meaning any substantial error may be prejudicial. (See e.g., *People v. Robertson* (1982) 33 Cal.3d 21, 54 ["any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial."].) Therefore, under California law, the error is reviewed under the "reasonable possibility" standard. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Under this standard, the court ". . . must ascertain how a hypothetical 'reasonable juror' would have . . . been affected"

by the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 984.) This test has been held to be "the same in substance and effect" as the [*Chapman*] harmless beyond a "reasonable doubt" test applied to federal constitutional error. (*Id.* at 990.)

2. The Penalty Trial Was Closely Balanced

The prosecution relied primarily upon the circumstances of the offense and victim impact evidence to argue for imposition of the death penalty. Furthermore, the prosecutor implied that appellant knowingly and intentionally participated in the crimes.[353]

On the other hand, the trial record, as well as the assessment of three judges familiar with the case, contradicted the prosecution's theory that appellant was a cold blooded killer who knowingly and willfully conspired to rob and murder the victims.

As observed by Judge Moody, there was "an inexplicable disconnect between the evidence of the defendant's character and the enormity and monstrosity of the crimes committed." (72 RT 14217.) And, Judge Moody's assessment was consistent with the evaluation of Judges Price and Phillips who both "felt strongly" that a life without parole sentence would be a "fair and prudent disposition of this case." (2 SCT 316.)

These judicial assessments were corroborated by the evidence. Testimony of the guilt phase indicated that it would have been out of character for him to knowingly commit the crimes with which he was charged. (See 44 RT 8711-13 [appellant was a "nice guy"]; 43 RT 8429; 8447 [when intoxicated, appellant was "very happy, a dancer"].) Moreover, the penalty

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[353] See e.g., 53 RT 10417 [DA argues that "This man doesn't live by the same morals, the same societal rules that the rest of us have."]

trial witnesses provided additional evidence of appellant's non-violent character as well as his warmth, kindness and generosity. (See 63 RT 12402-03; 12407-08; 12412-13; 12426; 12430-31; 64 RT 12630-31.)

There were also numerous other mitigating factors which could have, individually and cumulatively, justified a life verdict. These factors included appellant's traumatic childhood, his positive family relationships, his good performance in school, his willingness to help others, his lack of any prior felony convictions, the absence of an "ingrained pattern of predatory violence," and his expressions of remorse. (See 64 RT 12622-24.)

Furthermore, at least some of the jurors believed the defense theory that appellant did not know that anything bad was going to happen to the victims and that he did not personally use either a knife or a handgun as alleged by the prosecution. (See Statement Of Case §C, pp.11-12, incorporated herein [jurors' failure to return special allegations alleged by the prosecution].) By rejecting the use of a knife enhancement and failing to return special verdicts alleging that appellant used a firearm and conspired to commit the murders, the jurors credited the defense theory that appellant would not have willfully committed the alleged crimes. (See Claim 10 § B(2), pp. 141-46, incorporated herein [evidence that appellant did not intend to rob or murder the victims].) Indeed, the prosecutor acknowledged that some jurors may have accepted the defense theories of the evidence. (67 RT 13229-32.)

Finally, it is noteworthy that the jurors' inquired about the consequences of a hung jury as to penalty. This further indicates that the penalty decision was not open and shut despite page after page of highly charged victim impact testimony, as well as inflammatory physical evidence and the emotional "audio-video slingshot" used by the prosecutor during argument to emphasize that inflammatory evidence.

In sum, the penalty phase decision can fairly be described as "closely balanced."

3. The Error Was Prejudicial

The dramatic nature of the video medium and its unquestioned acceptance by the general population give reason to conclude that the jurors were moved by the "audio-video slingshot." (See *Bolstridge v. Central Maine Power Co., supra,* 621 F.Supp.1202, 1203 ["use of a videotape for such purposes is troublesome because it dominates evidence more conventionally adduced simply because of the nature of its presentation."] Also, because the video tape was part of the prosecution's closing, it would have had a dramatic effect on jurors' memory and recall.

Finally, the prosecution presented extensive emotionally powerful victim impact evidence. (See Guilt Phase: Statement Of Facts § H(1), pp.46-47[overview of penalty facts], incorporated herein.) Because the video montage played on and unduly emphasized the victim impact testimony it was especially prejudicial.

In sum, because the penalty trial was closely balanced, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-51, incorporated herein.)

H. Even If The Audio-Video Slingshot Was Properly Allowed, The Judge Erroneously Refused The Defense Requested Instruction Which Could Have Limited It's Prejudicial Impact

Even if allowing the "audio-video slingshot" was not error, it cannot be denied that it emphasized the most emotionally charged aspects of the case. Under these circumstances it was especially important to caution the jurors to temper such emotion. Thus, the defense requested an instruction admonishing the jurors to fulfill their "proper role" of "soberly and rationally" deliberating

on penalty. (3 SCT 874; see also Claim 60, pp. 554-61, incorporated herein.) Denial of this instruction was reversible error because there was no other instruction which limited the prejudicial impact of the "audio-video slingshot."

CLAIM 60

THE JUDGE ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT AND "AUDIO-VIDEO SLINGSHOT" EVIDENCE

A. Factual And Procedural Background

The prosecution presented extensive, highly inflammatory victim impact evidence as well as a theatrical audio-video slingshot that highlighted some of the victim impact evidence. (See Claim 59, pp. 537-53, incorporated herein.) Accordingly, in his proposed penalty jury instructions, defense counsel requested the following instruction which would have limited the inflammatory impact of such evidence:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention away from your proper role of deciding whether the defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction of death as the result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy. (3 SCT 874.)

However, the trial court refused this instruction and gave no other cautionary instruction on victim impact evidence. (66 RT 13015-16.)

B. The Court Erred In Failing To Instruct The Jury On The Proper Use Of Emotionally Charged Evidence

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues

raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman, supra*, 19 Cal.4th at 154.)

In this case, the trial court breached its instructional obligation by denying appellant's proposed jury instruction on victim-impact evidence and by failing to instruct the jury on the proper use of victim-impact evidence.

Given the highly inflammatory nature of the crime itself, there was a very real danger that emotions engendered by the victim-impact evidence would preclude the jury from making a rational penalty decision unless the trial court provided some guidance on how the victim-impact evidence should be used and considered. This was especially true in light of the prosecutor's emphasis of the victim impact in argument and during the theatrical video shown to the jury. (See e.g., 67 RT 13211; 13217; 13242-43.) Therefore, an appropriate limiting instruction was necessary for the jury's proper understanding of the case, and it should have been given (as requested by appellant) or on the court's own motion. (See generally *People v. Koontz*, *supra*, 27 Cal.4th at 1085; *People v. Breverman*, *supra*, 19 Cal.4th at 154; *People v. Murtishaw*, *supra*, 48 Cal.3d at 1022.)

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "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 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee, and Georgia have held that, in every case in which victim-impact evidence is introduced, the trial court must instruct the 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 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at 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 upon 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 decision on emotion or the consideration of improper factors.[354]

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[354] For example:

> 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 appropriate punishment to be imposed.

(continued...)

This Court addressed a limiting instruction like the one requested by appellant in *People v. Ochoa, supra,* 26 Cal.4th at 455, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC 8.84.1. However, appellant respectively disagrees that CALJIC 8.84.1 covers the same concerns addressed in the proposed instruction.

True, CALJIC 8.84.1 as given in the present case[355] does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings." (6 CT 1180; 68 RT 13446.) However, the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim-impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor

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[354](...continued)

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 159. The last sentence is based on *State v. Koskovich, supra*, 776 A.2d at 177.

[355] The jurors were instructed:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict. (6 CT 1180.)

would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private feelings and emotions of the victim's relatives.

Moreover, even if CALJIC 8.84.1 was adequate in the circumstances of the *Ochoa* case, it was not adequate in the present case due to the added emotion kindled by the "audio-video slingshot" which gave undue emphasis to the victim impact evidence.

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 by the defense here would have conveyed that message to the jury; none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion from tainting the jury's decision. Thus, 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., 6th, 8th & 14th Amends.; Cal. Const., Article I, sections 7, 15, and 17.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by

due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[356] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. The Error Was Prejudicial

The violations of appellant's federal constitutional rights require reversal unless the state can show that they were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 381 U.S. 18, 24.) The violations of appellant's comparable or equivalent state rights also require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown, supra,* 46 Cal.3d at 447-448.) In *Brown*, the Court stressed the applicability of a more exacting standard of review when assessing the prejudicial effect of state-law errors at the penalty phase of a capital trial.

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[356] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

(*People v. Brown, supra*, 46 Cal.3d at 447; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 983-84.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. (See also Claim 10 § H(3), p. 158 and Claim 59 § G, pp. 548-51, incorporated herein.)

In *People v. Ashmus, supra*, 54 Cal.3d at pp. 983-984, the Court again invoked *Brown,* explaining that to apply the standard required the reviewing court to reverse based on even the possibility that a hypothetical juror might have reached a different decision absent the error. "We must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*Id.* at 983-984.) For the reasons discussed above in *Ashmus*, where the Court equated the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard (*ibid.*), and additionally in view of the purely emotional nature of the victim-impact evidence presented in this case, as well as the prosecutor's effective use of that evidence during her closing argument, the trial court's instructional error alternatively cannot be considered harmless under *Brown*, and therefore the death judgment should be reversed.

Moreover, the evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29

[discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the failure to adequately caution the jurors regarding the highly prejudicial "audio-video slingshot" was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp.548-51, incorporated herein.)

CLAIM 61

THE JURORS WERE IMPROPERLY ALLOWED TO CONSIDER FACTUAL ALLEGATIONS AS PENALTY AGGRAVATION WHICH WERE AGGRAVATING FACTS REJECTED BY ONE OR MORE JURORS AT THE GUILT TRIAL

The jurors failed to return three of the special verdict allegations at the guilt trial: (1) The allegation that appellant used a knife was rejected by all twelve jurors; (2) the allegation that appellant used a firearm was rejected by one or more jurors; and (3) the allegation that appellant conspired with intent to commit murder was rejected by one or more jurors. (See Statement Of Case § C, pp.11-12, incorporated herein.) However, the penalty phase instructions erroneously permitted the very jurors who had rejected these allegation at the guilt trial to consider them in aggravation at the penalty trial.

As to the use of a knife allegation – which the jurors unanimously rejected – the jurors should have been instructed not to consider such allegation. (See *People v. Jennings* (1991) 53 Cal.3d 334, 389-90.)

As to the other allegations, upon which the jurors could not agree, the individual jurors who believed that such allegations were proved could consider them. (See *People v. Jennings*, *supra*, 53 Cal.3d at 389, fn. 4; *People v. Caro* (1988) 46 Cal.3rd 1035, 1057.)

On the other hand, it violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to allow jurors who found the allegation not to be proved to consider it in aggravation. (See generally *People v. Jennings*, *supra*, 53 Cal.3d at 389-90; *Wardius v. Oregon* (1973) 412 U.S. 470.) For those jurors, the issue was already litigated in favor of the defense at the guilt trial. Therefore, the prosecution should not have been allowed to relitigate the issue as to those jurors. (Cf., *People v. Miller* (1990) 50 Cal.3d 954, 1005; *Oregon v. Guzek* (2006) 546 U.S. 517, 1121-22; *Allen v. McCurry*

(1980) 449 U.S. 90, 94 ["As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"].)

Moreover, to the extent that such findings constituted an "aggravating factor" necessary for imposition of death, allowing the jurors to relitigate the factor under a lesser standard of proof violated appellant's federal constitutional rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and it's progeny. (See Claim 88 § C(1), pp.686-96, incorporated herein.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[357] The judge's

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[357] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 (continued...)

erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Finally, the error was prejudicial. The error was substantial because it allowed jurors to find at the penalty trial that appellant committed culpable acts – use of a knife and gun – and had a mens rea – intent to kill and murder – which the prosecution had failed to prove at the guilt trial.[358] Therefore, because the penalty phase was closely balanced, the death sentence should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp.548-51, incorporated herein.)

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[357](...continued)
Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

[358] Just because a juror had rejected the allegation at guilt does not mean that they failed to consider it at penalty. Because the penalty instructions did not require that the prosecution's special allegations be proved beyond a reasonable doubt (see Claim 88, pp. 686-96 [lack of standard of proof was constitutional error] incorporated herein), the jurors who had rejected those allegation at the guilt trial were free to "re-think" their position without the need to abide by the presumption of innocence.

CLAIM 62

THE PROSECUTOR IMPROPERLY URGED THE JURORS TO "DETERMINE WHAT OUR COMMUNITY WILL AND WILL NOT TOLERATE"

Even if it was not prejudicial as to the guilt trial, the prosecutor's argument regarding what the "community" should tolerate was prejudicial as to penalty. (See Claim 17, pp. 248-52, incorporated herein.)

The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the prosecutor's misconduct was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIM 63

THE JURORS SHOULD NOT HAVE BEEN PERMITTED TO CONSIDER CONSCIOUSNESS OF GUILT AT THE PENALTY TRIAL

Consciousness of guilt is inapplicable at the penalty phase. (*People v. Rowland* (1992) 4 Cal.4th 238, 281-82.) However, the jurors were allowed to consider the guilt phase instructions on Flight and False Statements at penalty. (See Claim 77, pp. 639-42 [penalty instruction failed to expressly inform jurors as to applicability of guilt phase instructions] incorporated herein.).[359] This error violated the federal constitution (6th, 8th and 14th Amendments) by denying appellant a fair, reliable and non-arbitrary jury determination of penalty. (See generally *Beck v. Alabama* (1980) 447 U.S. 625; *Maynard v. Cartwright* (1988) 486 U.S. 356.) The error was prejudicial under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

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[359] The judge instructed the jurors that guilt instructions regarding the evidence applied to the penalty trial. (6 CT 1179.)

CLAIM 64

THE JUDGE ERRONEOUSLY REJECTED THE DEFENSE REQUEST TO PRECLUDE THE JURORS FROM CONSIDERING APPELLANT'S FAILURE TO TESTIFY IN THEIR PENALTY DELIBERATIONS

At the guilt trial the jurors were instructed not to draw any inferences from the defendant's failure to testify.[360] However, the judge denied appellant's request to renew this instruction at the penalty trial.[361] This was prejudicial error which improperly allowed to consider appellant's failure to testify at the penalty trial. For example, without a limiting instruction, the jurors may consider the failure to testify as indicating lack of remorse. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 635-36 [neither the defendant's failure to confess nor his or her denial of guilt may be relied on as aggravation or to conclude that the defendant did not have remorse]; *People v. Fierro* (1991) 1 Cal.4th 175, 244 [same]; *People v. Coleman* (1969) 71 Cal.2d 1159, 1169 [same].)

Mitchell v. United States (1999) 526 U.S. 314 held that the prosecution may not rely upon the defendant's "rightful silence" at the guilt phase of a trial

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[360] The guilt phase instructions stated: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." (6 CT 1246.)

[361] The defense requested the following instruction:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way. (3 SCT 866.)

in meeting its "burden of proving facts relevant to the crime at the sentencing phase. . . ." (119 S.Ct. at 1316.) Accordingly, at the penalty phase of a capital trial in California, where the aggravating factors must be proved to outweigh the mitigation, the Fifth Amendment privilege against self-incrimination should preclude any adverse inference from the defendant's silence with respect to the weighing process. (See also *Estelle v. Smith* (1981) 451 U.S. 454, 463 ["Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing would clearly contravene the Fifth Amendment"]; see generally *Griffin v. California* (1965) 380 U.S. 609.) As the Supreme Court recognized in *Estelle v. Smith*, there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial as far as the protection of the Fifth Amendment privilege is concerned." (451 U.S. at 462-63; see also *Beathard v. Johnson* (5th Cir. 1999) 177 F.3d 340 [upon request, defendant is entitled to an instruction at the sentencing phase that no adverse inference may be drawn from the defendant's failure to testify].) Accordingly, the jury should not be permitted to make any use of the defendant's failure to testify either at the guilt or the penalty phase in deciding whether aggravation outweighs mitigation and the judge erred in refusing the defense requested instruction.

The error was especially prejudicial in appellant's case because the judge did instruct the jury not to consider appellant's failure to testify in determining guilt. (6 CT 1246.) Thus, the fact that the judge did not give a similar instruction as to penalty necessarily implied to the jurors that the instruction did not apply to the penalty trial and that appellant's failure to

testify could be considered at the penalty phase.[362]

The evidence as to penalty was closely balanced. (See Claim 59 § G(1), pp.548-50, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the judge's failure to adequately caution the jurors regarding appellant's failure to testify was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

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[362] The penalty instructions allowed the jurors to consider certain categories of guilt phase instructions. (6 CT 1179.) However, the failure to testify instruction did not fit in any of those categories.

CLAIM 65

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURORS TO CONSIDER NON-VIOLENT UNCHARGED ACTS AS NON-STATUTORY AGGRAVATION

The record contained evidence that appellant had committed or participated in the non-violent conduct such as vehicular arson (Guilt Phase: Statement Of Facts § B(6), p. 24) as well as bringing illegal aliens across the border, and driving under the influence. (See Penalty Phase: Statement Of Facts § C(7), p.527 and § C(11), p. 528, incorporated herein.) Such crimes did not qualify as Factor (b) aggravation. (See *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013-14 [violence toward property not sufficient for Factor (b)]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-87 [Factor (b) satisfied if statute involved force, violence or the threat of violence in the abstract]; *People v. Grant* (1988) 45 Cal.3d 829, 850-51 [Factor (b) satisfied if underlying conduct involved force, violence or the threat of violence].)

However, as instructed, the jurors were permitted to consider this conduct as aggravation favoring a death sentence. The jury was instructed:

> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself. (68 RT 13455-56; 6 CT 1194.)

Under this instruction the jury was clearly permitted to consider the arson as an aggravating factor since according to the prosecution's expressed theory of events and the capital offenses the arson was part of the conduct attending the murders. That is, the prosecution argued that the money Antonio Sanchez had obtained from the arson was used to buy ammunition for the rifles later used in the murders. (See Guilt Phase: Statement Of Facts § B(6), pp. 24-

25, incorporated herein.)[363]

Additionally, the jurors were allowed to consider appellant's alleged "coyote" activities in aggravation because the prosecution contended that it was appellant who brought Antonio Sanchez and Joaquin Nuñez from Mexico to Salinas the week before the murders. (See Guilt Phase: Statement Of Facts § B(4), p. 22, incorporated herein.)

Similarly, the jurors could have considered the fact that appellant drove under the influence of alcohol. (See Penalty Phase: Statement Of Facts § C(7), p. 527, incorporated herein.)

However, the instruction on Factor (b) did not preclude the jury from considering this non-violent criminal conduct as weighing in favor of death. To the contrary, it effectively informed the jury – in an instruction entitled "Penalty Trial – Other Criminal Activity – Proof Beyond A Reasonable Doubt" – that ". . . a juror may consider any criminal acts as an aggravating factor [if that juror is] satisfied beyond a reasonable doubt that [appellant] did in fact commit the criminal acts." (6 CT 1193.)

Accordingly, because the jurors were permitted to consider non-statutory aggravation, the death verdict violated state law and the federal constitution. Under the California death penalty statute, the jurors' consideration of aggravation is limited to the statutorily enumerated aggravating factors. (*People v. Keenan* (1988) 46 Cal.3d 478, 510 [aggravating factors are limited to those expressly set forth in the statute]; *People v. Boyd* (1985) 38 Cal.3d 762, 776 [death penalty statute does not permit jury to consider non-statutory evidence in aggravation]; see also *People v. Crittenden*

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[363] As an overt act the arson was an element of the conspiracy charge. However, at the penalty phase the focus was on the murders.

(1994) 9 Cal.4th 83, 148 [same].) Allowing consideration of non-statutory facts, such as prior non-violent criminal activity, artificially inflates the aggravation in the case and skews the jury's delicate weighing process in violation of California law. Moreover, because appellant's jury was allowed to consider non-statutory aggravating factors, he was arbitrarily deprived of vital state procedural protections and liberty interests in violation of appellant's Fourteenth Amendment right to federal due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

The error also violated the Eighth Amendment which requires that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 (opinion of Stewart, Powell, and Stevens, JJ.).) In particular, the Supreme Court's Eighth Amendment jurisprudence since *Gregg* has explained that while sentencers may not be prevented from considering any relevant information offered as a reason for sparing a defendant's life, the decision to impose death must be guided by "carefully defined standards that must narrow a sentencer's discretion." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 304.) By simultaneously promoting both individualized sentencing decisions and uniform application of the death penalty, these two principles are designed to provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (White, J., concurring).

Jury consideration of non-statutory aggravation undermines one of the central teachings in *Furman* – that death penalty statutes must focus jury discretion in a consistent and rational manner. (*Furman v. Georgia*, 408 U.S.

at 256 (Douglas, J., concurring), 408 U.S. at 309-10 (Stewart, J., concurring), 408 U.S. at 313-14 (White, J., concurring).)

Furthermore, the error violated the teachings of *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584 and *Cunningham v. California* (2007) _____ U.S. ____ [127 S. Ct. 856; 2007 U.S. LEXIS 1324] because it allowed the jurors to rely on facts not proved beyond a reasonable doubt to make the predicate findings necessary to authorize imposition of the death penalty.

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[364] The judge's

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[364] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 (continued...)

erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

In sum, the penalty judgment should be reversed because the jury instructions which unconstitutionally skewed the aggravating factors in favor of death. Such a result was prejudicial in the present case because the penalty decision was closely balanced. (See Claim 59 § G, pp. 548-52, incorporated herein.) Moreover, the defense heavily relied on appellant's good character as a reason for sparing his life. The error allowed the jurors to discount this defense theory based on erroneous non-statutory aggravation which was never properly charged or proved.

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[364](...continued)
Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

CLAIM 66

THE INSTRUCTION ON UNCHARGED VIOLENT OFFENSES WAS UNCONSTITUTIONAL AND PREJUDICIAL BECAUSE IT ALLOWED THE JURORS TO "DOUBLE COUNT" A SINGLE COURSE OF CONDUCT

The prosecution presented evidence of several allegedly violent uncharged offenses based on acts committed by appellant while awaiting trial in the county jail. Therefore, the judge instructed the jury at the penalty trial in the language of CALJIC 8.87 as follows. (68 RT 13453-55; 6 CT 1193.)

The alleged assault and attempted escape by force were predicated on a single course of conduct, i.e., striking the officer and jumping the fence. (See Penalty Phase: Statement Of Facts §B(5), p. 23, incorporated herein.) However, the instructions permitted the jurors to consider this single course of conduct as two discrete violent acts/crimes. The improper inflation of this incident violated the Eighth Amendment because it unreliably and unfairly skewed the penalty trial in favor of the prosecution by artificially adding an additional aggravating factor. In weighing aggravating and mitigating factors, the jury may not "double count" or consider the same aggravating fact more than once. (*People v. Melton* (1988) 44 Cal.3d 713, 768; see also *People v. Morris* (1991) 53 Cal.3d 152, 224; *People v. Malone* (1988) 47 Cal.3d 1, 46.) The consideration by the jury of duplicative or overlapping aggravating factors violates the federal constitution (8th and 14th Amendments) by creating a danger that the death penalty may be imposed arbitrarily. (*U.S. v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111-1112.)

Moreover, as the United States Supreme Court has admonished:

> 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." [Citation.] Because the death penalty is unique "in both its severity and its finality," [citation], we have recognized an acute need for reliability in capital sentencing proceedings. [Citations.]

(*Monge v. California* (1998) 524 U.S. 721, 731-32.)

In sum, the penalty judgment should be reversed under both the state and federal standards of prejudice because the penalty trial was closely balanced and the jury instructions unconstitutionally skewed the aggravating factors in favor of death. (See Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIMS 67-74: MITIGATION ERRORS

CLAIM 67

THE JURORS WERE IMPROPERLY PRECLUDED FROM CONSIDERING THE MITIGATING FACT THAT APPELLANT WAS AN ACCOMPLICE WHO DID NOT PERSONALLY SHOOT AND/OR INTEND TO KILL THE VICTIMS

At the guilt trial the prosecutor alleged that appellant personally participated in the shooting by using a .38 handgun. However, the jury failed to reach a verdict on this allegation. Hence, because the jurors could have convicted appellant on the theory that he was an accomplice – who neither killed and/or intended to kill – it was crucial for the instructions to make it clear that such factors should be considered as mitigation. However, far from being clear on this point, the instructions erroneously precluded the jurors from considering appellant's accomplice status as a mitigating factor. This is so because the only instruction to specifically address this issue – Factor j – erroneously required the jurors to find both that appellant was an accomplice and that his role in the crime was relatively minor.

CALJIC 8.85, Factor (j) admonished the jurors as follows:

> You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. (6 CT 1191-92.)

As reasonably interpreted by the jurors[365], this instructional language

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[365] See *People v. Rogers* (2006) 39 Cal.4th 826, 869, 873 [reviewing court should inquire whether the jury was "reasonably likely" to have construed them in a manner that violates the defendant's rights]; *id.*, at 869 [reviewing (continued...)

precluded juror consideration of appellant's accomplice status as a mitigating factor unless the jurors also found that appellant's participation in the offense was "relatively minor."

Furthermore, this is exactly how the prosecutor interpreted Factor (j) in her argument:

> Factor j, let's talk about that. Whether or not the defendant was an accomplice to the offense and his participation in the crime was relatively minor. This factor requires two things, accomplice and . . . minor participation." (67 RT 13227:3- 8, emphasis added.)

Thus, the prosecutor was able to substantially discount the accomplice evidence because – even if appellant "didn't believe anyone was going to be killed" and even if "Antonio was just going to get his items back" and even if the jurors were "uncertain as to whether or not the defendant actually shot a gun" – none of these factors was to be considered in mitigation because appellant's role was not "relatively minor." (67 RT 13229-32; compare *People v. Rogers* (2006) 39 Cal.4th 826, 898-899 ["No one suggested [Factor d and h] evidence could not be considered simply because it did not establish a defense to the charges."]; *People v. Hernandez* (1988) 47 Cal.3d 315, 359-360 [prosecutor's argument did not suggest jury could not consider mitigating evidence if such evidence did not establish insanity or other legal defense].)[366]

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[365](...continued)
instructions as "reasonably understood" by the jury]; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72.

[366] Nor did the prosecution's argument allow for consideration of the accomplice evidence under Factor (a) or Factor (k). The prosecutor argued that Factor (a) is "generally considered aggravating. . ." (67 RT 13218-19) and that Factor (k) evidence that "humanize[s] the defendant. . . to show that he's a (continued...)

Furthermore, the judge also erred in rejecting appellant's specific request to instruct the jury that not being an actual killer is mitigation.[367]

Nor was the specific language of Factor (j) cured or clarified by other instructions such as Factor (a) [circumstances of the offense] and Factor (k) [catchall mitigation]. Absent the Factor (j) instruction the jurors could reasonably have considered appellant's accomplice stature under either or both Factor (a) or Factor (k). However, because the accomplice factor was specifically addressed in Factor (j) and not in Factors (a) or (k), the most

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[366](...continued)
positive human being . . . to show some good . . . qualities, and kind deeds." (67 RT 13233.)

[367] The defense requested the following instruction:

> The fact that the defendant was an accomplice or a coconspirator who did not personally commit the killing or all of the charged acts may be considered by you as mitigation. The fact that the defendant was not the actual killer may be considered as a mitigating factor. (3 SCT 875.)

The judge refused this instruction because the wording of the instruction "assumes that the defendant in this case . . . did not personally commit any killing. . . ." (66 RT 13018.)

However, even if the requested instruction was technically defective, the judge was obligated to correct it. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law rather than deny outright]; *People v. Falsetta* (1999) 21 Cal.4th 903, 924 ["trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"]; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Whitehorn* (1963) 60 Cal.2d 256, 265; *People v. Coates* (1984) 152 Cal.App.3d 665, 670-71; *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1597; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446.)

logical and reasonable implication was that Factor (j) controlled. It is well recognized that, in construing how lay jurors would understand a series of instructions, "the more specific charge controls over the general charge." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878 and n.8; *accord*, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 316-320 [viewing instructions as a whole, where reasonable juror could have understood specific instruction as creating unconstitutional burden shifting presumption with respect to element, more general instructions on prosecution's burden of proof and presumption of defendant's innocence did not clarify correct law]; *People v. Easley* (1983) 34 Cal.3d 858, 877-879 [where one instruction erroneously and specifically told jurors not to consider sympathy, provision of more general instruction – former CALJIC 8.84.1 – directing jurors to consider "any other circumstance that extenuates the gravity of the crime" did not cure error]; *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1387 and n.8; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975.) Hence, it should be presumed that the jury interpreted Factor (j) – as suggested by the prosecutor – to preclude consideration of the accomplice evidence in mitigation if appellant was a "major participant." "'It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general.' [Citation.]" (*Buzgheia v. Leasco Sierra Grove, supra*, at p. 395.)

Here, of course, Factor (j) was the only instruction specifically directed to the mitigating impact of evidence that appellant was an accomplice.

Moreover, at best, Factor (j) conflicted with Factors (a) and (k). A conflict between instructions does not clarify either instruction. As the United States Supreme Court observed in *Francis v. Franklin, supra*, 471 U.S. 307,

322: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."

And, assuming a conflict or ambiguity in the instructions, the reviewing court may look to the argument of counsel for clarification. (See *People v. Rogers* (2006) 39 Cal.4th 826; *People v. Fudge, supra*, 7 Cal.4th 1075.) This, too, leads to a finding of error because the only argument on the point – the above-referenced argument of the prosecutor – improperly limited juror consideration of the accomplice evidence.

Accordingly, the error violated the state (Article I, sections 7, 15 and 17) and federal (6th, 8th and 14th Amendments) constitutions because it precluded the jurors from fully considering important mitigating evidence which reduced the fairness and reliability of the death sentence and abridged appellant's constitutional rights to due process, fair trial by jury and against cruel and unusual punishment. (See *Penry v. Johnson* (2001) 532 U.S. 782; *Graham v. Collins* (1993) 506 U.S. 461; *Lockett v. Ohio* (1978) 438 U.S. 586; *People v. Panah* (2005) 35 Cal.4th 395, 498.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court

has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[368] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

In sum, the penalty judgment should be reversed under both the state and federal standards of prejudice because the penalty trial was closely balanced and the jury instructions unconstitutionally skewed the aggravating factors in favor of death. (See Claim 59 § G, pp. 548-52 incorporated herein.)

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[368] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

CLAIM 68

THE JUDGE ERRONEOUSLY EXCLUDED IMPORTANT MITIGATING EVIDENCE BECAUSE IT WAS HEARSAY

A. Procedural And Factual Background

Lisa Sobalvarro, a defense investigator, interviewed two witnesses in Mexico who provided mitigating facts about appellant which Ms. Sobalvarro memorialized in a written report. (59 RT 11611-12.)[369] At the time of her interviews, the defense anticipated that these witnesses would testify at the penalty trial. However, at the time of trial, the witnesses were not available and the defense moved for admission of Ms. Sobalvarro's report instead. (59 RT 11611-13.)[370]

The judge excluded this mitigation because it was hearsay and he didn't "know of any authority for the admission of rank hearsay material without any indicia of trustworthiness. . . ." (59 RT 11613.) This ruling was prejudicial error because, in a capital trial, the domestic rules of evidence should yield to the Eighth Amendment's requirement that the jury consider all mitigating evidence before sentencing a defendant to death.

B. Content Of The Declarations

1. Adan Medina-Garcia

At the time of his interview, Adan Medina-Garcia had known appellant approximately three years. Appellant helped out Medina-Garcia and his family when they were "suffering" by allowing them to make their home on

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[369] The correct spelling of her last name is Sobalvarro. (See 6 CT 1157-58.) Her report was defense Exhibit C. (RT 11615.)

[370] Ms. Sobalvarro's reports were submitted to the court in support of counsel's offer of proof. (2 SCT 345-59; RT 11614.) Ms. Sobalvarro's report reflects remorse on the part of appellant. (2 SCT 350-59.)

appellant's lands in Mexicali. Appellant also put up money so Medina-Garcia and appellant could start a business selling coconuts.

Medina-Garcia knew both Joaquin Nuñez and Antonio Sanchez – who were present with appellant on the night of the shootings in the present case. Both Joaquin Nuñez and Antonio Sanchez were living in Mexicali in November 1994. Sanchez – who was Medina-Garcia's cousin – was "not welcomed" by many of his relatives. Medina-Garcia told Sanchez he could not stay at their home "because he had the habit of drinking too much and he used offensive language around Medina-Garcia's wife and children. However, Sanchez refused to leave when Medina-Garcia asked him to. Medina-Garcia talked to appellant about the situation and appellant told Antonio Sanchez that he had to respect the wishes of Medina-Garcia who was the "owner" of the property as long as he was there.

Antonio Sanchez was "desperate to leave [Mexicali] and return to Salinas." (2 SCT 352.) Sanchez and Joaquin Nuñez asked appellant to take them to Salinas but appellant did not want to do so because he would lose his work permit from the immigration department if he not work more in the fields in El Centro. Appellant wanted to work and "make a good record with the company." (2 SCT 352.)

Nevertheless, appellant agreed to take Joaquin Nuñez and Antonio Sanchez to Salinas because (1) Sanchez' mother agree to pay appellant and (2) appellant had decided to go to Salinas anyway to pick up some guns from Lorenzo Nuñez and bring them to Mexicali to sell. The money from the guns was to be used to pay appellant to bring Lorenzo's wife across the border into the United States. (2 SCT 352-53.)

Appellant did not plan on staying in Salinas and he didn't even pack a change of clothes. (2 SCT 353.) Both Joaquin Nuñez and Antonio Sanchez

had bags packed for their stay in Salinas. (2 SCT 353.)[371]

At some point, Antonio Sanchez and Joaquin Nuñez returned to Medina-Garcia's house in Mexicali without appellant. Antonio Sanchez – who had a pistol in his waistband – said they had killed some people in Salinas. (2 SCT 354.) Medina-Garcia told them that if they did not leave immediately he would call the police. (2 SCT 354.)

About a half-hour later, appellant arrived with his wife Yolanda. However, appellant did not say anything about what had happened in Salinas except that it was "something really bad." Appellant and his wife left within minutes for Tiajuana [sic]. (2 SCT 354.)

About eight months later appellant returned. He said he was "tired of hiding and wanted to turn himself in." (2 SCT 355.)

Medina-Garcia was present when appellant was apprehended by bounty hunters. Appellant was working on a car in which he was going to drive to the United States to turn himself in when the bounty hunters apprehended him. There were six bounty hunters in two cars. One of the bounty hunters said "we gotch [sic] mother fucker now we're going to screw you." (2 SCT 356.) Appellant started running but the six bounty hunters caught him.[372]

2. Humberto Hernandez

Humberto Hernandez, who had known and worked with appellant for 5-6 years, saw appellant just before Christmas of 1994, while appellant was at his parent's home in Guanajuato, Mexico.

Humberto Hernandez described appellant "as appearing depressed or

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[371] Neither Antonio Sanchez nor Joaquin Nuñez mentioned anything to Medina-Garcia about committing any crimes while they were in Salinas.

[372] According to appellant's brother, Sergio, who was also present, there was blood on the upper part of appellant's shoulder by his neck.

down." Appellant "didn't like to talk about [what happened in Salinas] because it hurt too much." Appellant did say – as his "eyes welled up with tears" – that "I shouldn't have been with [Antonio Sanchez and Joaquin Nuñez]." (2 SCT 359.)

Appellant cried when he left, after embracing members of his family. (2 SCT 359.)

C. The Hearsay Rule Should Not Be Invoked To Exclude Important Mitigating Evidence From The Penalty Phase Of A Capital Trial

The U.S. Supreme Court has consistently held that domestic rules of evidence may not be arbitrarily and unjustifiably invoked to preclude a criminal defendant's right to present a defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44; *Green v. Georgia* (1979) 442 U.S. 95; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas* (1967) 388 U.S. 14.)

The Supreme Court has applied a balancing test in resolving conflicts between state rules of evidence and the federal constitutional right to present a defense, weighing the interest of the defendant against the state interest in the rules of evidence. (*Chambers, supra*, 410 U.S. at 295; *Green v. Georgia, supra*, 442 U.S. at 97; *Washington v. Texas, supra*, 388 U.S. at 19-23.) Several federal circuit courts of appeal have also utilized such a test. (*Pettijohn v. Hall* (1st Cir. 1979) 599 F.2d 476, 486; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970; *Alicea v. Gagnon* (7th Cir. 1982) 675 F.2d 913, 923; see also *Newman v. Hopkins* (8th Cir. 2001) 247 F.3d 848 [refusal to permit defendant to present voice exemplar evidence to establish that he does not speak with an Hispanic accent violated right to present a defense; domestic rule excluding voice exemplar evidence was an unreasonable application of clearly established federal law providing that a defendant has the constitutional

right to present favorable evidence to the jury]; *Lajoie v. Thompson* (9th Cir. 2000) 217 F.3d 663 [constitutional error to apply state rape shield laws literally where State's interest outweighed by defendant's]; *Perry v. Rushen* (9th Cir. 1983) 713 F.2d 1447, 1449; see also *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Corona* (1989) 211 Cal.App.3d 529, 544 ["[A] rule of evidence may not be enforced if it would infringe the right to a fair trial"].)

Exclusion of evidence has been found to be arbitrary or disproportionate "where it has infringed upon a weighty interest of the accused." (*United States v. Scheffer* (1998) 523 U.S. 303, 308; see also *Franklin v. Duncan* (9th Cir. 1995) 70 F.3d 75, 83 [exclusion of evidence violated defendant's constitutional right to present a defense].) A domestic rule of evidence may not be used to exclude evidence if it "significantly undermined fundamental elements of the accused's defense." (*Scheffer, supra*, 523 U.S. at 315.) However, rules excluding evidence from criminal trials "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" (*Id.* at 308.)

This balancing principle has also been recognized in California. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 704; *People v. Babbitt, supra*,45 Cal.3d at 684; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) "A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion." (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) "[A] defendant's due process rights are violated when hearsay testimony at the penalty phase of a capital trial is excluded, if both of the following conditions are present: (1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of the trial,' and (2) there are substantial reasons to assume the reliability of the evidence." (*People v. Kaurish*, *supra*, 52 Cal.3d at p. 704, quoting

Green v. Georgia (1979) 442 U.S. 95, 97; see also *People v. Williams* (2006) 40 Cal.4th 287, 317.)

D. The Excluded Statements Were Reliable And Highly Relevant To Critical Mitigation Issues

The excluded statements were reliable because they concerned matters about which the witnesses had no reason to lie such as the fact that appellant cried when he talked about the incident.

Moreover, the statements of Adan Medina-Garcia and Humberto Hernandez included highly relevant mitigation evidence that was not presented by other witnesses.

First, the statement of Medina-Garcia of appellant's reasons for bringing Antonio Sanchez and Joaquin Nuñez to Salinas corroborated the defense theory that Antonio Sanchez was the instigator of the crimes and that appellant never intended to conspire with Antonio Sanchez to rob or kill the victims.

Second, both Medina-Garcia and Humberto Hernandez provided sympathetic insights into how remorseful appellant felt about his involvement in the shootings. For example, the fact that tears welled up in appellant's eyes when he talked about the shootings countered the prosecutor's portrayal of appellant as a cold-blooded killer.

Third, Medina-Garcia's statement that appellant was preparing to turn himself in demonstrated appellant's willingness to take responsibility for his conduct.

E. The Error Violated State Law And The Federal Constitution

When the jury returns a death verdict without considering important mitigating evidence the Eighth Amendment of the federal constitution is violated. One of the fundamental underpinnings of Eighth Amendment

jurisprudence is that the sentencer must be allowed to consider any aspect of the defendant's character or record that is proffered by the defendant as a basis for a sentence less than death. (*Buchanan v. Angelone* (1998) 522 U.S. 269; see also *Lockett v. Ohio* (1978) 438 U.S. 586; *People v. Brown* (1985) 40 Cal.3d 512, 540 ["The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty."].) If there is one principle consistently recognized in United States Supreme Court death penalty cases, it is that a death penalty scheme must allow particularized consideration of relevant aspects of the character and record of each convicted defendant, before the penalty of death may be imposed. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Jurek v. Texas* (1976) 428 U.S. 262, 271, 276; *Roberts v. Louisiana* (1976) 428 U.S. 325, 333.) For purposes of Eighth Amendment analysis, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. (*Roberts v. Louisiana* (1977) 431 U.S. 633, 637.)

An equally well-established principle emanates from *Gardner v. Florida* (1977) 430 U.S. 349, 362, in which a plurality of the Supreme Court concluded that the defendant's due process rights were violated because his "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Nine years later, in *Skipper v. South Carolina* (1986) 476 U.S. 1, all nine justices cited *Gardner*, with approval, as establishing the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' [Citations.]" (*Skipper*, 476 U.S. at 5, fn. 1.)

Further, when important mitigating evidence has been kept from the sentencing jury the reliability of the resulting death verdict is compromised.

This too violates the federal constitution. As the high court has admonished:

> 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 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, (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, (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* (1998) 524 U.S. 721, 731-32.)

Additionally, also applicable to the sentencing trial are the federal constitutional rights to effective representation of counsel, due process, compulsory process, confrontation and to present a defense. (See generally *Ring v. Arizona* (2002) 536 U.S. 584; see also Claim 88 § C(1), pp. 686-96 [constitutional challenge to the California penalty statute] incorporated herein.) Those rights are abridged when the defendant's theory of defense evidence is not considered at either the guilt or penalty trials.

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt

and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[373] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Penalty Judgment Should Be Reversed

As discussed elsewhere in this brief, the penalty trial was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) In particular, the prosecution and defense took conflicting positions regarding the

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[373] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

true nature of appellant's character. (*Ibid.*) Hence, the excluded evidence regarding appellant's good character was a substantial error.

Moreover, the excluded statements corroborated and elaborated on the expert's testimony regarding appellant's remorse. (See 64 RT 12630.)

Finally, appellant's intent to turn himself in was especially compelling because it (1) showed remorse, (2) demonstrated strength of character and (3) contradicted the consciousness of guilt inference from his alleged flight (see 6 CT 1237) and false statements. (6 CT 1229).

In sum, the error was prejudicial under both the state and federal standards. (See Claim 59 § G(1), pp.548-50, incorporated herein.)[374]

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[374] See Claim 59 § G, pp. pp. 548-52, herein [any substantial error at penalty should be considered prejudicial because the penalty evidence was closely balanced].)

CLAIM 69

THE INSTRUCTIONS UNCONSTITUTIONALLY PRECLUDED THE JURORS FROM CONSIDERING APPELLANT'S INTOXICATION DURING THE CRIMES AS A MITIGATING CIRCUMSTANCE

A. Introduction

The record contains substantial evidence from which the jurors could have inferred that appellant, due in whole or part to his intoxication, was unaware (1) of Antonio Sanchez' plan to rob and kill the victims and/or (2) of the danger to human life posed by his actions.

However, the instructions and arguments of counsel unconstitutionally precluded the jurors from considering this evidence at either the guilt or penalty phases of the trial. Therefore, the death judgment should be reversed.

B. The Record Contains Substantial Evidence Of Intoxication

Both the prosecution and defense evidence established that appellant was intoxicated the day the crimes were committed. (See Guilt Phase: Statement Of Facts §B(9), p 26, and § G(2), p 45, incorporated herein.) For example, one prosecution witness testified that appellant was so intoxicated she would not have felt safe riding in a car he was driving. (43 RT 8429-30.)

Moreover, at the penalty trial the defense presented expert testimony concerning appellant's alcoholism and how it impaired his judgment, ability to control impulses and understanding of the consequences of his actions.

C. The Guilt Instructions Precluded The Jury From Considering Whether Appellant, As A Result Of His Intoxication, Was Not Aware Of Antonio Sanchez' Alleged Intent To Kill And/Or Rob

Knowledge was an essential mental element of both prosecution

theories of vicarious liability: aiding/abetting and conspiracy.[375] However, because the guilt instructions limited the jurors' consideration of intoxication solely to specific intent, the jurors were effectively precluded from considering appellant's intoxication as to the essential knowledge elements of the charges.

Moreover, because the knowledge and intent elements of aiding and abetting were not described in terms of "specific intent" the jurors were precluded from considering intoxication in deciding whether appellant was an aider and abettor. (See Claim 18, pp. 253-67 [claim based on *People v. Mendoza* holding that intoxication may negate the mens rea elements of aiding and abetting], incorporated herein.)

D. The Penalty Instructions Did Not Cure The Error

There can be no dispute that appellant's intoxication was a mitigating circumstance to the extent that it negated the knowledge and intent necessary for aider and abettor liability. (*People v. Mendoza* (1998) 18 Cal.4th 1114.)

Furthermore, it would unquestionably be a mitigating circumstance if, due to intoxication, appellant was not actually aware of the danger to human life which his actions created. (See *Tison v. Arizona* (1987) 481 U.S. 137.)

However, the penalty phase instructions precluded the jurors from considering such mitigating circumstances.

First, the penalty instructions incorporated the erroneous guilt instructions on intoxication by informing the jurors that:

> You are still to be guided by the court's previous instructions regarding such matters as the functions and duties of jurors[,] evidence[,]the evaluation of evidence[,] expert testimony and the definition of and culpability for crimes where

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[375] Both vicarious liability theories relied on by the prosecution – aider/abettor and conspiracy – required such knowledge. (See 6 CT 1255-57; 6 CT 1263-64.)

applicable. . . . (6 CT 1179.)

Hence, the jurors were still precluded from considering intoxication as to mental state issues (other than specific intent) by the faulty guilt phase instructions.

Second, the only penalty phase instruction to specifically address intoxication was Factor (h) which stated:

> In determining which penalty is to be imposed upon the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter or previously instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> Factor (h): Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication. (68 RT 13451-53:26-4; 6 CT 1191-92.)

This instruction did not cure the error because it addressed "capacity" to "appreciate criminality" rather than actual subjective knowledge or awareness. Appellant's theory was not based on lack of capacity to "appreciate criminality." Instead it was based on (1) actual subjective unawareness of Antonio Sanchez' intent, (2) lack of agreement to rob and/or kill and (3) lack of awareness of the danger to human life created by helping Sanchez or agreeing to participate in the alleged plan to rob and kill. However, these defense theories were not within the scope of Factor (f).

Moreover, even if Factor (h) had expressly allowed consideration of intoxication as to the required knowledge element, it still would have directly conflicted with the guilt phase intoxication instruction which was expressly made applicable to the penalty phase. Such a conflict is insufficient to cure the

error. A conflict between instructions does not clarify either instruction. As the United States Supreme Court observed in *Francis v. Franklin* (1985) 471 U.S. 307, 322: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (See also *People v. Noble* (2002) 100 Cal.App.4th 184, 191 [contradictory instructions on burden of proof in MDO proceeding made it impossible to determine whether the jury reached its verdict using the correct burden].)

Similarly, this Court has recognized that: "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury." (*People v. Dail* (1943) 22 Cal.2d 642, 653.)

E. The Error Violated State Law And The Federal Constitution

When the jury returns a death verdict without considering important mitigating evidence the Eighth Amendment of the federal constitution is violated. One of the fundamental underpinnings of Eighth Amendment jurisprudence is that the sentencer must be allowed to consider any aspect of the defendant's character or record that is proffered by the defendant as a basis for a sentence less than death. (*Buchanan v. Angelone* (1998) 522 U.S. 269; see also *Lockett v. Ohio* (1978) 438 U.S. 586; *People v. Brown* (1985) 40 Cal.3d 512, 540 ["The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty."].) If there is one principle consistently recognized in United States Supreme Court death penalty cases, it is that a death penalty scheme must allow particularized consideration of relevant aspects of the character and record of each convicted defendant, before the penalty of death

may be imposed. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Jurek v. Texas* (1976) 428 U.S. 262, 271, 276; *Roberts v. Louisiana* (1976) 428 U.S. 325, 333.) For purposes of Eighth Amendment analysis, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. (*Roberts v. Louisiana* (1977) 431 U.S. 633, 637.)

An equally well-established principle emanates from *Gardner v. Florida* (1977) 430 U.S. 349, 362, in which a plurality of the Supreme Court concluded that the defendant's due process rights were violated because his "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Nine years later, in *Skipper v. South Carolina* (1986) 476 U.S. 1, all nine justices cited *Gardner*, with approval, as establishing the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' [Citations.]" (*Skipper*, 476 U.S. at 5, fn. 1.)

Further, when important mitigating evidence has been kept from the sentencing jury the reliability of the resulting death verdict is compromised. This too violates the federal constitution. As the high court has admonished:

> 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 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, (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, (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* (1998) 524 U.S. 721, 731-32.)

Additionally, also applicable to the sentencing trial are the federal constitutional rights to effective representation of counsel, due process, compulsory process, confrontation and to present a defense. (See generally *Ring v. Arizona* (2002) 536 U.S. 584; see also Claim 88 § C(1), pp. 685-95 [constitutional challenge to the California penalty statute], incorporated herein.) Those rights are abridged when the defense theory evidence is not considered at either the guilt or penalty trials.

Finally, because appellant was arbitrarily denied his state created rights under California law, including the right to present relevant and material evidence under the California Evidence Code (§ 350-§ 352) and the California Constitution (Article I, section 28(d)), the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Error Was Prejudicial

1. Standard Of Prejudice

See Claim 59 § G(1), pp.548-50, incorporated herein.

2. The Prosecution Cannot Meet Its Burden Of Demonstrating That The Error Was Harmless Beyond A Reasonable Doubt

The evidence as to penalty was closely balanced. (See Claim 59 § G(2),

pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement Of Facts § C, pp.521-29 , incorporated herein.)

Accordingly, because precluding juror consideration of important mitigating evidence as to appellant's alcoholism and intoxication during the offenses was a substantial error, the judgment should be reversed under any of the above standards.

CLAIM 70

BECAUSE THE INSTRUCTIONS ONLY PERMITTED CONSIDERATION OF MITIGATING EVIDENCE "THAT THE DEFENDANT OFFERS," IMPORTANT MITIGATING EVIDENCE COULD NOT BE CONSIDERED UNDER FACTOR (K)[376]

A. Introduction

Factor (k), the crucial "catch-all" mitigating factor was defined for the jurors as follows:

> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character background or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial . . .] [Emphasis added.] (6 CT 1192.)[377]

However, the phrase "that the defendant offers" improperly limited the jurors' consideration of this mitigating factor to the defense evidence. The Eighth Amendment requires the jury to consider any and all mitigation, not just that which appears from the defense evidence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Easley* (1983) 34 Cal.3d 858, 876.) Hence, the instruction violated the federal constitution and, as will be shown below, was substantially

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[376] This Court has previously rejected this issue. (See *People v. Dunkle* (2005) 36 C4th 861, 925-26.) In light of *People v. Schmeck* (2005) 37 Cal. 4th 240 appellant requests that the Court reconsider this issue even though the briefing on it is not complete. (See Claim 7, p. 105, fn. 100, incorporated herein.)

[377] The brackets were included in written instruction but not the oral rendition. (68 RT 13453.)

prejudicial to appellant.

B. The Prosecution Evidence Included Factors Which The Jurors Could Have Found To Be Mitigating

The prosecution evidence included substantial mitigating evidence such as appellant's video statement in which he maintained that he was an unknowing accomplice who did not intend to rob or kill the victims. (See Claim 10 § B(2)(b)(i), pp. 144, incorporated herein.) Additionally, the prosecution witnesses also provided evidence of other mitigating factors such as the fact that appellant was intoxicated on the day of the shootings (see Guilt Phase: Statement Of Facts § B(9), p. 26, incorporated herein), and that appellant was not involved in the sale or distribution of illegal drugs. (See 41 RT 8063.) However, because appellant did not "offer" this evidence, the jury was not authorized to consider it under Factor (k).

C. The Error Violated State Law And The Federal Constitution

The error violated the Eighth Amendment. One of the fundamental underpinnings of Eighth Amendment jurisprudence is that the sentencer must be allowed to consider any aspect of the defendant's character or record that is proffered by the defendant as a basis for a sentence less than death. (*Buchanan v. Angelone* (1998) 522 U.S. 269; see also *Lockett v. Ohio* , *supra*, 438 U.S. 586; *People v. Brown* (1985) 40 Cal.3d 512, 540 ["The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty."].)[378]

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[378] The erroneous instruction also arbitrarily violated state law. (See *People v. Brown*, *supra*, 40 Cal.3d at 540. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th (continued...)

D. A New Penalty Trial Should Be Ordered

1. The Error Was Structural

The Eighth Amendment requirement that the jury consider all mitigating evidence is so fundamental that it undermines the entire structure of the penalty trial and, therefore, the error should be reversible per se. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism which defy analysis by "harmless-error" standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

2. If Not Structural, The Prosecution Cannot Demonstrate Beyond A Reasonable Doubt That The Error Was Harmless

Under both the federal and state standards of prejudice, the prosecution must demonstrate beyond a reasonable doubt that the error was harmless. (See Claim 59 § G(1), pp.548-50, incorporated herein.) Hence, because the error was substantial and the penalty deliberation were closely balanced (see Claim 59 § G(2), pp. 550-51, incorporated herein), the prosecution cannot meet its burden of demonstrating that the error was harmless.

Accordingly, the penalty judgment should be reversed.

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[378](...continued)
Cir. 1991) 930 F.2d 714, 716.)

CLAIM 71

THE JUDGE ERRONEOUSLY REFUSED THE REQUESTED INSTRUCTION ALLOWING THE JURORS TO CONSIDER THE MORE LENIENT SENTENCE RECEIVED BY JOSE LUIS RAMIREZ AS MITIGATION

Appellant submitted a special instruction during the penalty phase which would have told the jury that it could consider the fact that his accomplice received a more lenient sentence as a mitigating factor. (3 SCT 875 ["You may consider the fact that defendant's accomplice(s) received a more lenient sentence as a mitigating factor."].) The judge refused this request. (66 RT 13018.)

This proposed instruction was a proper pinpoint instruction, i.e., an instruction that pinpoints a legal theory of the defense. "For example, a court at the guilt phase upon request must give an instruction that "'pinpoint[s]' the crux of a defendant's case, such as mistaken identification or alibi." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 337.) This is so even though the general instructions "sufficiently encompass" those theories of defense to relieve the court of any duty to instruct sua sponte on them. (See e.g., *People v. Freeman* (1978) 22 Cal.3d 434, 438 [no sua sponte duty for the court to instruct on alibi, which would have been "redundant" since "the jury was instructed to acquit defendant if the prosecution failed to establish his guilt beyond a reasonable doubt"].) A defendant's pinpoint instruction at the penalty phase is proper where "the instruction .. . assist[s] the jury in comprehending the legal 'crux' of defendant's case [by] illuminating the legal standards at issue." (*People v. Howard* (1988) 44 Cal.3d 375, 442.)

In the present case, a pinpoint instruction on leniency given an accomplice was warranted. Despite the fact that Jose Luis Ramirez was an accomplice to the crimes for which appellant was convicted as a matter of law,

Jose Luis Ramirez received a plea bargain that limited his exposure to less than 12 years in state prison. Appellant's proposed instruction would have assisted the jury precisely because consideration of Jose Luis Ramirez' punishment was not part of the general instructions that were given.

In capital cases, the actual death verdict is a highly "moral and. .. not factual" determination. (*People v. Brown* (2004) 33 Cal.4th 382, 400; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Therefore, one circumstance the jury may consider in mitigation of the offense is the relative culpability and participation levels of the principals. (Pen. Code, sec. 190.3, subd. (k); *People v. Malone* (1989) 47 Cal.3d 1, 58 ["Because this was a two-person crime and much of the defense was directed to placing primary responsibility on Crenshaw, defendant's relative culpability was relevant."]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [relative culpability is a "critical issue" in the penalty phase of a capital trial].)

The Due Process Clause of the Fourteenth Amendment entitles 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. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163; accord *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, fn.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*, *supra*,

442 U.S. at 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* (9th Cir. 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].)

In sum, the trial court's refusal to give the requested instruction violated appellant's federal constitutional rights to due process, equal protection, a fair trial by jury and a reliable and non-arbitrary penalty determination. (U.S. Const., 6th, 8th and 14th Amendments.) By refusing to specifically instruct that the jury could consider the leniency given to the accomplice, the trial court failed to give guidance to the jury with respect to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio, supra*, 438 U.S. at 604.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v.*

Cartwright (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[379] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Furthermore, the error warrants reversal of the death judgment.

The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm

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[379] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the refusal to instruct the jurors to consider the lenient sentence received by Jose Luis Ramirez was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G(1), pp.548-50, incorporated herein.)

CLAIM 72

THE LACK OF PARITY BETWEEN CALJICS 8.85 AND 8.87 REGARDING JURY NON-UNANIMITY PRECLUDED INDIVIDUAL JURORS FROM CONSIDERING CRUCIAL MITIGATING FACTORS

A crucial question for the jurors at appellant's penalty trial was whether or not they had to unanimously agree as to specific mitigating factors. This was so because the guilt phase special verdicts demonstrated that the jurors were divided as to two of the most important mitigating factors relied upon by the defense: (1) that appellant did not intend to kill and (2) that he did not personally shoot any of the victims. (See Claim 10 § D, pp.149-51 [jurors failure to return verdicts n special guilt phase allegations], incorporated herein.) However, as reasonably interpreted and as a matter of common sense, the instructions in the present case required unanimity as to all mitigating and aggravating factors except Factor b because only Factor b included specific language allowing consideration of it by individual jurors. Thus the only reasonable interpretation for the jurors was that all the other factors—for which such language was not added—required unanimous agreement. Thus, the instruction violated the state and federal constitutions by not allowing individual juror consideration of important mitigating factors.

CALJIC 8.85 given in this case instructed the jury on the factors it could consider in weighing aggravating and mitigating evidence when determining the life or death of appellant. (6 CT 1191-92.) CALJIC 8.87 instructed the jury on the burden of proof required for "other criminal activity" evidence. (6 CT 1193.) Paragraph three of this instruction specifically told the jury that "it is not necessary for all jurors to agree" as to other unadjudicated criminal activity. (6 CT 1193.) This states the law as interpreted by this Court, as does the comparable rule regarding mitigation. (*People v. Caro* (1988) 46

Cal.3d 1035, 1057, overruled on another ground *People v. Whitt* (1990) 51 Cal.3d 620, 657 fn. 29; *People v. Breaux* (1991) 1 Cal.4th 281, 314.) However, because *Breaux* precludes the defendant from obtaining a specific non-unanimity instruction as to mitigation, the prosecution should not be permitted to obtain such an instruction in the specific context of other crimes aggravation.

It is the trial court's duty to see that jurors are adequately informed on the law. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490-491.) The trial court also has a duty to refrain from instructing on principles of law that have the effect of confusing the jury. (*People v. Satchell* (1971) 6 Cal.3d 28, 33 fn. 10.) Thus, the language that "it is not necessary for all jurors to agree" should have been deleted from CALJIC 8.87 sua sponte, or alternatively, the same non-unanimity language should be added to the instructions defining the burden of proof regarding mitigation evidence (CALJICs 8.85, 8.88) so that the instructions were symmetrical.[380]

Without such symmetry the jurors reasonably could have inferred – as a matter of common sense – that unanimity was required as to all aggravating and mitigating factors except Factor b because it was the only factor as to which the specific non-unanimity language was added. (See e.g., *U.S. v. Echeverri* (3rd Cir. 1988) 854 F.2d 638, 643 [giving a special unanimity

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[380] "There should be absolute impartiality as between the People and the defendant in the matter of instructions. . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) Lack of parity skews the proceeding toward death thus promoting the random and arbitrary imposition of death in violation of appellant's constitutional right to be free from cruel and unusual punishment, to due process, and to equal protection. (U.S. Const. 8th and 14th Amendments; *Sochor v. Florida* (1992) 504 U.S. 527; *Gregg v. Georgia* (1976) 428 U.S. 153.)

instruction as to predicate acts under a RICO charge, but not as to predicate acts under a concurrent CCE (Continuing Criminal Enterprise) statute charge, violated due process, since jurors may have inferred from this discrepancy that unanimity was not required as to the CCE related predicate acts]; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; see also *U.S. v. Crane* (9th Cir. 1992) 979 F.2d 687, 690 [maxim expression unius est exclusio alterius "is a product of logic and common sense"].)]

The error was especially prejudicial in the present case because the jurors were clearly split regarding two of the most important mitigating circumstances relied upon by the defense: whether appellant (1) intended to kill and (2) fired a weapon during the shooting. (See Claim 10 § D, pp. 149-51, incorporated herein.) Therefore, the jurors who found either or both of these mitigating factors were effectively precluded from considering them by a common sense interpretation of the instructions. Such a result violated the state (Article I, sections 7, 15 and 17) and federal (6th, 8th and 14th Amendments) constitutions. (*Penry v. Johnson* (2001) 532 U.S. 782; *Graham v. Collins* (1993) 506 U.S. 461; *Lockett* v. *Ohio* (1978) 438 U.S. 586; *People v. Panah* (2005) 35 Cal.4th 395, 498.) Moreover, the error also unfairly benefitted the prosecution in violation of fundamental due process principles because there was little likelihood of juror disagreement regarding its key aggravating factors: (1) the nature of the wounds and (2) victim impact. (See *Wardius v. Oregon* (1973) 412 U.S. 470; *Cool v. United States* (1972) 409 U.S. 100.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v.*

Cartwright (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[381] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Moreover, the error was prejudicial. The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the

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[381] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 , incorporated herein [discussing substantial mitigating factors relating to both the offense and appellant's character].)

Hence, because the failure to instruct the jurors that they need not unanimously agree on mitigating factors was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIM 73

THE JUDGE ERRONEOUSLY REFUSED APPELLANT'S REQUESTED INSTRUCTION ADVISING THE JURORS THAT THEY COULD CONSIDER MERCY

A. Overview

The defense sought requested the following instruction:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy. (3 SCT 874.)

However, the judge erroneously rejected the request because "the Supreme Court to be an unconstitutional standard and unconstitutional concept to put before the jury." (66 RT 13016.)

B. Juror Consideration Of Mercy Is Required By State Law And The Federal Constitution

This Court has acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. In *People v. Lewis* (1990) 50 Cal.3d 262, 284, the Court advised that in death penalty cases trial courts "should allow evidence and argument on emotional albeit relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." This statement implicitly recognizes that mercy plays a legitimate role in a jury's decision not to impose the ultimate penalty. The United States Supreme Court has also

acknowledged the role of mercy in death penalty systems which comply with federal constitutional requirements. The capacity to show mercy is personal to the jurors; it is their part of a "reasoned moral response" to mitigating evidence which the 8th Amendment requires. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *Lockett v. Ohio* (1978) 438 U.S. 586.)

In this sense, mercy is a consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of the murder and not withstanding what a jury thinks the defendant deserves. (See *People* v. *Lanphear* (1984) 36 Cal.3d 164, 169 [trial counsel's plea for "mercy" and "compassion" relevant only to whether death was an appropriate penalty for this individual notwithstanding his culpability in the commission of the murder].)

Without instructional guidance, however, there was a substantial likelihood in this case that the jury excluded any consideration of mercy – even when the concept was implicated by the evidence and arguments of counsel. The jury could have been misled into believing mitigating evidence relating to mercy must be ignored, which belief conflicts with a capital jury's "obligation to consider all of the mitigating evidence introduced by the defendant." (See *California v. Brown* (1987) 479 U.S. 538, 542-43, 546.)

Moreover, where the death penalty is involved, and there is a heightened need for reliability, accurately crafted instructions regarding mitigation should be given upon request to assure a constitutionally acceptable sentence. (See generally *Beck v. Alabama* (1980) 447 U.S. 625; U.S. Const., 8th Amendment.) It remains the law that if the death penalty is to be imposed at all, jurors must be permitted to take into account all evidence the defense offers in support of his argument that death is not appropriate. (*Woodson v.*

North Carolina (1976) 428 U.S. 280, 304-305.) Moreover, this Court has also said that California has an independent interest in the reliability of its death penalty system. (*People v. Chadd* (1981) 28 Cal.3d 739, 751-753.)

In sum, because there was a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (*see Boyde* v. *California* (1990) 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

Moreover the error was prejudicial. The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the failure to instruct that the jurors could consider mercy was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G(1),pp.548-50, incorporated herein.)

CLAIM 74

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT ON GOOD CHARACTER EVIDENCE AT THE PENALTY TRIAL

A. Overview

Appellant requested that the jury be instructed at the penalty trial pursuant to the following modified version of CALJIC 2.40:

> Evidence has been received for the purpose of showing the good character of the defendant for your consideration at this phase of the trial.
>
> Good character for the traits may be sufficient by itself to justify a verdict of Life Without Possibility of Parole.
>
> If the defendant's character as to certain traits has not been discussed among those who know him, you may infer from the absence of this discussion that his character in those respects was good.
>
> However, evidence of good character for certain traits may be refuted or rebutted by the evidence of bad character for those same traits.
>
> Any conflict in the evidence of defendant's character and the weight to be given to that evidence is for you to decide. (3 SCT 864.)

The judge denied the request because the instruction applies "to a situation where character traits of the defendant are offered in evidence for the purpose of bearing upon the question of guilt or innocence, which is not the situation in the penalty phase of a capital case." (66 RT 13005.)

B. The Judge Erroneously Refused The Instruction

Good character evidence was important at the penalty trial as to the issue of lingering doubt.[382] There was substantial penalty phase that appellant

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[382] Under *Eddings v. Oklahoma* (1982) 455 U.S. 104, the defense is allowed to present a wide variety of evidence in mitigation, and the jury must be (continued...)

was not the type of person who would not have intended to commit violence or have violence committed on his behalf. (See Penalty Phase: Statement Of Facts § C, pp.521-29 , incorporated herein.) Hence, good character was an appropriate subject for instruction and the judge erred in failing to modify the instruction requested by appellant to apply to the issue of lingering doubt.

It is a longstanding rule of law that character evidence may be admitted to show a reasonable doubt that a defendant committed charged crimes. (*People v. Adams* (1902) 137 Cal. 580, 582; *People v. Castillo* (1935) 5 Cal.App.2d 194, 198; *People v. Pauli* (1922) 58 Cal.App. 594, 596, 209 P. 88, 89.) That evidence was admissible under California Evidence Code §1100:

> Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

Specific evidence of that character is also admissible pursuant to Cal.

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[382](...continued)
allowed to consider that evidence. In *People* v. *Easley* (1983) 34 Cal.3d 858, 877-880, this court made it clear that mitigating evidence could not be limited to facts that lessen the gravity of the crime, but must also include facts pertaining to the background of the defendant, as the United States Supreme Court has long required. (See e.g., *Lockett* v. *Ohio* (1978) 438 U.S. 586; *Eddings* v. *Oklahoma* (1982) 455 U.S. 104; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393, 399.)

The jury is entitled to consider all relevant mitigating evidence during the penalty phase pursuant to the Eighth and Fourteenth Amendments. (*Lockett* v. *Ohio*, *supra*, 438 U.S. at p. 604.) Appellant's good character was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" (*Skipper* v. *South Carolina* (1986) 476 U.S. 1, 4-5 [*quoting Lockett* v. *Ohio* (1978) 438 U.S. 586, 604].) Character evidence is clearly admissible on the subject and is properly considered by the sentencer (see e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104.)

Evid. Code §1102:

> In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:
>
> (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.
> (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

The limitations provided by Cal. Evid. Code §1101 do not bar admission of this evidence:

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

As evidence of appellant's good character for nonviolence was properly admitted in the present case (see Evidence Code § 1102, subd. (a); *People v. Jones* (1954) 42 Cal.2d 219, 223-225, 266 P.2d 38; *People v. Ashe* (1872) 44 Cal. 288, 291; *People v. Stewart* (1865) 28 Cal. 395, 396), it would have been proper for the trial court to give CALJIC 2.40 (*People v. Bell* (1875) 49 Cal.

485, 489-490; *People v. Raina* (1873) 45 Cal. 292, 292-293). "It may be reasoned that a person of good character as to such traits would not be likely to commit the crime[s] of which the defendant is charged." (CALJIC 2.40 (6th ed. 1996); *People v. McAlpin* (1991) 53 Cal.3d 1289, 1310-1311).

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149 and *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) "The duty to instruct, *sua sponte,* on general principles closely and openly connected with the facts before the court ... encompasses an obligation to instruct on defenses ... and on the relationship of these defenses to the elements of the charged offense." (*People v. Sedeno, supra,* 10 Cal.3d at p. 716).

Moreover, "a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation] – evidence sufficient for a reasonable jury to find in favor of the defendant [citation] – unless the defense is inconsistent with the defendant's theory of the case [citation]." (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

In the present case, lingering doubt – based in part on the substantial evidence of appellant's good character – was a defense theory at the penalty trial. (See e.g., 68 RT 13418 [argument re: lingering doubt]; 3 SCT 873; 66 RT 13013 [request for lingering doubt instruction]; see also Penalty Phase: Statement Of Facts §C, pp. 521-29 [good character evidence of appellant]

incorporated herein.) Accordingly, the judge erred in failing to modify the instruction requested by appellant to apply to lingering doubt.

C. The Error Violated State Law And The Federal Constitution

The failure to instruct on the use of character evidence at the penalty trial violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Moreover, the error also violated the federal constitution. In *People v. Cox* (1991) 53 Cal.3d 618, 675-79, this Court, relying on *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174 held that although a capital defendant is entitled to present evidence on, and argue, residual doubt, neither the Eighth Amendment nor the California Constitution requires a residual-doubt instruction. This holding is error, at least as it pertains to the Eighth Amendment, in light of recent United States Supreme Court cases. This Court relied on *Franklin*'s holding that because "lingering doubt" is a not an aspect of the defendant's character, record or a circumstance of the case, the trial court had no obligation to instruct on lingering doubt. (*Cox*, 51 Cal.3d at 575 [citing *Franklin*, 487 U.S. at 174].) However, subsequent United States Supreme Court cases undermine this statement in *Franklin*, and suggest that a jury must consider lingering doubt, even if not a circumstance of the case or an aspect of the

defendant's record or character.

The United States Supreme Court held: "'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.'" (*Tennard v. Dretke* (2004) 542 U.S. 274, 284 [citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 440].) Mitigation evidence is any evidence the trier of fact could "reasonably find warrants a sentence less than death." (*Id/* at 285.) There is nothing in this statement which limits mitigation to "character," "record," or "circumstances of the case." Lingering doubt is an acknowledged factor which the jury could use to choose a sentence of life imprisonment, and because the "Eighth Amendment requires that the jury be able to consider and give effect to all of a capital defendant's mitigating evidence (*Boyde v. California* (1990) 494 U.S. 370, 377-78) an instruction on good character – from which the jurors could have had at lingering doubt as to guilt – should be given when requested.

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[383] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory

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[383] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

D. The Death Judgment Should Be Reversed

The evidence as to penalty was closely balanced. (See Claim 59 § G(2),pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on inflammatory victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant would have willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because refusal of the requested instruction on character evidence was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G(1), pp.548-50, incorporated herein.)

CLAIMS 75-87: MISCELLANEOUS PENALTY PHASE ERRORS

CLAIM 75

THE JUDGE ERRED IN FAILING TO ASSURE THE JURORS THAT THE GUILT AND SPECIAL CIRCUMSTANCE VERDICTS WOULD STAND EVEN IF THEY DID NOT REACH A VERDICT AS TO PENALTY

A. Overview

During the penalty deliberations, the jurors submitted the following question: "If we can't come to an agreement on a penalty, is it a mistrial or defaults to life imprisonment [without] parole, or does judge make decision?" (6 CT 1212; 69 RT 13601-02.)

The judge responded by admonishing the jurors not to consider the consequences of any failure to reach a verdict. Thereafter, the jury returned a verdict of death. (69 RT 13603-06; 5 CT 1066 [minute order]; 5 CT 1067 [verdict of death].)

This response was prejudicial error because it did not assure that the jurors understood that their guilt and special circumstances verdicts would still stand even if they didn't agree as to penalty. The jurors' question, which suggested some jurors believed a mistrial would result, indicates fatal confusion on this point.

B. The Judge Was Obligated To Assure That The Jurors Understood That The Guilt Verdicts Would Not Be Affected By Failure To Reach A Verdict At Penalty

In *Jones v. U.S.* (1999) 527 U.S. 373 the U.S. Supreme Court in a five-to-four decision held that the Eighth Amendment does not require a jury to be instructed as to the consequences of a deadlocked jury for purposes of the Federal Death Penalty Statute (18 U.S.C. § 1201(a)(2)). The court agreed with

the Supreme Court of Virginia, which rejected a similar instruction in *Justus v. Commonwealth* (VA 1980) 266 S.E.2d 87, 92 because this type of instruction "would [be] an open invitation for the jury to avoid its responsibility and to disagree."

However, *Jones v. U.S.* fails to address whether the jury should be informed that the guilt and special circumstance verdicts will remain unaffected even if the jurors do not reach a verdict as to penalty. This concern was not at issue in *Jones*, which involved the issue of whether the jury properly understood that it was required to attempt to reach a unanimous verdict as to a lesser sentence if it could not reach a verdict as to the greater sentence.

In the present case, the verdict was unreliable and in violation of the Eighth Amendment because the jurors may not have known that the failure to reach a verdict at the penalty trial would not nullify the guilt verdicts. (See generally *Dawson v. Delaware* (1992) 503 U.S. 159; *Sochor v. Florida* (1992) 504 U.S. 527; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Clemons v. Mississippi* (1990) 494 U.S. 738; *McCleskey v. Kemp* (1987) 481 U.S. 279.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[384] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. The Error Warrants Reversal Of The Death Sentence

The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29

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[384] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

[discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the failure to assure the jurors understood that the guilt verdicts would not be disturbed even if they did not reach a verdict as to penalty was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G(1), pp.548-50, incorporated herein.)

CLAIM 76

THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN PENALTY PHASE INSTRUCTIONS

A. Introduction

The written instructions were given to the jury during the penalty deliberations. (2 SCT 315.)

All but one of these written instructions contained the standard CALJIC title at the top of the page in all capital letters.[385] This was improper and

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[385] The only untitled instruction concerned the applicability of the previously given guilt phase instructions. (6 CT 1179.) The remaining instructions were titled as follows:

CALJIC 8.84 PENALTY TRIAL – INTRODUCTORY (6 CT 1178.)
CALJIC 8.84.1 DUTY OF JURY– PENALTY PROCEEDING (6 CT 1180.)
CALJIC 1.01 INSTRUCTIONS TO BE CONSIDERED AS A WHOLE (6 CT 1181.)
CALJIC 2.00 DIRECT AND CIRCUMSTANTIAL EVIDENCE – INFERENCES (6 CT 1182.)
CALJIC 2.11 PRODUCTION OF ALL AVAILABLE EVIDENCE NOT REQUIRED (6 CT 1183.)
CALJIC 2.12 WEIGHING TRANSCRIPT TESTIMONY OF UNAVAILABLE WITNESSES (6 CT 1184.)
CALJIC 2.20 BELIEVABILITY OF WITNESS (6 CT 1185-86.)
CALJIC 2.21.1 DISCREPANCIES IN TESTIMONY (6 CT 1187.)
CALJIC 2.27 SUFFICIENCY OF TESTIMONY OF ONE WITNESS (6 CT 1188.)
CALJIC 2.60 DEFENDANT NOT TESTIFYING–NO INFERENCE OF GUILT MAY BE DRAWN (CT 1189.)
CALJIC 2.80 EXPERT TESTIMONY–QUALIFICATIONS OF EXPERT (6 CT 1190.)
CALJIC 8.85 PENALTY TRIAL–FACTORS FOR CONSIDERATION (6 CT 1191-92.)

(continued...)

prejudicial because it was potentially misleading and gave undue emphasis to some principles and less emphasis to others.

B. The Legal Principles

It is well settled that no single instruction or item of evidence should be given undue emphasis. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135; *Commonwealth v. Oleynik* (Pa. 1990) 524 Pa. 41, 46-47 [568 A.2d 1238].) Similarly, any procedure which results in the undue emphasis or de-emphasis of a material legal principle is improper.

An instruction that is one-sided or unbalanced violates the defendant's federal constitutional rights under the 6th and 14th Amendments to due process and a fair, impartial trial by jury. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on accomplice testimony]; *Starr v. United States* (1894) 153 U.S. 614, 626 [trial judge must use great care so that judicial comment does not mislead and "especially that it [is] not . . . one-sided"]; see also *Quercia v. United States* (1933) 289 U.S. 466, 470; see also generally *Wardius v. Oregon* (1973) 412 U.S. 470; *United States v. Laurins* (9th Cir. 1988) 857 F.2d 529, 537.) "Instructions must not, therefore, be argumentative or slanted in favor of either side, [citation] . . . [the instructions] should neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory'. . . nor overemphasize the importance of certain evidence

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[385](...continued)

CALJIC 8.87 PENALTY TRIAL– OTHER CRIMINAL ACTIVITY – PROOF BEYOND A REASONABLE DOUBT (6 CT 1193.)

CALJIC 8.88 PENALTY TRIAL – CONCLUDING INSTRUCTION (6 CT 1194-95.)

or certain parts of the case." (*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414; see also *U.S. v. Neujahr* (4th Cir. 1999) 173 F.3d 853; *United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 45; *State v. Pecora* (Mont. 1980) 190 Mont. 115 [619 P.2d 173, 175].)

Because instructional titles may emphasize or de-emphasize isolated parts of the instructions, they may violate the above principles if left on the written instructions which are given to the jurors.[386] Moreover, as recognized by the CALCRIM committee: "The title is not part of the instruction." (CALCRIM "Guide To Using" (Fall 2006 Edition, printed by West), p. x.)

Hence, a number of jurisdictions specifically recommend that titles should not be included on the written instructions given to the jury. For example, in Hawaii the jury instruction committee has specifically stated that "titles are not part of the instructions and are not intended to be read to the jury. . . ." (*Hawaii Pattern Jury Instructions - Criminal, HAWJIC Introduction* (West, 1998); see also *5th Circuit Pattern Jury Instructions - Criminal* 1.17 [Expert Witness] note (2001) ["When the judge gives written instructions to the jury, the judge may wish to delete the title 'expert witness'"]; *Alaska Pattern Criminal Jury Instructions* General use notes (Alaska Bar Association, 1987) [titles of instructions are not intended to come to the attention of the jury]; *Idaho Criminal Jury Instructions, ICJI Introduction and General Directions for Use* (Idaho Law Foundation, Inc., 1995) [subject and title "must be omitted"]; *Wisconsin Jury Instructions - Criminal, WIS-JI-Criminal* 926 [Contributory Negligence] comment p. 2 (University of Wisconsin Law School, 1999) ["The term 'contributory negligence' is used only in the title of

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[386] This Court has held that the written instructions are the ones upon which it must be assumed the jurors relied. (See Claim 42 § F, pp. 407-08, incorporated herein.)

the instruction. The Committee recommends that the title not be communicated to the jury and has drafted this instruction without using the term"].)[387]

This Court briefly addressed the issue of instructional titles in *People v. Bloyd* (1987) 43 Cal.3d 333, 355 and held that no error is committed when descriptive titles – even if erroneous – are on the written instructions submitted to the jury. (But see *People v. Staten* (2000) 24 Cal.4th 434, 459, fn. 7 [suggesting that failure to strike inapplicable wording from instruction title would be error if the defendant was prejudiced].) However, if titles are included, it should be presumed that the jurors read and relied on those titles. "Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy* (1992) 2 Cal.4th 86, 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324-25, fn 9.)[388] Hence, an inaccurate or misleading title may be a substantial error if it leaves the reviewing court in doubt as to whether a given legal principle was over-emphasized or under-emphasized due to the formatting of the written instructions. Failure of the jury to fully and fairly consider <u>all</u> the legal rules

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[387] On the other hand, in North Dakota, it is recommended that the heading of the instruction be given to make oral delivery of the instructions more understandable and assist the jury in reviewing the instructions in the juryroom. (*North Dakota Pattern Jury Instructions, NDJI-criminal Introduction*, page 1 (State Bar Association of North Dakota, 1985).)

[388] The reality that the jurors will rely on the titles is also reflected by the numerous jury instruction committees, cited above, who have directly addressed the question.

set forth in the jury instructions violated state (Cal. Const. Article I, sections 1, 7, 15, 16 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jury fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Furthermore, verdict reliability is also required by the Due Process Clause (14th Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

C. The Titles In The Present Case Were Constitutionally Deficient

As a general proposition the trial judge should assure that no particular instruction or group of instructions is given undue emphasis or de-emphasis. (See generally *United States v. Sutherland* (5th Cir. 1970) 428 F.2d 1152, 1157-58; *United States v. Piatt* (8th Cir. 1982) 679 F.2d 1228, 1231; *United States v. Parr* (11th Cir. 1983) 716 F.2d 796, 809; *Davis v. United States* (D.C. App. 1986) 510 A.2d 1051, 1053.) However, in the present case the instructional titles undermined the fairness and reliability of the deliberative

process at the penalty phase in violation of the Eighth Amendment.[389]

This is so because the various penalty phase principles were given different emphasis. For example, the expectation that the jurors would "reach a verdict" was unduly emphasized by including it in an instruction entitled "DUTY OF JURY – PENALTY PROCEEDING." (6 CT 1180.) Similarly, the rule that the testimony of a single witness is "sufficient for the proof of [any] fact" was unduly emphasized by individually titling it: "SUFFICIENCY OF TESTIMONY OF ONE WITNESS." (6 CT 1188.)[390]

On the other hand, other equally important penalty phase rules were de-emphasized by not being given individual titles. For example, the crucial instruction as to applicability of the guilt phase instructions had no title at all. (6 CT 1179.) And other crucial matters, such as the definition of aggravation and mitigation and how to weigh those factors, were buried within an instruction titled: "PENALTY TRIAL – CONCLUDING INSTRUCTION" rather than having individual titles. (6 CT 1194.)

And, other instruction titles diverted the jurors from crucial principles by inaccurately describing the content of the instruction. For example, in light of the substantial expert testimony presented at the penalty phase it was important for the jurors to consider the basis for those opinions. [391] However,

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[389] Compare *People v. Staten*, *supra*, 24 Cal.4th at 459, fn. 7 [no error where erroneous title was not prejudicial].

[390] This emphasis benefitted the prosecution because the crux of its case against appellant depended on the testimony of a single, discredited witness: Jose Luis Ramirez. (See Claim 10 § B(2), pp.141-46, and § D, pp.147-50, incorporated herein.)

[391] It is well established that ". . .expert opinions, even though uncontradicted, are worth no more than the reasons and factual data upon which they are (continued...)

this principle could not be found by reference to the instructional titles because it was included within an instruction titled: "EXPERT TESTIMONY – QUALIFICATIONS OF EXPERT." (6 CT 1190.)

Furthermore, other titles were substantively inaccurate. For example, the instruction regarding appellant's decision not to testify at penalty was titled: "DEFENDANT NOT TESTIFYING – NO INFERENCE OF GUILT MAY BE DRAWN." [Emphasis added.] (6 CT 1189.) Thus, the title erroneously implied, contrary to the instruction itself, that the jurors could rely on appellant's failure to testify as a reason for imposing the death penalty.[392/393]

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[391](...continued)
based." (*Griffith v. County Of Los Angeles* (1968) 267 Cal.App.2d 837, 847; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 618 [reliability of material relied on by expert is a threshold requirement]; *People v. Bassett* (1969) 71 Cal.2d 153, 166; *Sears Roebuck & Co. v. Walls* (1960) 178 Cal.App.2d 284, 289.) "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations]." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

[392] *Mitchell v. U.S.* (1999) 526 U.S. 314 held that the prosecution may not rely upon the defendant's "rightful silence" at the guilt phase of a trial in meeting its "burden of proving facts relevant to the crime at the sentencing phase...." (119 S.Ct. at 1316.) Accordingly, at the penalty phase of a capital trial in California, where the aggravating factors must be proven to outweigh the mitigation, the Fifth Amendment privilege against self-incrimination should preclude any adverse inference from the defendant's silence with respect to the weighing process. (See also *Estelle v. Smith* (1981) 451 U.S. 454, 463 ["Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing would clearly contravene the Fifth Amendment"]; see generally *Griffin v. California* (1965) 380 U.S. 609.) As the Supreme Court recognized in *Estelle v. Smith*, there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial as far as the protection of the Fifth Amendment privilege is concerned." (451 U.S. at 462-63; see also *Beathard v. Johnson* (5th Cir. 1999) 177 F.3d 340 [upon request, (continued...)

The fact that the instruction body and title were inconsistent raises doubt as to which the jurors followed. (See *Francis v. Franklin* (1985) 471 U.S. 307.)

Additionally, the title to the instruction listing the mitigating and aggravating factors[394] violated state law and the federal constitution by implying that the jurors' consideration of mitigation was limited to those

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[392](...continued)
defendant is entitled to an instruction at the sentencing phase that no adverse inference may be drawn from the defendant's failure to testify].)

[393] When a generally applicable instruction is made applicable specifically to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (*People v. Salas* (1976) 58 Cal.App.3d 460, 474; see also *United States v. Echeverri* (3rd Cir. 1988) 854 F.2d 638, 643 [giving a special unanimity instruction as to predicate acts under a RICO charge, but not as to predicate acts under a concurrent CCE (Continuing Criminal Enterprise) statute charge, violated due process since jurors may have inferred from this discrepancy that unanimity was not required as to the CCE related predicate acts].)

"Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the deductive concept is commonly understood . . . ." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; see also *United States v. Crane* (9th Cir. 1992) 979 F.2d 687, 690 [maxim expressio unius est exclusio alterius "is a product of logic and common sense"].) That is how this Court reasoned in *People v. Dewberry* (1959) 51 Cal.2d 548, 557:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

[394]CALJIC 8.85 PENALTY TRIAL–FACTORS FOR CONSIDERATION (6 CT 1191-92.)

factors enumerated in the instruction.[395]

D. The Error Violated State Law And The Federal Constitution

Because the instructional titles made the instructions unbalanced and in some cases one-sided in favor of the prosecution, they violated appellant's federal constitutional rights to due process and trial by jury under the Sixth and Fourteenth Amendments. There should be absolute impartiality as between the prosecution and the defendant in the matter of instructions. (See *People v. Moore* (1954) 43 Cal.2d 517, 526; see also *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on accomplice testimony]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)

"[I]n the absence of a strong showing of state interests to the contrary" there "must be a two-way street" between the prosecution and the defense. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475.) Hence, the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (*Ibid.*; see also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution

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[395] The 8th and 14th Amendment guarantees to due process, equal protection and against cruel and unusual punishment require that mitigation not be limited to the enumerated factors but include any mitigating matter that may convince a juror to vote for a sentence less than death. (*Blystone v. Penn* (1990) 494 U.S. 299, 308; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-06; *People v. Easley* (1983) 34 Cal.3d 858, 874-80.)

witnesses]; *Washington v. Texas* (1967) 388 U.S. 14 [accomplice permitted to testify for the prosecution but not for the defense]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

Additionally, the erroneous titles also violated appellant's state (Article I, sections 7, 15 and 17) and federal constitutional rights to due process and fair trial by jury (6th and 14th Amendments) which require that the jurors fully understand the law stated in the jury instructions and that the jury fairly and accurately apply that law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions]; see also *United States v. Gaudin* (1995) 515 U.S. 506, 514 [it is "the jury's constitutional responsibility . . . not merely to determine the facts, but to apply the law to those facts . . ."].)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044;

see also § 1093(f) [power to instruct jury]; § 1127 [same].)[396] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Judgment Should Be Reversed

1. The Error Was Reversible Per Se

Because proper jury consideration of the jury instructions is a fundamental underpinning of the entire trial process, the misleading titles were structural errors and the death judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error" standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

2. The Error Was Reversible Under Harmless Error Analysis

The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact

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[396] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the failure to remove the instruction titles was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIM 77

THE PENALTY INSTRUCTIONS FAILED TO ASSURE THAT THE JURORS HEEDED ALL OF THE APPLICABLE GUILT PHASE INSTRUCTIONS

A. Overview

Because the defense relied, *inter alia*, on lingering doubt at the penalty trial (68 RT 13418-19) juror consideration of the applicable guilt instructions was crucial. However, the penalty instructions – which did not include all the applicable guilt instructions – failed to assure that the jurors would heed all the applicable guilt instructions.

The penalty instructions stated:

> You are still to be guided by the court's previous instructions regarding such matters as
>
> the functions and duties of jurors
> evidence
> the evaluation of evidence
> expert testimony and
> The definition of and culpability for crimes
>
> where applicable and with certain exceptions, namely:
>
> 1. Inst. # 1.00: the previous instruction that you are not to be influenced by sympathy is not applicable in the penalty phase.
>
> 2. The admonition that hou (sic) are to reach a just verdict "regardless of the consequences" is no longer applicable. You are still to strive to reach a just verdict, but you are now free to consider and weigh the consequences as part of your deliberative process. (6 CT 1179.)

B. The Instructional Omission Violated State Law And The Federal Constitution

While reference back to the applicable guilt phase instructions is not per se error (see *People v. Steele* (2002) 27 Cal.4th 1230, 1258), the practice has been "discouraged" by the Ninth Circuit (*Mayfield v. Woodford* (9th Cir. 2001)

270 F.3d 915, 923 fn. 6) and abandoned by revisions to CALJIC. (See CALJIC 8.84.1 and Use Note (7th ed. 2004) [recommending that penalty instructions stand on their own and not refer back to the guilt instructions].)

However, even if the referral-back method is permissible in theory, "trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." (*People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26.)

In the present case, the judge did not give such a clarifying instruction. Instead, the instruction vaguely referred to generic categories of previous instructions without expressly informing the jurors which instructions fell into which categories. This prejudicially violated state law and the Eighth Amendment of the federal constitution.

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044;

see also § 1093(f) [power to instruct jury]; § 1127 [same].)[397] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

C. The Error Warrants Reversal Of The Death Sentence

The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character] incorporated herein.)

Accordingly, because the failure to assure the jurors heeded all of the

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[397] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

guilt phase instructions was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIM 78

EXECUTION FOLLOWING LENGTHY CONFINEMENT UNDER SENTENCE OF DEATH WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND INTERNATIONAL LAW

A. Introduction

Executing appellant following his lengthy confinement under sentence of death (now nearing seven years) would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, sections 1,7, 15, 16, and 17 of the California Constitution.)

Carrying out the death sentence after excessive delay is violative of the Eighth Amendment's Cruel and Unusual Punishments Clause in at least two respects. First, it constitutes cruel and unusual punishment to confine an individual on death row for this extremely prolonged period of time. (See e.g., *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461; *Ceja v. Stewart, supra*, (Fletcher, J., dissenting from order denying stay of execution). Second, after the passage of such a period of time since his conviction and judgment of death, the imposition of a sentence of death upon appellant would violate the Eighth Amendment because the State's ability to exact retribution and to deter other murders by actually carrying out such a sentence is drastically diminished. (*Id.*)

Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions inherent in life on death row:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing

> effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. (in *People v. Anderson* (1972) 6 Cal.3d 628, 649; see also *In re Medley* (1890) 134 U.S. 160, 172.)

Accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Because it would serve no legitimate penological interest to execute appellant after this passage of time and because his confinement on death row for over eight years (so far) constitutes cruel and unusual punishment, the execution of appellant is prohibited by the Eighth Amendment's Cruel and Unusual Punishments Clause.

B. International Law

See Claim 97, pp. 763-65.

CLAIM 79

THE STATE MAY NOT EXECUTE AN ACCUSED WHOM IT HAS NOT AFFORDED FAIR AND RELIABLE PROCEDURAL PROTECTION

In capital cases, our fundamental respect for humanity manifested in the Eighth Amendment requires, inter alia, that the procedures employed to determine who lives and who dies reflect a heightened reliability sufficient to produce confidence that the ultimate decision is just. (*Woodson v. North Carolina* (1976) 428 U.S. 280.

The Supreme Court has adhered to *Woodson* and applied its reasoning in many later cases. (E.g., *Lankford v. Idaho* (1991) 500 U.S. 110 [sentencing in part based upon information contained in a pre-sentence report which was not disclosed to petitioner or to his counsel and to which petitioner had no opportunity to respond required reversal of death sentence]; *Craig v. North Carolina* (1987) 484 U.S. 887; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Maxwell v. Florida* (1986) 479 U.S. 972 [Justice Marshall, dissenting, opined that the Eighth Amendment's requirement of heightened reliability entitled habeas petitioner to access to his case file to ensure that his claim of inadequate assistance of counsel was fully and fairly resolved]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [death sentence vacated where the prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the state supreme court]; *Cabana v. Bullock* (1986) 474 U.S. 376; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plurality opinion) and *Gardner v. Florida* (1977) 430 U.S. 349, 358-359 (opinion announcing judgment); *Ford v. Wainwright* (1986) 477 U.S. 399 [procedure for determining whether condemned was mentally incompetent to be executed criticized on Eighth

Amendment grounds].); *Spaziano v. Florida* (1984) 468 U.S. 447, 456 [fact-finding procedures in capital cases must reflect a heightened standard of reliability].)

In effect, the Eighth Amendment stands as a silent sentinel to protect the capitally accused from procedures and judicial rulings that tilt the playing field against him, thereby calling into question the reliability of any potential determination that death is the appropriate punishment. (See *Monge v. California* (1998) 524 U.S. 721; see also *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430-31.)

In the present case appellant was not given a fair opportunity to defend, in light of the many errors throughout the trial which violated the due process and reliability requirements of the federal constitution. (See e.g., Claims 10 -12 , pp.136-205, incorporated herein.) These violations of appellant's substantial rights profoundly tilted the playing field against him rendering the resultant death sentence unfair and unreliable in violation of the Eighth Amendment.

Accordingly, structural error was committed and the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural defects in the trial mechanism, which defy analysis by "harmless-error" standards are reversible per se]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275 .)

Moreover, because the failure to provide fair and reliable procedural protections was a substantial error, the judgment should be reversed under both the state and federal harmless error standards. (See Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIM 80

THE JURY INSTRUCTIONS UNCONSTITUTIONALLY CHARACTERIZED THE PENALTY DECISION AS A CHOICE BETWEEN "GOOD" AND "BAD"

A. The Instructions Violated State Law And The Federal Constitution

It is a fundamental premise of Eighth Amendment jurisprudence that the jurors' consideration of penalty go beyond the question of "good and evil" or "good and bad." The very premise of California's death penalty statute is that every special circumstance murder is extraordinarily bad; and accordingly, the minimum sentence for such an offense is life imprisonment without possibility of parole. Hence, jurors do not properly exercise their discretion to decide which special circumstance murders warrant death if they impose death based on a finding that, on balance, there is more bad than good about the defendant and his crime. This is not a conclusion that can properly serve as a basis for distinguishing who should be sentenced to die and who should be given a life imprisonment sentence, because it is a conclusion that will apply in almost every special circumstance murder case.

At the penalty trial, the jury was instructed to reach its sentencing verdict by weighing aggravating circumstances versus mitigating circumstances. (6 CT 1194-95.) Because no further explanation/definition of aggravation vs. mitigation was offered, reasonable jurors could have construed these terms as equivalent to morally bad and morally good which called for a balancing of evil versus good. In light of these instructions it is reasonably probable that the jury would have adopted this unconstitutional "good" versus "bad" view of the mandated balancing test. (See *Boyde v. California* (1990) 494 U.S. 370, 380 [to find constitutional error based on an ambiguous instruction, there must be a reasonable likelihood that the challenged instruction was applied in

unconstitutional fashion by the jury].)

Hence, the instructions violated appellant's federal constitutional rights by making it likely that the jurors would believe that they were to return a verdict of death if they concluded that there was more "bad" than "good" about appellant and his crimes – a conclusion which simply does not provide a basis for distinguishing one capital murderer (or one capital murder) from another. (See generally *Godfrey v. Georgia* (1980) 446 U.S. 420, 427; see also Claim 10 § H(3), pp. 158-59, incorporated herein.)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[398] The judge's

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[398] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 (continued...)

erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

B. The Error Warrants Reversal Of The Death Sentence

Because characterizing the sentencing decision as a choice between "good" and "bad" was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

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[398](...continued)
Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

CLAIM 81

BY FAILING TO INSTRUCT THE JURY THAT NEITHER PARTY HAD THE BURDEN OF PROOF AT PENALTY THE JUDGE FAILED TO ASSURE JUROR IMPARTIALITY

A. Proceedings Below

The judge generally followed the CALJIC model instructions at penalty which contained no explanation of the burden of proof as to penalty.[399] Therefore, the instructions failed to inform the jurors as to the neutral standard applicable to the penalty determination.

B. Under California Law Neither Party Has The Burden Of Proof At Penalty

This court has consistently stated that "[u]nlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1053.) Accordingly, "'neither the prosecution nor the defense has the burden of proof' during the penalty phase. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 767.)

C. The Judge Was Obligated To Instruct On The Lack Of A Burden Of Proof

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Moreover, "a trial court must instruct sua sponte on those general principles of law which are '. . . closely and openly connected

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[399] The proof beyond a reasonable doubt burden was included in the penalty instructions but it was specifically limited to proof of uncharged violent criminal conduct under "Factor (b)." (6 CT 1193.)

with the facts before the court, and which are necessary for a jury's understanding of the case.'" (*People v. Crawford* (1982) 131 Cal.App.3d 591, 596, citation omitted; *People v. Sedeno* (1974) 10 Cal.3d 703, 715.) This duty of the judge specifically includes instructing on the burden of proof. (Evidence Code § 502.)[400]

D. Failure To Instruct On The Burden Of Proof Violated State And The Federal Constitutional

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*, 508 U.S. 275; *Cage v. Louisiana* (1990) 498 U.S. 39.) 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.

The same is true if there is no burden of proof but the jury is not so told that. This is true because jurors who believe the burden should be on the defendant to prove mitigation at the penalty phase would continue to believe so. Such jurors do exist.[401] This raises the constitutionally unacceptable possibility that a juror may vote for the death penalty because of a misallocation of what

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[400] Evidence Code § 502 provides:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

[401] See, e.g., *People v. Dunkle* (2005) 36 Cal.4th 861, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

is supposed to be a nonexistent burden of proof in violation of the Sixth, Eighth, and Fourteenth Amendments. (See generally *Sullivan v. Louisiana, supra*, 508 U.S. 275; *Cage v. Louisiana, supra*, 498 U.S. 39; *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625.)

Moreover, because the failure to instruct arbitrarily deprived appellant of his state created right under California law, including Evidence Code § 500-502, to a jury verdict based on the legally applicable burden of proof, the error violated the Due Process Clause of the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Penalty Judgment Should Be Reversed

The failure to properly explain the burden of proof to the jury infects the entire proceeding to which the burden applies and, therefore, the judgment should be reversed without a showing of prejudice. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Sullivan v. Louisiana, supra*, 508 U.S. 275 .)

Alternatively, the error was prejudicial under the state and fedral harmless error standards. (Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIM 82

THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON

The failure to instruct the jury regarding the selection, duties and powers of the foreperson was prejudicial error as to the penalty as well as guilt. (See Claim 49, pp. 458-61, incorporated herein.)

CLAIM 83

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS, PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Overview

CALJIC 8.88, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in that crucial instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

B. The Instruction Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

The sentence of CALJIC 8.88 that purported to guide the jurors' decision on which penalty to select told them they could vote for death if "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it [*sic*] warrants death instead of life without parole." (6 CT 1195; 67 RT 13217.) Thus, the decision whether to impose death hinged on the words "so substantial," an impermissibly vague phrase which bestowed intolerably broad discretion on the jury. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

In short, there is nothing about the language of CALJIC 8.88 that "implies any inherent restraint on the arbitrary and capricious infliction of the

death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222, 235-236.)

C. The Instruction Did Not Convey That The Central Determination Is Whether The Death Penalty Is Appropriate, Not Merely Authorized Under The Law

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court has consistently held that it would mislead jurors to say that the deliberative process is merely a simple weighing of factors, in which the appropriateness of the chosen penalty should not be considered. (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *People v. Milner* (1988) 45 Cal.3d 227, 256-257.)

Again, CALJIC 8.88 told the jurors they could "return a judgment of death [if] . . . persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." In addition to infecting the deliberative process with ambiguity by using the term "so substantial," that instruction also failed to inform the jurors that the central inquiry was not whether death was "warranted," but rather whether it was appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital

cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of that earlier stage in our statutory sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding that special circumstances authorize the death penalty in a particular case. Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

In sum, the deliberative instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty.

Furthermore, this Court has assumed that the pattern instructions adequately communicate to the jury that a death sentence is not appropriate for all defendants for whom a death penalty is warranted. This is not so. Instead, the evidence shows that a substantial minority of jurors who have been read the pattern instructions believe that they are required to sentence the defendant to death once they have found aggravation. (Bentele & Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brook. L.Rev. 1011, 1031-1041 (2001); Bowers, Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the*

Ultimate Penal Sanction (Acker, Bohm, Lanier edits., 2003 (2nd Edit)) p. 440.) Many jurors who have been instructed with the pattern instructions do not understand their duty and do not wait for evidence in the penalty phase about whether the death penalty is appropriate in light of all the additional mitigation and aggravation, but rather have decided at the end of the guilt and special circumstance phase that the sentence is death. (Bowers, Steiner & Antonio, *supra*, at p. 427 ["Many jurors appear not to wait for the penalty phase and arguments regarding the appropriate punishment . . ."].) Such jurors are deciding for death without having even been exposed to, much less considered, mitigating evidence. (*Id.* at p. 428.) Again, the judge's instructional omission denied appellant his rights to a reliable penalty determination, to a jury which deliberated with an accurate understanding of its responsibility for the decision, and to full consideration of his mitigation evidence. (U.S. Const., 6th, 8th & 14th Amends.)

D. The Instruction Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them That The Death Penalty Was Inappropriate

The instruction in question was also defective because it failed to inform the jurors, as this Court has held they must be informed, that neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital-sentencing jury must be clearly informed of the applicable standards, so it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> "To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]" (*Id.* at pp. 727-728.)

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at 727.) Nonetheless, the district court in *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instant instruction, taken from CALJIC 8.88, suffers from the same defect, with the result that appellant's jury was not properly guided on this crucial point in violation of the 8th Amendment.

E. The Instructional Deficiencies Violated State Law And The Federal Constitution

The instructional deficiencies discussed above unconstitutionally allowed appellant to be sentenced to death under vague, standardless and inaccurate instructions which violated California law and the federal constitution. The errors violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[402] The judge's erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Judgment Should Be Reversed

Because the instructional deficiency as to the scope of the jury's sentencing discretion was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G,pp. 548-52, incorporated herein.)

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[402] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the rights of the accused . . ."].)

CLAIM 84

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS BY FAILING TO INSTRUCT THE JURY THAT IT WAS IMPROPER TO RELY SOLELY UPON THE FACTS OF THE MURDER VERDICT AND THE SPECIAL CIRCUMSTANCE FINDING AS AGGRAVATING FACTORS

The judge failed to instruct the jurors that they could not sentence appellant to death based solely upon the same facts that caused it to find appellant guilty of first degree murder. Failure to do so was a violation of appellant's right to due process, to a fair and reliable capital trial, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 8th & 14th Amends.; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Estelle v. Williams*, *supra*, 425 U.S. 501.) In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., Article I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. 288, 302; *Duncan v. Louisiana*, *supra*, 391 U.S. 145), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346-347; *Fetterly v. Paskett*, *supra*, 997 F.2d 1295, 1300). The error requires reversal.

The bare fact that a defendant committed first degree murder fails to justify giving that defendant a death sentence as compared to the life sentences given to others convicted of first degree murder. (See *Godfrey v. Georgia*, *supra*, 446 U.S. 420, 428-433.) Such evidence cannot be used as an aggravating factor because that aggravating factor would exist in every single case in California. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972.) Thus, the mere fact that appellant committed a first degree murder cannot justify the imposition of a death sentence. Moreover, using the evidence that was necessary to find appellant guilty of first degree murder as aggravating evidence collapses the

multi-step inquiry required of capital-sentencing schemes. If the very facts needed to establish his death-eligibility are also the exclusive facts used to demonstrate death-worthiness, then the selection phase's capability to ensure that only the most culpable defendants receive death sentences is hampered. Requiring different evidence at the worthiness phase would alleviate this problem.

Appellant recognizes that the United States Supreme Court's cases have appeared to focus the channeling decision to the eligibility phase. (See, e.g., *Buchanan v. Angelone*, *supra*, 522 U.S. 269, 275-276.) However, decisions such as *Buchanan* do not contemplate a sentencing scheme such as California's. The Supreme Court decisions de-emphasizing the need to constrain jury discretion at the penalty phase are rooted in the assumption that a capital-sentencing scheme narrows the class of people eligible for the death penalty. (See *Tuilaepa v. California*, *supra*, 512 U.S. at p. 981 (conc. opn. of Stevens, J.).) However, since California's scheme has minimal narrowing at the eligibility phase, the jury's discretion must be channeled at the selection phase. Without employing such a ban, California's scheme would not "adequately channel[] the sentencer's discretion so as to prevent arbitrary results." (*Harris v. Alabama* (1995) 513 U.S. 504, 511; see *Graham v. Collins* (1993) 506 U.S. 461, 468.)

In sum, the death judgement should be reversed. In a situation where the jury is assessing the circumstances of the crime to determine whether a death sentence is to be imposed, it is virtually impossible to determine with any certainty that the jury did not assess a death sentence by finding no more culpability than that required to find the appellant guilty of first degree murder with a special circumstance. If the trial court had properly channeled the jury's consideration at the penalty phase, the balance between the aggravating and

mitigating circumstances would have been significantly altered. Therefore, the judgement should be reversed because the prosecution cannot show that the error had no effect on the jury's weighing process. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.)

CLAIM 85

THE UNCONSTITUTIONAL USE OF LETHAL INJECTION RENDERS APPELLANT'S DEATH SENTENCE ILLEGAL

Appellant's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment.

The state of California plans to execute appellant by means of lethal injection. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Penal Code §3604.) As amended in 1992, Penal Code §3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, §3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

In 1996, the California Legislature amended Penal Code §3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . ., the penalty of death shall be imposed by lethal injection."

On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp. 1387 that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit affirmed the district court's conclusions in *Fierro*, concluding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the

Eighth and Fourteenth Amendments." (*Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309.) The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. (*Ibid.*) Accordingly, lethal injection is the only method of execution currently authorized in California.

The Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. (Cf. *Estelle v. Gamble* (1976) 429 U.S. 97, 106.) There are a number of known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles* (1958) 356 U.S. 86, 100, the Eighth Amendment stands to safeguard "nothing less than the dignity of man."

To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (*Glass v. Louisiana* (1985) 471 U.S. 1080, 1086; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 709-711 (Reinhart, J., dissenting); see also, *Zant v. Stephens* (1985) 462 U.S. 862, 884-85 [state must minimize risks of mistakes in administering capital punishment]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J., concurring) [same].)

It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the various individual factors which have to be accessed in each case. Appellant should not be subjected to experimentation by the State in its attempt to figure out how best to kill a human being.

California's use of lethal injection to execute prisoners sentenced to

death unnecessarily risks extreme pain and inhumane suffering. Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment of the United States Constitution.

The Eighth Amendment prohibits methods of execution that involve the "unnecessary and wanton infliction of pain." (*Gregg v. Georgia*, *supra*, at 173.) Accordingly, appellant's sentence should be reversed.

CLAIM 86

THE TRIAL COURT ERRED IN FAILING TO GIVE INSTRUCTIONS EXPLAINING THE JURY'S TASK AT PENALTY, CLARIFYING THE MEANING OF "MITIGATION" AND EXPLAINING THE TASK OF WEIGHING AGGRAVATION AND MITIGATION

The judge failed to give numerous penalty phase jury instructions which would have explicated three areas for the jury: First, the instructions would have made it clear that appellant's jury's task at penalty was moral and normative and, as such, was significantly different from what it had been at guilt. Second, they would have illuminated critical, and frequently misunderstood, aspects of the notion of "mitigation." Third, the omitted instructions would have guided the jury as it weighed aggravation against mitigation. The omission of these proposed instructions, both alone and in combination, was reversible error.

The instructional omissions violated appellant's right to present a defense because it led the jury to fail to give due weight to appellant's mitigation evidence. (U.S. Const., 6th & 14th Amends.; Cal. Const., Article I, §§ 7 and 15; *Chambers v. Mississippi*, *supra*, 410 U.S. 284.) They denied his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., Article I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638), and his right to a fair trial secured by due process of law. (U.S. Const., 14th Amend.; Cal. Const., Article I, §§ 7 & 15; *Estelle v. Williams*, *supra*, 425 U.S. 501, 503.) The errors denied appellant his right to a jury which deliberated with a full understanding of its responsibility for the decision. (U.S. Const., Amends. 8th & 14th; *Caldwell v. Mississippi*, *supra*, 472 U.S. 320.) In addition, the errors violated appellant's right to trial by a properly instructed jury. (U.S. Const., 6th &14th Amends.; Cal. Const., Article I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. 288, 302; *Duncan v. Louisiana*, *supra*, 391 U.S. 145.) Finally, the failure

to instruct violated appellant's right to due process by arbitrarily depriving appellant of his state right to the delivery of requested instructions supported by the evidence. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma, supra*, 447 U.S. 343, 346-347; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

This Court has previously rejected arguments similar to the ones he presents here. However, appellant urges the Court to reconsider those opinions, particularly in light of recent empirical studies of capital juries showing repeatedly that juries do not understand concepts necessary to perform its function at penalty phase. (See also Claim 51, pp. 469-82, incorporated herein; see also Claim 7, p. 105, fn. 100, incorporated herein.)

A. The Court Erred In Not Reading Instructions Informing The Jury That Its Task At Penalty, As Moral And Normative, Was Significantly Different From The Factfinding Task In The Guilt Phase

The jury in appellant's case was misled about its normative responsibilities at penalty phase. This was in part because it was read a number of instructions which incorrectly suggested that its task was primarily factual – just like it had been at guilt. For instance, the court instructed the jury with CALJIC 8.84.1 which provided: "You must determine what *the facts are from the evidence* received during the entire trial unless you are instructed otherwise." (6 CT 1180.) [italics added].) The court also instructed the jury with CALJIC 8.85 which told the jury that "in determining which penalty is to be imposed you shall . . . *consider the evidence*." (6 CT 1191.) [italics added].) The jury also heard instructions emphasizing the manner in which it should use the evidence to determine "facts." For instance, the jury was instructed with CALJIC 2.00 informing it that: "[e]vidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a *fact*." (6 CT 1228.) [italics added].)

They were instructed with CALJIC 2.27 which told the jury that it could rely on the testimony of a single witness "for proof of a *fact*." (6 CT 1243.) [italics added].) It was also read instructions emphasizing "guilt." So, CALJIC 2.72 informed the jury that it could not find appellant "guilty" of the prior crimes without proof (6 CT 1249), and CALJIC 8.87 told it that it must find appellant "guilty" beyond a reasonable doubt. (6 CT 1193-94.) Without a counter-balancing instruction the jury surely believed that its task at penalty was no different than it had been at guilt.

In sum, the jury was misled into believing that its only or primary role was to find facts, when, in fact, the fact finding is only part of the jurors' duty at the penalty trial. Since appellant's jury believed that its essential role was to find facts, it was likely to misunderstand and neglect its normative role, *i.e.*, its role as the voice of the "conscience of the community." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519.)

B. The Court Erred In Failing To Give An Instruction Defining Mitigation

1. Appellant Was Entitled To An Instruction Explaining In Detail What Evidence Was Offered In Mitigation

CALJIC 8.85 specifically pointed out the prosecution's aggravation evidence, i.e., the circumstances of the crime, appellant's prior violent acts and his prior felony conviction. (6 CT 1191.) However, the jurors were given no other instruction which would have provided needed balance (see *People v. Moore*, *supra*, 43 Cal.2d 517, 526-529) by explaining to the jurors what specific matters they could consider in mitigation.

This error had constitutional dimensions. Instructions that fail "to tell the jury that any aspect of the defendant's character or *background* [can] be considered mitigating, and [can] be a basis for rejecting death even though it

did not necessarily lessen culpability . . . [are] constitutionally inadequate." (*People v. Lanphear* (1984) 36 Cal.3d 163, 167-168.) [italics added.] The instructions here did not so inform the jury adequately about the critical background evidence offered for appellant and therefore were constitutionally inadequate. (See generally, Haney, Sontag and Costanzo, "*Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*," 50 Journal of Social Sciences No. 2 (Summer 1994) at p. 163 [social science study of capital jurors found that "it was clear from the interviews that all of the . . . juries [sparing the defendant's life] took the defendant's background somehow into account."].)

In sum, the instructions prejudicially misled the jury into disregarding pertinent evidence so that it failed to give consideration and full effect to constitutionally relevant mitigation. (*Lockett v. Ohio, supra*, 438 U.S. 586.) Appellant was deprived of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.) The pattern instructions alone unfairly skewed the verdict toward death, in violation of the Eighth and Fourteenth Amendments.

2. The Trial Court Erred In Failing To Instruct The Jury That Mitigation Evidence Is Unlimited

The judge should also have told the jury that mitigating factors are unlimited. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 807 [approving instruction that mitigating factors are unlimited and that mitigating factors listed in the instruction are just examples of possible mitigation]; *People v. Raley* (1992) 2 Cal.4th 870, 918 [same].)

A jury which does not understand the broad scope of mitigation is constitutionally unacceptable. As noted, it is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less

severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) The failure to adequately instruct the jury on the scope of mitigation impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

C. The Trial Court Erred In Failing to Give Instructions Elaborating The Concept Of "Weighing"

1. The Court Erred In Failing To Inform The Jury That It Was Never Required To Find That Death Was The Appropriate Punishment And That It Could Always Return A Verdict Of Life Without Parole

The instructions failed to tell the jurors that the death penalty is never mandatory and that they always have the discretion to return a verdict of life without the possibility of parole. (See *People v. Duncan* (1991) 53 Cal.3d 955, 978-379 ["our statute . . . give[s] the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.].) This Court has found that instructions informing the jury that it can return a verdict of life, even if it failed to find mitigation is not required (even upon request) because the instruction is implicit in CALJIC 8.88. This Court in *People v. Johnson* (1993) 6 Cal.4th 1, 52 has held that by reading what is now CALJIC 8.88, "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances merely because no mitigating circumstances were found to exist."

However, this Court's assumption that juror's understand that the death penalty is not mandatory once aggravation is found is simply false. Far from understanding that the life without parole is always an option, even if aggravation is found, a substantial minority of jurors given the pattern instructions believe that once they find any aggravation *at all* then the death penalty is required. (Bentele & Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brook. L.Rev. 1011, 1031-1041 (2001); Bowers, Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Acker, Bohm, Lanier edits., 2003 (2nd Edit)) p. 440 [presence of an aggravating factor, which should merely make a defendant eligible for a death sentence, operates as a mandate for the death penalty]; see also Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L.Rev. 1, 2; Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law & Hum. Beh. 575 at p. 582 [hereafter "Clarifying Life and Death Matters"].)

Without the aid of proper instructions, the jurors were not able to fully engage in the type of individualized consideration the Eighth Amendment requires in a capital case (*Zant v. Stephens*, *supra*, 462 U.S. 862, 879) and created the risk that the death penalty would be imposed in spite of factors calling for a less severe sentence. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Furthermore, the instructions given made the penalty determination unreliable (U.S. Const., 8th & 14th Amends.)

2. It Was Error To Fail to Instruct That If Mitigation Outweighed

Aggravation Then Life Without Parole Is Required

Penal Code § 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." This mandatory language was not included in CALJIC 8.88. (6 CT 1194-95.) Nevertheless, this Court has repeatedly held that an instruction explicitly requiring life without parole when mitigation outweighs aggravation is not necessary. For example, in *People v. Duncan, supra*, 53 Cal.3d at 978, this Court found the formulation in CALJIC 8.88 without additional language permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." 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. However, the *Duncan* opinion cites no authority for this proposition; moreover, the proposition conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See *People v. Moore*, *supra*, 43 Cal.2d at pp. 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; 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*, *supra*, 157 U.S. 301, 310.)

Additionally, studies show that this Court's assumption that the notion that jurors understand that life without parole is mandatory when mitigation outweighs aggravation is unfounded. (Bentele & Bowers, *supra*, at pp. 1031-

1041; Bowers, Steiner & Antonio, *supra*, at pp. 438-440; Eisenberg & Wells, *supra*, at p. 2.) In fact, many jurors instructed with the language of CALJIC 8.88 thought that the death penalty was required if there was any aggravation, regardless of whether mitigation outweighed such aggravation. Barely half of the jurors understood that life was mandatory if mitigation outweighed aggravation, with about a fifth of the jurors believing that either life or death could be the verdict, and with another fifth believing that the instruction gave them no guidance on this issue at all. (*Clarifying Life and Death Matters*, *supra*, at p. 582.)

In sum, appellant's rights under the Eighth and Fourteenth Amendments to a reliable penalty verdict by a jury which considered all his mitigation evidence, and which understood its sentencing responsibilities were violated. (*Mills v. Maryland*, *supra*, 486 U.S. 367, 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

D. This Court's Reliance On Pattern Instructions To Convey Adequately The Meaning Of Penalty Phase Law Must Be Revisited

The rules for death penalty deliberation are simply too complex for pattern instructions. As one court recently put it, courts have "established a set of increasingly reticulated rules for capital sentencing, including shifting burdens, unanimity on some issues but not on others, and consideration of mitigating factors that do not appear in state statues." (*Welborn v. Gacey* (7th Cir. 1993) 994 F.2d 305, 312.) Even justices of the United States Supreme Court sometimes complain that the rules are too complex. (See *Graham v. Collins* (1993) 506 U.S. 461, 483-495 (conc. opin. of Thomas, J.); *Walton v. Arizona* (1990) 497 U.S. 639, 656-674 (conc. opin of Scalia, J.).) The high reversal rates of capital convictions on grounds of instructional error indicates the same. (Liebman, et al., *A Broken System: Error Rates in Capital Cases,*

1973-1995 (June, 2000), p. 137 <http://www.ccjr.policy.net/cjedfund/jpreport/finrep.pdf> (as of November 14, 2005) [three quarters of death penalty cases reversed for instructional error].)

However, the issue is not simply of the jury misunderstanding, as bad as that is. Rather, the evidence shows pattern instructions systematically miscommunicate core penalty phase concepts in a way which creates a tilt toward death. The nature of the juror's misunderstandings of mitigation and weighing is such that they virtually always skew the process in favor of death. (See Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided* (1995) 70 Ind. L.J. 1161, 1176-1177; Haney & Lynch, *Comprehending Life and Death Matters* (1994) 18 Law & Hum. Behav. 411, 428.) As one study summed up, "if the final penalty decision is death, there is a high probability [i.e., not just a "reasonable likelihood"] that this final penalty verdict is partially a product of the faulty interpretation of the law." (Luginbuhl & Howe, *supra*, at p. 1180.) Far from providing a "helpful framework" with which citizens can understand the concepts of capital decision-making (*People v. Steele* (2002) 27 Cal.4th 1230, 1258; *People v. Dyer* (1988) 54 Cal.3d 26, 82), California's pattern instructions confuse many jurors, who misunderstand and misapply the concepts. (See *Clarifying Life and Death Matters*, *supra*, at p. 582.) Appellant urges this Court to reconsider its decisions holding otherwise.

E. The Death Judgment Should Be Reversed

Had the jury been properly instructed there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 536.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death

should be reversed. Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde* v. *California*, *supra*, 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

CLAIM 87

INSTRUCTING THE JURY PURSUANT TO CALJIC 8.85 WITHOUT MODIFICATION VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

A. CALJIC 8.85, As Given In The Present Case, Was Constitutionally Flawed

At the conclusion of the penalty phase, the trial court instructed the jury pursuant to CALJIC 8.85. (6 CT 1191-92.) As discussed below, this instruction was 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, 191-92), but has not adequately addressed the underlying reasoning presented by appellant. This Court should reconsider its previous rulings in light of the arguments made herein. (See Claim 7, p. 105, fn. 100, incorporated herein.)

B. 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

See Claim 88 § C(7), pp. 705-07, incorporated herein.

C. The Trial Court's Failure to Delete Inapplicable Statutory Mitigating Factors Precluded A Fair And Reliable Capital-Sentencing Determination

1. The Trial Court Should Have Deleted The Factors Enumerated In Penal Code Section 190.3, Subdivisions (e), (f) And (j) From CALJIC 8.85 Before Instructing The Jury

The trial court's failure to tailor CALJIC 8.85 to this case by deleting the inapplicable sentencing factors created a barrier to full consideration of appellant's mitigating evidence and deprived appellant of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments.

(See *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5; *Lockett v. Ohio* (1978) 438 U.S. 586, 604-05.)

2. Use Of The Phrase "if Applicable" In CALJIC 8.85 Does Not Cure The Constitutional Defect

The phrase "if applicable" did not save the instruction from being unconstitutional because the instruction was not given in isolation, but was given in conjunction with CALJIC 8.88. (6 CT 1194.) Thus, one must consider both of these instructions together to understand how a jury would interpret the phrase "if applicable" in CALJIC 8.85. When one does that, the meaning of the "if applicable" phrase in CALJIC 8.85 becomes confusing at best.

D. The Trial Court's Failure To Instruct The Jury That It Could Not Consider Aggravating Factors Not Enumerated In The Statute Further Violated Appellant's Right To A Fair And Reliable Capital-Sentencing Determination

The death penalty scheme under which appellant was prosecuted contemplated that the jury would only consider the factors set forth in Penal Code § 190.3 when determining whether appellant was to live or die. This Court recognized this principle when it noted that the purpose of passing Penal Code § 190.3 was to restrict the sentencer to making its decision based solely upon consideration of those factors. (See *People v. Boyd* (1985) 38 Cal.3d 762, 772-76.) The instructions, however, did not specifically tell the jury that they should only consider as aggravating factors those circumstances enumerated in Penal Code § 190.3. (6 CT 1191-92.)

The use of evidence by the jury to assess a death sentence based on unspecified factors is the type of evil the this Court in *Boyd* cautioned trial courts to avoid. The trial court here did not avoid this error, consequently the jury instruction given pursuant to CALJIC 8.85 failed to channel and guide the jury's discretion and permitted the arbitrary and capricious imposition of the

death penalty, in violation of the Eighth and Fourteenth Amendments. (See *Harris v. Alabama* (1995) 513 U.S. 504, 511.)

E. Factor (i) is Vague

In *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834 (plur. opn.) the United States Supreme Court recognized the importance of treating defendant's youth as a mitigating factor. Yet this Court treats age as both an aggravator and a mitigator, so that the jury is permitted to use youth as a reason to impose the death penalty.

Consequently, appellant urges this Court to reconsider the *People v. Lucky* (1988) 45 Cal.3d 259, 302 definition of the age factor as an invitation to consider "any age-related matter suggested by the evidence, common experience, or morality." (*Lucky*, 45 Cal.3d at 302.) Such a definition does nothing to supply guidance for the jury, the trial judge or the parties, invites capriciousness and arbitrariness, and renders this factor unconstitutionally vague. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) This Court's holding to the contrary should be reconsidered. (See *People v. Edwards* (1991) 54 Cal.3d 787, 844.)

F. The Judgement Should Be Reversed

Because the errors discussed above were individually and cumulatively substantial, the judgment should be reversed under both the state and federal standards of prejudice. (See Claim 59 § G, pp. 548-52, incorporated herein.)

CLAIM 88: CONSTITUTIONAL CHALLENGES TO THE CALIFORNIA DEATH PENALTY STATUTE

CLAIM 88

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) ____ U.S. ____ [126 S.Ct. 2516, 2527, fn. 6].)[403] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while

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[403]In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other

at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

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

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances[404] purporting to narrow the category

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[404] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 (continued...)

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

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

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[404](...continued)
Cal.3d 797. The number of special circumstances has continued to grow and is now 33.

international law.[405] (See Section E of this Claim and Claims 78, 95 and 96, incorporated herein.)

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." 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.[406] The Court has allowed extraordinary expansions

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[405]In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[406] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC 8.88 (2006), par. 3.

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,[407] or having had a "hatred of religion,"[408] or threatened witnesses after his arrest,[409] or disposed of the victim's body in a manner that precluded its recovery.[410] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn

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[407] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[408] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[409] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[410] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

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

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to

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

1. Appellant's Death Verdict Was Not Premised On Findings Beyond A Reasonable Doubt By A Unanimous Jury That One Or More Aggravating Factors Existed And That These Factors Outweighed Mitigating Factors; His Constitutional Right To Jury Determination Beyond A Reasonable Doubt Of All Facts Essential To The Imposition Of A Death Penalty Was Thereby Violated

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable

doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) _____ U.S. ____ [127 S. Ct. 856; 2007 U.S. LEXIS 1324] [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and

compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham*

v. California, supra, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. *In The Wake of Apprendi, Ring, Blakely, And Cunningham, Any Jury Finding Necessary To The Imposition Of Death Must Be Found True Beyond A Reasonable Doubt.*

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[411] 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 (68 RT 13455-56; 6 CT 1194-95),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity,*

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[411]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[412] 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.[413]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied

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[412]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[413]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.)

precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[414] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact

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[414] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[415] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

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

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[415]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."

more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

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

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[416])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[417] As the high court stated in *Ring*,

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[416]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[417]In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'

(continued...)

supra, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

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[417](...continued)
([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

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

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 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 pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its

decision true, but that death is the appropriate sentence.

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at p. 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his

application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[418] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias, supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a

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[418]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.)

capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante.*)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster*

without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

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

situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely In The Penalty Phase On Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For The Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As A Factor In Aggravation Unless Found To Be True Beyond A Reasonable Doubt By A Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. 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* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* (2000) 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[419]

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[419]There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. See *People v. Cruz*, No. S042224, Appellant's Supplemental Brief.

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings, supra*, 455 U.S. at p. 112.) Whether a

capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

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

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more

strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[420] as in *Snow*,[421] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by 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

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[420]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[421]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

circumstances in aggravation or mitigation justifying the term selected."[422]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[423] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

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[422]In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[423]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

CLAIMS 89-91: CUMULATIVE PREJUDICE

CLAIM 89

IF ANY CONVICTION OR SPECIAL CIRCUMSTANCE IS REVERSED, THE PENALTY OF DEATH SHOULD ALSO BE REVERSED

In Claims 1- 57 appellant has shown that all of the jurors verdicts should be reversed. However, even if all the verdicts are not reversed, the reversal of any single substantive count or special circumstance finding warrants reversal of the penalty verdict. This is so because the jury's consideration of unauthorized factors in aggravation added improper weight to death's side of the scale and violated appellant's right to a fair and reliable penalty determination. (U.S. Const., Amends. 8, 6 &14; Cal. Const., Article I, section 17; *Stringer v. Black* (1992) 503 U.S. 222, 232; *Johnson v. Mississippi, supra*, 486 U.S. at p. 586; see also Claim 90, pp. 713-15, incorporated herein [errors not prejudicial at guilt trial may warrant reversal of penalty verdict] .)

Moreover, in *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi, supra*, 530 U.S. 466, to capital sentencing procedures and concluded that specific findings the legislature makes as a prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. (See also *Cunningham v. California* (2007) _____ U.S. ____ [127 S. Ct. 856; 2007 U.S. LEXIS 1324].) In this state, the trier of fact has two critical facts to determine at the penalty phase of the trial: (1) whether one or more aggravating circumstances exists, and (2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances. (Pen. Code § 190.3.) Therefore, those findings must be made by the jury beyond a reasonable doubt. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., Article I, section 7, 15 and 17.) If this Court reverses any of the

convictions or special circumstances, the delicate calculus the jury must undertake is necessarily skewed, and there is no longer a valid finding that the aggravation outweighs mitigation beyond a reasonable doubt.

This Court cannot conduct a harmless error review of the death sentence without making findings that go beyond the facts reflected in the verdict itself (see *Ring v. Arizona*, *supra*, 536 U.S. at p. 588; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483), and under *Ring*, the power to make those findings is the jury's alone. Findings by the jury regarding the existence and weight of the factor supporting an increased sentence are constitutionally required. Therefore, a new determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed. Accordingly, appellant's death sentence should be reversed if any substantive conviction or special verdict is reversed.

CLAIM 90

EVEN IF DEEMED HARMLESS AT THE GUILT PHASE, THE GUILT PHASE ERRORS SHOULD BE DEEMED PREJUDICIAL TO THE PENALTY PHASE BECAUSE THE STATE CANNOT PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT

Appellant has demonstrated that this Court should reverse his guilt and special circumstance convictions because of substantial guilt phase errors. (See Claims 1-57.) Those same errors also impacted appellant's penalty phase defense. Should this Court hold that the guilt and special circumstance phase errors were harmless, it should nonetheless reverse the death sentence because of the prejudice those errors caused appellant at the penalty phase.

The issues the jurors must consider at the guilt phase are fundamentally different from the ones that they must consider at the penalty phase. Consequently, an error that might be deemed harmless as to the guilt determination could substantially prejudice a defendant at the penalty phase. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 256 [guilt phase error requires reversal of a death sentence unless the State proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"]; *Smith v. Zant* (11th Cir. 1988) 855 F.2d 712, 721-722 [confession obtained in violation of *Miranda* held harmless as to the guilt verdict but prejudicial on the issue of sentence].) "[B]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing," there is "a unique opportunity for . . . prejudice to operate" there. (*Turner v. Murray* (1986) 476 U.S. 28, 35.) Consistent with the fairness and reliability principles that govern review in death cases (see *Eddings v. Oklahoma, supra,* 455 U.S. at 112), it cannot be assumed that the guilt phase errors could have played no role in the penalty verdict.

This Court has, of course, adopted a "reasonable possibility" standard

for assessing prejudice resulting from state law errors at the penalty phase. In *Chapman, supra*, the United States Supreme Court equated an almost identically worded standard adopted by it in *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87, with the *Chapman* standard of "harmless beyond a reasonable doubt." The Supreme Court stated:

> There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about "whether there is a reasonable possibility that the evidence complained of may have contributed to the conviction" and requiring the beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Chapman, supra*, 386 U.S. at 24.)

Thus, the Supreme Court has recognized that the language of "reasonable possibility" and of "harmless beyond a reasonable doubt" implicate virtually the same standard and impose the same burden upon a "beneficiary of a constitutional error." Under either standard, the penalty verdict should be reversed because of the guilt phase errors.

This Court has recognized that guilt phase errors can prejudice the penalty decision, even in cases where evidence of guilt is overwhelming:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial . . . . [I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136; see also *People v. Brown* (1988) 46 Cal.3d 432, 464 (conc. Opn. Mosk, J.); *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error was harmless as to guilt but prejudicial as to penalty].)

In the present case the prosecution's penalty evidence was not overwhelming – it was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein [penalty trial was closely balanced].) Accordingly, the guilt

phase errors, individually and cumulatively, warrant reversal of the penalty verdict.

CLAIM 91

CUMULATIVE ERROR: THE CUMULATIVE EFFECT OF THE ERRORS WARRANTS REVERSAL OF THE DEATH JUDGMENT

A. Introduction

The discussion below addresses the cumulative effect of the errors identified throughout this brief. The term "cumulative" refers to all the errors identified in the guilt phase briefing and penalty briefing, all of which could have affected the penalty verdict by virtue of the ruling allowing cross-admissibility of all the charges.

B. The Errors Cumulatively Violated The Federal Constitution

State law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone may cumulatively produce a trial setting that is fundamentally unfair. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Furthermore, the numerous state law and federal constitutional errors identified throughout this brief precluded the jurors' verdict from meeting the heightened reliability requirements constitutionally mandated in a capital proceeding, and deprived appellant of his rights to due process, fair trial by jury, confrontation, compulsory process, representation of counsel and the right to present a defense, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-

363; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 646.)

C. The Errors Were Cumulatively Prejudicial

The errors identified in appellants opening brief were cumulatively prejudicial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone]; *Delzell v. Day* (1950) 36 Cal.2d 349, 351; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520.)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.) Accordingly, this Court's review of guilt and penalty phase errors is not limited to the determination of whether a single error, by itself, constituted prejudice.

In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, appellant has identified numerous errors that occurred during the guilt (Claims 1-51), special circumstances (Claims 52-56), and penalty (Claims 57-96) phases of his trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a

fair trial, of the right to compulsory process and to confront the evidence against him, of a fair and impartial jury, of the right to present a defense, of the right to representation of counsel, and of fair and reliable guilt and penalty determinations in violation of appellant rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error considered separately is sufficiently prejudicial to warrant reversal of the guilt, special circumstances and/or death judgment. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

In sum, should this Court find multiple errors within this brief, then they should be viewed cumulatively as well as individually, and the guilt and/or penalty judgment should be reversed based on the cumulative errors, under any standard of prejudice. (E.g., *People v. Buffum* (1953) 40 Cal.2d 709, 726 [state law]; *People v. Sims* (1958) 165 Cal.App.2d 108, 116 [same]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 17 [*Chapman* standard]; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963, and cases cited [same]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438 [*Strickland* standard]; *Mak v. Blodgett* (9th Cit. 1992) 970 F.2d 614, 622 [same]; see also, e.g., *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1681; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Phillips* (1985) 41 Cal.3d 29, 83; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.)

Moreover, "the death penalty is qualitatively different from all other punishments and [thus] the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 [citing *Ford v. Wainwright* (1986) 477 U.S.

399, 411]; *Zant v. Stephens* (1983) 462 U.S. 862, 885; and *Gardner v. Florida* (1977) 430 U.S. 349, 358].) This is also so because of the reality that "death is different," and the recognized need for heightened reliability in the capital sentencing context. (*People v. Horton* (1995) 11 Cal.4th 1068, 1134-35; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586.)

Thus, this Court should consider the penalty phase errors cumulatively in conjunction with all guilt and special circumstances errors, which may have affected the penalty phase toward the same end. Such consideration includes, but is not limited to, considering the effect of any and all guilt and special circumstances errors with respect to their prejudice at the penalty phase. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; see generally Goodpaster, "*The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases*" (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses And Their Penalty Phase Effects"].)

This court should also assess the combined effect of the errors, because the jury's consideration of all the penalty factors resulted in a single general verdict of death. Multiple errors, each of which may have been harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett, supra,* 970 F.2d at 622.)

CLAIMS 92-94: DEATH PENALTY PROPORTIONALITY CLAIMS

CLAIM 92

INTRACASE PROPORTIONALITY REVIEW IS REQUESTED

In the present case, the prosecution failed to prove beyond a reasonable doubt that appellant knowingly and intentionally participated in the shootings. Rather, appellant's convictions and the resultant death sentence appear to be founded on a theory of vicarious liability whereby the acts and intent of Antonio Sanchez and Joaquin Nuñez were constructively imputed to appellant. (See Claim 10 § D, pp. 149-50 [verdicts demonstrate juror rejection of prosecution theory that appellant and Antonio Sanchez conspired to commit murder] incorporated herein.) And, even if appellant's lack of knowledge was the product of criminal negligence or even implied malice (but see Claim 21, pp. 285-90, incorporated herein [jurors required to find appellant and Antonio Sanchez "equally guilty"]), such a mens rea is an insufficient predicate for death eligibility, as a matter of law.

Furthermore, appellant's character and background were inconsistent with the prosecutor's allegation that he conspired with Antonio Sanchez to commit robbery and murder. Appellant had no prior felony convictions or ingrained history of criminal violence. All the witnesses who knew appellant consistently recounted his generosity, warmth and love for his family. Thus, as recognized by the trial judge, it would have been totally out of character for appellant to have knowingly participated in the alleged conspiracy. (See 72 RT 14218 ["there seems to be an inexplicable disconnect between the evidence of the defendant's character and the enormity and monstrosity of the crimes committed."].)

Additionally, no less than three judges who reviewed appellant's case

before trial "felt strongly" that a life without parole sentence would be a "fair and prudent disposition of this case." (2 SCT 316; 22 RT 4202-04.) However, the district attorney continued to demand a death sentence.

Finally, none of the perpetrators of these crimes received the death penalty including Antonio Sanchez who – as conceded by the prosecutor – "was the one who had the bone to pick here." (52 RT 10224.)

In sum, the present case stands apart from the vast majority of other cases in which this Court has conducted intracase proportionality review. In none of the instances in which this Court has considered intracase proportionality has the defendant in question had so clearly minimal a connection to the events, nor such a clear lack of homicidal mens rea. So therefore, appellant's case is a clearly extreme instance of disproportionality. (See generally *Getsy v. Mitchell* (6th Cir. 2006) 456 F.3d 575, 584 [intra-case proportionality review is constitutionally required, and just as defendants with "plainly different" levels of culpability may not both receive the same capital sentence, less-culpable defendants may not be given the death penalty when more culpable defendants have been spared] see also *Enmund v. Florida* (1982) 458 U.S. 782.)[435] Under the unique circumstance of the present case – in

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[435] In none of the instances in which the California Supreme Court has considered intracase proportionality has the defendant in question had so clearly minimal a connection to the events, nor such a clear lack of homicidal mens rea. So therefore, appellant's case is a clearly extreme instance of disproportionality. (Compare e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 967 ["Defendant, 22 years of age and already with a long criminal history at the time of this violent crime spree, brutally robbed and stabbed one man to death; brutally robbed, stabbed and nearly killed another; robbed another victim in an elevator by beating him unconscious with a hard, blunt object; robbed another victim in a gas station by attacking and beating him in the restroom of the business; and violently robbed three taxicab drivers while (continued...)

which appellant's death sentence may well be based on nothing more than criminal negligence – the death judgement should based on intra case proportionality.

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[435](...continued)
holding a knife to their throats and threatening to kill them"]; *People v. Rogers* (2006) 39 Cal.4th 826, 895 [". . .the jury found that defendant, acting alone, shot to death two young women, one of whom was only 15 years of age, in part to save himself from embarrassment and the adverse personal and employment consequences that might have ensued had his involvement with prostitutes become known. Defendant not only was a mature man in his forties at the time of the crimes; he also was a deputy sheriff who was knowledgeable concerning the law and was charged with protecting the public. The jury rejected defendant's mental state defense"]; *People v. Avila* (2006) 38 Cal.4th 491, 615 ["Given the nature of these murders, defendant's conduct and comments thereafter, and his previous criminal activity, his sentence is not grossly disproportionate to his personal culpability. [Citation.]"]; *People v. Chatman* (2006) 38 Cal.4th 344, 410 ["The jury found, on proper and substantial evidence, that the killing involved torture. Defendant committed other crimes of violence, both before and after he murdered [the victim]"]; *People v. Wilson* (2005) 36 Cal.4th 309, 361 ["Defendant robbed and murdered [the victim], who trusted defendant by employing him and allowing him to live in his home for a period of time. Defendant shot [the victim] twice in the head while he was asleep in order to take his money. Later, while in custody, defendant solicited the murder of a key prosecution witness who could place defendant and [the victim] together before the crimes. . . . [Citation.]].)

CLAIM 93

CONDEMNING APPELLANT TO DEATH FOR A MURDER THAT DID NOT REQUIRE AN INTENTIONAL KILLING, WHILE AT THE SAME TIME INSULATING PREMEDITATED AND DELIBERATE MURDERERS FROM THE DEATH PENALTY, IS IRRATIONAL AND ARBITRARY

Appellant qualified for the death penalty on the basis that he was found to have committed the killing while he was engaged in the commission or attempted commission of robbery. (See § 190.2, subd. (a)(17).) As the actual killer, he did not need an intent to kill in order to so qualify. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146-1147.) Indeed, appellant did not need any culpable mental state beyond that necessary for robbery, i.e., an intent to steal; it is enough that he killed in the course of that crime. On the other hand, an intentional killing by itself does not qualify for the death penalty. Indeed, even a premeditated and deliberate murder, no matter how cold-blooded, does not qualify that murderer for the death penalty. Accordingly, the death judgment should be reversed.

The utter irrationality of punishing a homicide in the course of a robbery with death while at the same time withholding such punishment for a premeditated and deliberate murder, does so. (*People v. Dillon* (1983) 34 Cal.3d 441, 477.) The utter arbitrariness and capriciousness of the distinction for purposes of capital punishment also shows that it violates appellant's rights to due process and to equal protection, each of which is protected by the Fourteenth Amendment of the United States Constitution. (See, e.g., *Gray v Lucas* (5th Cir. 1982) 677 F.2d 1086, 1104 ["An allegedly improper classification scheme [for capital punishment] may . . . violate either the due process or equal protection clauses."].) It also violates the 8th Amendment prohibition against arbitrary and capricious imposition of the death penalty.

(See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

This Court has rejected similar constitutional challenges based on this discrepancy. (See e.g., *People v. Taylor* (1990) 52 Cal.3d 719.)

This Court should nevertheless address the issue here anew. (See Claim 7, p. 105, fn. 100, incorporated herein.) In *Taylor*, the Court further held that "defendant's argument also fails because the jury here found, in accordance with the then requirement of *Carlos*, that with respect to the burglary and robbery special circumstances defendant intended to kill. . . ." (*Id.* at 748.) In contrast, the jury at the guilt phase of appellant's trial never had to find an intentional killing for special-circumstance liability. Indeed, they were specifically instructed that "you need not find that the defendant intended to kill a human being in order to find this special circumstance to be true." (6 CT 1293.) Moreover, *Taylor* concerned only the equal protection aspect of the claim, and not the more fundamental question of cruel and unusual punishment caused by such arbitrary specifications of special circumstances.

While the Court in *Taylor* also adverted to its conclusion in *Anderson* that such a statutory distinction between deliberate murderers and felony-murderers does not violate the Eighth Amendment either, the court never fully confronted the issue there. First, *Anderson* concerned only a question of statutory interpretation, which the Court found clear without reference to the rule that ambiguity in a statute should be interpreted to preserve its constitutionality. Second, the Court dismissed the previous concerns it had expressed about the constitutionality of a law that permitted non-intentional felony-murders to be punished with death, with the simple observation that the statutory distinction here at issue was now generally accepted as constitutional. In support of that conclusion, however, it cited only two sources: *Gray v.*

Lucas, supra, 677 F.2d at page 1103, and the "Model Penal Code and Commentaries, sections 210.2, 210.6, pages 13-43, 107-171 (generally permitting the death penalty for unintentional felony-murders, while not permitting it for some intentional murders)." (*Anderson, supra*, 43Cal.3d at 1147, fn. 9.) The Model Penal Code is not an authority of any kind, while *Gray v. Lucas* is not an authority that this Court should follow. Again, in *Gray* the jury found that the defendant committed an intentional murder. (See *Gray v. Lucas, supra*, 677 F.2d at 1103 ["The jury found beyond a reasonable doubt that Gray had purposefully taken Derissa Scales' life to avoid capture."].)

More fundamentally, *Gray* misperceived the controlling law of the Supreme Court on the point, finding that the Eighth Amendment is not at all concerned about whether a death penalty statute may be "underinclusive." (*Ibid.*) It found that the concerns of *Furman* (*Furman v. Georgia* (1972) 408 U.S. 238) requiring a capital-sentencing law that meaningfully distinguishes those subject to the death penalty from those not subject to it did not require the qualifying circumstances to do so. Rather, it found that "[b]ecause each aggravating factor normally identifies a particular class of defendants, *Furman* and *Gregg* only require that the death penalty be consistently imposed within that class." (*Id.* at 1105; see also p. 1103 ["Thus, Mississippi's death penalty statute violates the eighth amendment if it relies on barbaric or inhumane methods, is excessive in relation to the crime committed or fails to ensure that the death penalty is imposed in a reasoned manner within a particular class of cases."].) Consequently, the single citation to *Gray v. Lucas* hardly supports this Court's conclusion that "it appears to be generally accepted that by making the felony murderer but not the simple murderer death-eligible," a death penalty law furnishes the "meaningful basis required by the Eighth Amendment for distinguishing the few cases in which the death penalty is imposed from the

many cases in which it is not." (See *People v. Anderson, supra*, 43 Cal.3d at 147; brackets in quote deleted.)

In addition, it is not clear what the *Gray* court meant by "simple murder," which may not include premeditated and deliberate murder at all. For example, against the equal protection challenge it upheld the distinction on the basis that the Mississippi legislature "could have rationally determined that the death penalty might not effectively deter atrocious simple murders since such people are likely as a group to act on passion or impulse and thus be unmindful of the consequences of their crime." (*Gray v. Lucas, supra*, 677 F.2d at 1104.) If one kills on impulse, however, the killing would not be premeditated and deliberate, but rather "simple murder" in the sense of second degree murder.

In any event, *Gray's* analysis is manifestly inadequate. It found the imposition of the death penalty for felony-murders but not for simple murders constitutional because "the legislature could have rationally decided that the one class of murders either presented a different problem from the other or that the death penalty would be a more effective deterrent to felony murders than atrocious simple murders." (*Ibid.*) But to the degree that felony-murders present a "different" problem than premeditated and deliberate ones, Mississippi could not reasonably "have sought to cure the felony murder problem first." (*Ibid.*) The difference between these two types of murder is that a premeditated and deliberate one is considerably more aggravated than a felony-murder, making it irrational to give higher priority to imposing death for felony-murders.

Gray found that the state could have rationally determined that the death penalty would more effectively deter felony-murders than simple murders, as follows:

> "Alternatively, the legislature could have decided that the death penalty would be more effective in deterring felony murders

> since an experienced felon is more likely to assess the consequences of his acts. Conversely, it could have rationally determined that the death penalty might not effectively deter atrocious simple murders since such people are likely as a group to act on passion or impulse and thus be unmindful of the consequences of their crime." (*Ibid.*)

But certainly someone sufficiently thoughtful as to premeditate and deliberate a killing will be more deterred by the death penalty for the crime than, for example, a rapist who kills unintentionally or accidentally. Moreover, California's felony-murder special circumstance is not directed at experienced felons, but includes the first-time felon as well. Nor is there any showing that premeditated and deliberate murderers are less likely to be experienced felons than other felons covered by the special-circumstance-felony statute. As noted in *State v. Cherry* (N.C. 1979) 257 S.E.2d 551, it is "highly incongruous" for a state to make felony-murder death-eligible, but not premeditated murder. (*Id.* at 567.) In sum, imposing the death penalty on felony-murderers while sparing premeditated and deliberate murderers from such a penalty is irrational and capricious, and reflects a failure of California to meaningfully distinguish those murderers deserving of the death penalty from those not so deserving, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The irrationality is especially egregious here, where the jury was not even required to find an intent to kill, much less reach the question of premeditation and deliberation, in order to find first-degree special circumstance murder based entirely on the felony murder allegations. Accordingly, appellant's death judgment should be reversed.

CLAIM 94

APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED DUE TO THE INHERENT UNRELIABILITY OF JOSE LUIS RAMIREZ

A. Overview

Appellant's guilt convictions and death sentence were largely based on the testimony of accomplice-witness Jose Luis Ramirez who testified regarding appellant's alleged participation in a plan to rob and murder the victims. (See Guilt Phase: Statement Of Facts § C, p. 28, incorporated herein.) However, the testimony of Jose Luis Ramirez was inherently unreliable due to numerous inconsistencies in his testimony and his own admission of untruthfulness in his pretrial statements. (See Claim 10 § B(2)(a), pp.141-46, and § D, pp.147-50, incorporated herein.) Moreover, Jose Luis Ramirez' exposure for his participation in the crime was reduced from life in prison to less than 12 years. "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence." (*U.S. v. Cervantes-Pacheco* (5th Cir 1987) 826 F.2d 310, 315.) Therefore, appellant's death sentence should be reversed because it does not meet the fundamental reliability requirements of the Eighth Amendment.

B. A Death Sentence Which Is Founded On Inherently Unreliable Testimony Violates State Law And The Federal Constitution

A murder conviction and sentence of death based on the testimony of a witness as demonstrably unreliable as Jose Luis Ramirez does not comport with the heightened standards of reliability required by the Eighth and Fourteenth Amendments to the federal constitution. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) As stated by Justice Mosk in his concurring opinion in *People v. Jones* (1998) 17 Cal.4th 279,

> . . . [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and

> penalty is paramount as a matter of policy. It is also constitutionally compelled: "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases . . . ."

(*Id.* At p. 321, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 623, conc. Opn., Mosk, J.; see also See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

Furthermore, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright* (1988) 486 U.S. 356; *Beck v. Alabama* (1980) 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia* (1980) 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code § 1044; see also § 1093(f) [power to instruct jury]; § 1127 [same].)[436] The judge's

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[436] Thus, under California law "it is the duty of the trial judge to see that a case is not defeated by 'mere inadvertence.' [Citation]." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 457; see also *People v. Jones* (1979) 95 Cal.App.3d 403, 407; *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [judge must determine "where justice lies . . ."]; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [judge has "the responsibility for safe guarding . . . the (continued...)

erroneous rulings as described in this claim arbitrarily violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this claim. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

The evidence as to penalty was closely balanced. (See Claim 59 § G(2), pp. 550-51, incorporated herein.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See Penalty Phase: Statement of Facts § C, pp.521-29 , incorporated herein [discussing substantial mitigating factors relating to both the offense and appellant's character].)

Accordingly, because the imposition of a death sentence based on inherently unreliable testimony was a substantial error, the judgment should be reversed under both the state and federal standards of prejudice. (See Clai 59 § G, pp.548-51, incorporated herein.)

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[436](...continued)
rights of the accused . . ."].)

CLAIMS 95-97:INTERNATIONAL LAW ISSUES

CLAIM 95

PURSUANT TO RULE 8.252 OF THE RULES OF COURT, THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN THE *AVENA* CASE, AND THE PRESIDENT'S MEMORANDUM OF FEBRUARY 28, 2005 CONCERNING COMPLIANCE WITH THE *AVENA* DECISION, THIS COURT SHOULD REFER THIS MATTER FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE PROVEN VIOLATION OF APPELLANT'S CONSULAR RIGHTS WAS PREJUDICIAL

A. Overview

On March 31, 2004, the International Court of Justice ("ICJ") determined that the rights of 51 named Mexican nationals – including Mr. Covarrubias – under the Vienna Convention on Consular Relations were breached. (See *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128, para. 106 (Judgment of Mar. 31, 2004) (hereinafter "*Avena*").) The ICJ also ruled that the matter of remedy should be decided by the United States courts after an evidentiary inquiry to into the prejudicial impact of the treaty violation on Mr. Covarrubias. (*Avena*, paras. 138, 141.)

In deference to the *Avena* judgment the President of the United States issued a signed, written determination that state courts must provide review and reconsideration to the 51 Mexican nationals named in the *Avena* judgment – including Mr. Covarrubias – pursuant to the criteria set forth by the ICJ in the *Avena* judgment.

"Under the Supremacy Clause of the United States Constitution, it is now incumbent upon this Court to provide Mr. Covarrubias with an adequate forum in which he can receive the remedy mandated by the President and the

International Court of Justice. (See also *Avena*, para. 112.)[437]

In sum, because the ICJ has already determined Mr. Covarrubias' rights under the Vienna Convention in *Avena*, and the President of the United States has determined that Mr. Covarrubias' right to relief under *Avena* should be decided by the State of California, this Court should refer the matter to the Superior Court (per California Rules of Court Rule 8.252(c))[438] to conduct the

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[437] *Sanchez-Llamas v. Oregon* (2006) ____ U.S. ____ [126 S. Ct. 2669] disagreed with the ICJ and held that procedural bars do apply to Vienna Convention claims generally. However, *Sanchez-Llamas* should not apply to Mr. Covarrubias' claim because (1) *Sanchez-Llamas* did not involve one of the named Mexican nationals from the *Avena* case and (2) it did not resolve what effect should be given to the presidential determination that claims of prejudice by such named Mexican nationals should be litigated.

[438] Rule 8.252(c) provides as follows:

(c) Evidence on appeal

(1) A party may move that the reviewing court take evidence.

(2) An order granting the motion must:

(A) State the issues on which evidence will be taken;

(B) Specify whether the court, a justice, or a special master or referee will take the evidence; and

(C) Give notice of the time and place for taking the evidence.

(3) For documentary evidence, a party may offer the original, a certified copy, or a photocopy. The court may admit the document in evidence without a hearing. *(Subd (c) amended effective January 1, 2007.) Rule 8.252*

(continued...)

"review and reconsideration" contemplated by the ICJ and the President of the United States.

B. The Vienna Convention And Its Optional Protocol

The Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." (DEP'T OF STATE TELEGRAM 40298 TO THE U.S. EMBASSY IN DAMASCUS (February 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).)

Article 36 of the Convention enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended." The United States has described the rights and obligations set forth in Article 36 as "of the highest order" because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens

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[438](...continued)
amended and renumbered effective January 1, 2007; repealed and adopted as rule 22 effective January 1, 2003.

abroad.[439]

The Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261, provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." (Optional Protocol, art. I.)

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. (See *Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna*, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. E, 91st Cong. at 59-61 (1st Sess. 1969).) Among other things, the United States proposed the binding dispute settlement provision that became the Optional Protocol and successfully led the resistance to efforts by other states to weaken or eliminate altogether the dispute settlement provisions. (See *id.* at 72-73.)

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for approval on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously ratified the instruments on October 22, 1969. (See 115 CONG. REC. 30,997 (Oct. 22, 1969).) To date, 166 States have ratified the Vienna

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[439] ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973). As observed by Judge Stephen Schwebel, former U.S. Judge on the ICJ, "the citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens of the United States." Vienna Convention on Consular Relations (*Para. v. U.S.*) 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

Convention and 45 States the Optional Protocol.[440] The Vienna Convention is among the most widely ratified multilateral treaties in force today. (LEE, at 23-25.)

C. The International Court Of Justice

Often referred to as the "World Court," the International Court of Justice is "the principal judicial organ of the United Nations." (U.N. CHARTER art. 92; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 1, 59 Stat. 1055 ("ICJ STATUTE").) The Court's Statute is annexed to the U.N. Charter, so that States that become Members of the United Nations also become parties to the Statute. (U.N. CHARTER art. 93, para. 1.)

Here, too, the United States proposed the draft ICJ Statute and led the effort to create the Court. (RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 865 (1958).) The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:

> Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter which places justice and international law among its foundation stones, it would naturally accept and use an international court to apply international law and to administer justice.

(EDWARD R. STETTINIUS, JR., SECRETARY OF STATE AND CHAIRMAN OF THE UNITED STATES DELEGATION, CHARTER OF THE UNITED NATIONS: REPORT TO

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[440] *See Status of Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations,* at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 137-38 (1945).)[441]

The United States has brought ten cases to the Court either as an applicant or by special agreement with another State. In another eleven cases, including *Avena*, the United States has been a respondent in an action brought by another State or States.[442]

D. The *Avena* Judgment

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice against the United States, alleging violations of the Vienna Convention in the cases of appellant and 52 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. (See Mexico's Application Instituting Proceedings (*Mex. v. U.S.*), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003).)[443]

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims.

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[441] The Court is composed of fifteen judges, none of whom may have the same nationality. (ICJ STATUTE, art. 3(1); *see also id.*, arts. 4, 9.) "Judges are picked in their individual capacity, and are not political appointees of their respective governments." (David J. Bederman et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76 (2003).) As a result, "the judges of the ICJ are rarely politicized." (DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 240 (2001).)

[442] *See* International Court of Justice: List of Contentious Cases by Country, *at* http://www.icj-cij.org/icjwww/idecisions/icasesbycountry/htm #UnitedStatesofAmerica.

[443] The parties' written and oral pleadings as well as the orders and press releases of the Court in the *Avena* case are available at http://www.icj-cij.org/icjwww/idecisions.htm.

On November 3, 2003, the United States filed a 219-page Counter-Memorial and 2500-page Annex, also containing written testimony and documentary evidence in rebuttal. Both parties' submissions exhaustively addressed the factual predicate for each of the Vienna Convention violations alleged, including those in the case of appellant, and argued all relevant points of law.

During the week of December 15, 2003, the International Court held a hearing. (*Avena* Judgment, para. 11 (App. 8, at 10).) The 18-person United States team was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and included lawyers from the Departments of State and Justice and distinguished professors of international law and comparative criminal procedure from France and Germany.

On March 31, 2004, the International Court issued its Judgment. The *Avena* Judgment built on the Court's earlier holdings in *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27) ("*LaGrand* Judgment"), which Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated.[444] However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed.

As a result, in *Avena*, the International Court expressly adjudicated

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[444] In *LaGrand*, the International Court held that, *first*, Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; s*econd*, by applying procedural default rules in the circumstances of those cases, the United States had applied its own law in a manner that failed to give full effect to the rights accorded under Article 36(1) and hence violated Article 36(2); and *finally*, if the United States failed to comply with Article 36 in future cases involving German nationals who were subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." (*LaGrand* Judgment, paras. 77, 90-91, 125.)

appellant's own rights. The International Court held that the United States had breached Article 36(1)(b) in the cases of 51 of the Mexican nationals, including appellant, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." (*Avena* Judgment, paras. 106(1)-(2), 153(4) (App. 8, at 42-43, 59).)

As to remedies, the International Court first denied Mexico's request for annulment of the convictions and sentences. (*Id.*, para. 123 (App. 8, at 49).) The Court held, however, that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. (*Id.*, paras. 121-22, 153(9) (App. 8, at 48, 60).) The International Court explained, *first*, that the required review and reconsideration must take place as part of the "judicial process;" *second*, that procedural default doctrines could not bar the required review and reconsideration; *third*, that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, that the forum in which the review and reconsideration occurred must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." (*Id.*, paras. 113-14, 122, 134, 138-39, 140 (App. 8, at 45-46, 48, 51-52, 53, 54).)

The International Court reached each of these holdings by a vote of fourteen to one. Both the United States and Mexican judges voted with the majority.

E. The Presidential Determination Regarding The 51 *Avena* Petitioners

On February 28, 2005, President George W. Bush issued a signed,

written determination that state courts must provide review and reconsideration to the 51 Mexican nationals named in the *Avena* judgment pursuant to the criteria set forth by the ICJ in the *Avena* judgment, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits. The President declared that:

> . . . the United States would discharge its international obligations under the Avena judgment by "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." (George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as Amicus Curiae 9a; see also *Medellin v. Dretke* (2005) 544 U.S. 660, 663.)

The President's determination was issued while the case of *Medellín v. Dretke* (2005) 544 U.S. 660, which involved one of the 51 Mexican Nationals named in Avena, was pending in the United States Supreme Court.[445] In its brief in *Medellin*, the United States explained that the President had determined that compliance with the *Avena* judgment "serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law." (*Medellín v. Dretke* (2005) (No. 04-5928) 544 U.S. 660 ["U.S. Fed. Br."] 9.) In particular, the United States observed that "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected." (*Id.* at 41.)

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[445]On May 23, 2005, the United States Supreme Court decided, by a vote of 5 to 4, to dismiss the writ of certiorari In *Medillin* as improvidently granted. (*Medellín v. Dretke* (2005) 544 U.S. 660, 662 (*per curiam*).)

As the United States also explained, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President's determination that the decision should be enforced under general principles of comity." (*Id.* at 42.) In the event that prejudice is found, "a new trial or a new sentencing would be ordered." (*Id.* at 47.) To the extent that state procedural default rules would prevent giving effect to the President's determination, "those rules must give way, because Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution and authorized by his power to represent the United States in the United Nations, see U.N. Charter Art. 94, constitutes 'the supreme Law of the Land.'" (*Id.* at 43-44 (citations omitted).) Finally, "a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention." (*Id.* at 46.)

F. This Court Is Obligated To Give Effect To The *Avena* Judgment As The Rule Of Decision In Appellant's Case

1. The Vienna Convention, The Optional Protocol, And The *Avena* Judgment Are Binding International Law

The *Avena* Judgment is binding on the United States as a matter of international law for the simple reason that the United States agreed that it would be binding.

The jurisdiction of the International Court of Justice is based entirely on consent.[446] Under Article 36(1) of the Statute of the Court, the Court has

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[446] David J. Bederman et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76, 76-77 (2003). ("Every matter that comes before the ICJ does so because of the consent of the litigants. The only question is how that consent is manifested. The Court does not – and cannot (continued...)

jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." ICJ STATUTE, art. 36(1). The Optional Protocol to the Vienna Convention constitutes a compromissory clause covering just such a "class of matters specially provided for." (DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 242 (2001).) The Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

(Optional Protocol, art. I.)

Hence, by ratifying the Optional Protocol, the United States both gained the right to sue and agreed to be subject to suit in the International Court of Justice in order to resolve disputes with other parties to the Optional Protocol regarding the "interpretation and application" of the Vienna Convention.[447] Though neither the United Nations Charter nor the ICJ Statute, both treaties to which the United States is party, provide the requisite consent, the binding character of the Court's adjudication in cases in which a State has given consent is reinforced by both those instruments. Article 59 of the ICJ Statute provides

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[446](...continued)
– exercise a mandatory form of jurisdiction over states.").

[447] Indeed, the United States was the first State to take advantage of that instrument, when in 1979 it sued Iran in the International Court to enforce rights, among others, under the Vienna Convention, and founded the Court's jurisdiction in part on the Optional Protocol. (See United States Diplomatic and Consular Staff in Tehran (*U.S. v. Iran*), 1980 I.C.J. 3 (May 24), *reprinted in* 19 I.L.M. 553 (1980).)

that decisions of the Court are binding on the parties to the case. And by Article 94(1) of the Charter, the United States unequivocally agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." (RESTATEMENT (THIRD) FOREIGN RELATIONS § 903 cmt. g (1987).)

The rule of *pacta sunt servanda* – that parties should perform their treaty obligations in good faith – "lies at the core of the law of international agreements and is perhaps the most important principle of international law." (RESTATEMENT (THIRD) FOREIGN RELATIONS § 321 cmt. a (1987).)[448] Here, the application of the rule could not be more straightforward: having agreed to submit disputes involving the Vienna Convention to the International Court, the United States must now abide by its adjudication of those disputes.[449]

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[448] See THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[A] treaty is only another name for a bargain[;] it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.") (emphasis in original); see also *Am. Dredging Co. v. Miller* (1994) 510 U.S. 443, 466 (1995) (Kennedy, J., dissenting) ("Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce.").

[449] *See* ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill, ed., 6th ed. 2003) ("Neither the Charter of the United Nations, nor any general rule of present-day international law, imposes on States the obligation to refer their legal disputes to the Court—but once consent has been given, the decision of the Court is final and binding and without appeal, and the States parties to the litigation are obliged to comply with that decision."); see also *La Abra Silver Mining Co. v. United States* (1899) 175 U.S. 423, 463 ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.").

2. The Vienna Convention, The Optional Protocol, And The *Avena* Judgment Are Binding Federal Law

The United States Constitution places the power to make treaties in the hands of the democratically elected branches of the federal government. Article II, section 2, clause 2, gives the President the power ". . . to make Treaties." (U.S. CONST. art. II, § 2, cl. 2.) The President may do so, however, only "with the Advice and Consent of the Senate." (*Id.*) For the Senate to grant consent, "two thirds of the Senators present [must] concur." (*Id.*) This structure ensures that the United States takes on international treaty obligations only with the clear support of the elected representatives of the American people. (See generally LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 36-37 (2d ed. 1996).)

Under the Supremacy Clause, a ratified treaty has the status of preemptive federal law.[450] Hence, as this Court has long held, a ratified treaty

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

(*Edye v. Robertson (Head Money Cases)* (1884) 112 U.S. 580, 598-

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[450] Emphasis added, Article VI, clause 2, 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 notwithstanding." (See Sandra Day O'Connor, *Federalism of Free Nations, in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (1996) ["The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations."].)

99(emphasis added).) The treaty obligations reflected in the Vienna Convention and its Optional Protocol are entirely self-executing; they required no implementing legislation to come into force. (See *Hearing Before the Senate Comm. on Foreign Rel.*, S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).) As President Richard M. Nixon stated when he announced their entry into force

> the [Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

(21 U.S.T. 77, 185.)

3. This Court Is Obligated To Abide By The *Avena* Judgment As To The 51 Named Mexican Nationals Because It Is A Final Judgment

In *Sanchez-Llamas v. Oregon* (2006) _____ U.S. _____ [126 S. Ct. 2669], the United States Supreme Court disagreed with the interpretation that the ICJ gave to the Vienna Convention in *Avena*. However, the Court did not have before it—and thus had no occasion to consider—the effect of the *Avena* judgment and the President's determination on the cases of the 51 Mexican nationals who were named in that judgment and whose rights were expressly adjudicated there. Like any final judgment or award, the *Avena* judgment is binding on the parties regardless of the underlying merits. (See e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 203 ["[T]he merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact."].) In other words, regardless of whether the *Avena* judgment correctly states principles of law applicable to other foreign nationals' cases

under the Vienna Convention, it remains binding by treaty "between the parties and in respect of that particular case." (ICJ Statute art. 59.)

The fear that the state courts might render ineffectual the federal government's efforts to comply with treaties—and that very experience under the Articles of Confederation—is precisely the reason that the Constitution makes treaties binding on state courts under the Supremacy Clause of Article VI and places them within the federal judicial power in Article III, § 2.[451] As Alexander Hamilton argued in support of the Constitution, "the peace of the whole [nation] ought not to be left at the disposal of a part. The union will undoubtedly be answerable to foreign powers for the conduct of its members." (THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961), *quoted in Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363 at 381 n.16.) Thus, *Sanchez-Llamas* should not be construed so as to violate a commitment made by the elected representatives of the American people as a whole.

4. This Court Is Bound By The February 2005 Presidential Determination

It is fundamental that the federal government—not the individual states—is responsible for the conduct of this nation's relations with foreign powers. The President, together with his subordinates in the executive branch, speaks for the United States in these relations.

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[451] See e.g., *Ware v. Hylton* (1796) 3 U.S. 199, 236-37 (opinion of Chase, J.); *id.* at 276-77 (opinion of Iredell, J.); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand rev. ed. 1966); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1102-49 (2000).

In his February 2005 determination, the President made clear that his determination to "discharge [the] international obligations" of the United States by giving effect to the *Avena* judgment was made "pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America." As the United States has explained, this determination reflects the President's decision "that the foreign policy interests of the United States in meeting its international obligations and in protecting Americans abroad justify compliance with the ICJ's decision." (U.S. CCA Br. 21; *accord* U.S. Fed. Br. 41, 48.) And as the United States Supreme Court has made clear, "[i]n our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states." (*United States v. Pink* (1942) 315 U.S. 203, 242.)[452]

Under the Constitution, it is the President who acts as the voice of the United States in its dealings with foreign governments. By vesting "[t]he executive Power . . . in a President of the United States of America," U.S. CONST. art. II, § 1, and granting the President the power to make treaties and appoint and receive ambassadors and consuls, *id.*, §§ 2-3, the Constitution extends to the President, as the "Head of State," authority to act as "the sole organ of the federal government in the field of international relations." (*United*

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[452] See also e.g., *Japan Line, Ltd. v. County of L.A.* (1979) 441 U.S. 434, 448 ["In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." (internal quotation omitted)]; *Hines v. Davidowitz* (1941) 312 U.S. 52, 63 ["The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."].

States v. Curtiss-Wright Exp. Corp. (1936) 299 U.S. 304, 320.) This constitutional power of the President includes the "independent authority" to formulate and execute foreign policy even without authorization by statute or treaty. (*Am. Ins. Ass'n v. Garamendi* (2003) 539 U.S. 396, 414; *accord Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 635-36 (Jackson, J., concurring).) Thus, for example, the President has the power to enter into executive agreements with foreign governments requiring no ratification by the Senate or approval by Congress. (*United States v. Belmont* (1937) 301 U.S. 324, 331.) His actions carry an even greater presumption of validity when carried out with "express or implied authorization from Congress." (*Dames & Moore v. Regan* (1981) 453 U.S. 654, 668 [citing *Youngstown,* 343 U.S. at 637 n.2 (Jackson, J., concurring)].)[453]

Hence, if anything, this is a far easier case than the United States Supreme Court's cases holding state law preempted by an executive agreement. (*See, e.g., Garamendi,* 539 U.S. at 416, 420; *Dames & Moore,* 453 U.S. at 686; *Belmont,* 301 U.S. at 330-32.) In this case, the United States entered into treaties ratified by the President and Senate—which the Constitution declares to be the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2—and the President has simply determined that the United States will abide by its

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[453] See also e.g., *Garamendi,* 539 U.S. at 414 ["the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations' "; "there is executive authority to decide what (foreign relations policy) should be"]; *First Nat'l City Bank v. Banco Nacional de Cuba* (1972) 406 U.S. 759, 767 (plurality opinion) [the President has the "lead role . . . in foreign policy"]; *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.* (1948) 333 U.S. 103, 109 ["The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."].

obligations under those treaties. If the President's authority in international affairs includes the authority to conclude new agreements without Senate approval, then surely it includes the authority to ensure that the United States complies with existing obligations to foreign nations under treaties already ratified with the advice and consent of the Senate. (See, e.g., U.S. CONST. art. II, § 3 [the President "shall take Care that the Laws be faithfully executed"].)

Moreover, as the United States as *amicus curiae* pointed out before the Texas court in *Medellin*, Congress has authorized the President to "use such means . . . as he may think proper" to obtain the release of U.S. citizens detained abroad. (22 U.S.C. § 1732; *see* U.S. CCA Br. 23.) As well, Congress has authorized the Secretary of State, an Executive Branch officer under the President's direction, to make provision for the "protection of . . . foreign persons in the United States, as authorized by law." (22 U.S.C. § 4802(a)(1)(D).) Congress also has recognized the President's broad control over the United States' relations with organs of the United Nations by empowering him, among other things, to direct the actions of the United States before those bodies. (See 22 U.S.C. § 287(a), 287a; U.S. CCA Br. 28.)

Finally, the fact that the President's determination is captioned as a memorandum to the Attorney General does not provide a basis for refusing to give it effect. The legal effect of a presidential directive depends on its substance, not on the form in which it was issued. (*Wolsey v. Chapman* (1880) 101 U.S. 755, 770.) Indeed, in the foreign policy arena, this Court has not required any particular formalities before state law can be preempted. For example, in *Belmont*, the Court identified a preemptive executive agreement from an exchange of diplomatic correspondence (see 310 U.S. at 326), and in *Garamendi*, the Court identified a preemptive foreign policy from executive officials' testimony before congressional committees. (See 539 U.S. at 421-23

[summarizing the testimony]; *id.* at 427 [finding the testimony "more than sufficient to demonstrate that the state Act stands in the way of (the President's) diplomatic objectives" (internal quotation marks omitted)].)

In this case, there can be no doubt that the President acted to require compliance with *Avena* in the cases of the 51 Mexican nationals, because he expressly and publicly said that that was what he was doing. The President addressed his determination to the Attorney General, who is responsible for representing the United States in the courts where the *Avena* judgment would be at issue. That determination constituted federal law, and this Court has a constitutional obligation to give it effect. (U.S. CONST. art. VI, cl. 2.)

F. Failure To Raise The Issue At Trial Did Not Waive It

In its 2001 *LaGrand* Judgment, the International Court expressly held, *first*, that the Vienna Convention conferred rights on the individual national as well as the sending State, and *second*, that the application of the procedural default doctrine to bar a Vienna Convention claim when the receiving State had failed in its obligation to advise the foreign national of his or her Vienna Convention rights, constituted a violation of Article 36(2) of the Convention. (*LaGrand* Judgment, paras. 77, 90-91.)

In the *Avena* Judgment, the International Court of Justice reiterated both of those holdings. Moreover, it did so in a case that *adjudicated appellant's own rights.* Specifically, the Court held that the United States had violated appellant's consular rights under the Convention and that under Article 36(2), the United States courts could not apply the procedural default doctrine to avoid assessing on the merits the impact of the violation on the proceedings that led to appellant's conviction and sentence. (See Avena Judgment, paras. 128-134, 140.)

Thus, *Sanchez-Llamas, supra,* ____ U.S. ____ [126 S. Ct. 2669] should

not preclude consideration of Mr. Covarrubias' claim for two reasons.

First, as to the 51 named Mexican nationals in *Avena* the decision is a final judgment. Like any final judgment or award, the *Avena* judgment is binding on the parties regardless of the underlying merits. (See e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 203 ["[T]he merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact."].) In other words, regardless of whether the *Avena* judgment correctly states principles of law applicable to other foreign nationals' cases under the Vienna Convention, it remains binding by treaty "between the parties and in respect of that particular case." (ICJ Statute art. 59.)

Second, the presidential determination of February 2005 – which is binding on this Court – expressly requires compliance with the *Avena* decision. Such a presidential determination, even if in the form of a "Memorandum for the Attorney General," is the equivalent of an Executive order, "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect." (*Armstrong v. U.S.* (1871) 80 U.S. 154, 156.)[454] Because the President is the "sole organ of the federal government in the field of international relations (*U.S. v. Curtiss-Wright Exp. Corp.* (1936) 299 U.S. 304, 320), his decisions in that realm must command particular respect; state procedural bars must give way if they impair the effective exercise of national foreign policy. (*American Insurance Ass'n v. Garamendi* (2003) 539 U.S. 396, 419; *Zschernig v. Miller* (1968) 389 U.S. 429, 440; see

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[454] It is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner. (Department of Justice, Office of Legal Counsel, Memorandum for the Counsel to the President, January 20, 2000 [www.usdog.gov/olc/predirective.htm].)

also, *U.S. v. Pink* (1942) 315 U.S. 203, 240 [Frankfurter, J., concurring]; *U.S. v. Belmont* (1937) 301 U.S. 324, 331.)

Hence, appellant has not waived his rights under the Vienna Convention Consular Treaty.

G. The Matter Should Be Referred For An Evidentiary Hearing For The Purpose Of Making The "Factual Examination" And Determination Of Prejudice Contemplated By The ICJ

In light of the above, this Court should refer the matter (per California Rules of Court Rule 8.252(c)) to the Monterey County Superior Court and order the lower court to engage in a factual examination of prejudice that will fully consider whether the Vienna Convention violations impaired the fairness of his underlying conviction and sentence. (See *Avena*, para. 138.)

In ordering referral pursuant to Rule 8.252(c), this Court should instruct the lower court to examine the facts taking into account the treaty violations and any evidence that the Vienna Convention violation harmed appellant's "interests in such a way as to affect potentially the outcome'" of his trial or his sentence. (See *United States v. Rangel Gonzales* (9th Cir. 1980) 617 F.2d 529, 530 (citation omitted).) In other words, the proper analysis of prejudice should turn not on whether the violation of appellant's Article 36 rights resulted in a violation of constitutional due process, but on whether the denial of rights would have had an "effect" on the fairness of the trial. (See *Breard v. Greene* (1998) 523 U.S. 371, 377.)

H. Practical Considerations Weigh In Favor Of a Rule 8.252 Evidentiary Hearing Over Deferring Review Until A State Habeas Corpus Petition Is Filed

1. The *Dixon/Waltreus Conundrum*

Under California law, the writ of habeas corpus is generally available to challenge the legality of imprisonment or other restraints of a persons liberty.

(Pen. Code, § 1474; *In re Clark* (1993) 5 Cal.4th 750, 763.) Habeas corpus attacks on the validity of a judgment may generally be brought based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (*In re Clark, supra,* 5 Cal.4th at p. 766-767.) Habeas corpus relief may also encompass redress for prisoners held in violation of international law. (*Mali v. Keeper of Common Jail* (1887) 120 U.S. 1.) As a general rule, the writ will not lie where claimed errors could have been, but were not, raised upon a timely appeal from the judgment of conviction. (*In re Dixon* (1953) 41 Cal.3d 756, 759; see also, *In re Harris* (1995) 5 Cal.4th 813, 821 [listing exceptions to the *Dixon* rule].) Given the availability of fact-finding pursuant to Rule 8.252, *if* Mr. Covarrubias fails to raise his VCCR claim on direct appeal, respondent may argue that Mr. Covarrubias has forfeited his right to habeas corpus review under *Dixon.*

A corollary rule to *Dixon* provides that habeas corpus will not lie to adjudicate claims that were raised and rejected on appeal. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.) This creates a conundrum because, if Mr. Covarrubias raises the issue on appeal and the issue is adjudicated on an incomplete record, the *Waltreus* rule could bar him from adjudicating the issue on a complete record in later habeas corpus proceedings. For this reason, in the context of his direct appeal, Mr. Covarrubias moves this Court to allow a Rule 8.252 hearing at which additional evidence may be adduced regarding the adverse effects of the denial of Mr. Covarrubias' right to consular assistance. (Cal. Rules of Ct., Rule 8.252 [formerly 22(b)&(c)]; Code of Civ. Proc. § 909.)

2. Lack Of Habeas Corpus Counsel And Probable Delays In The Filing Of A Petition

Assuming habeas corpus would be available as a procedural vehicle to show prejudice resulting from the already proven violation of consular rights,

adjudication of the claim by this method will not likely occur for years. Counsel has yet to be appointed by this Court to represent Mr. Covarrubias in state habeas corpus proceedings, although it has now been more than eight years since the death judgment was rendered in October 1998. Moreover, once appointed, barring unusual circumstances, habeas corpus counsel would normally have another three years to investigate, and file a petition for writ of habeas corpus on Mr. Covarrubias' behalf. (*Supreme Court Policies Regarding Cases Arising From Judgements of Death*; Policy 3; 1-1.1 [as amended effective November 30, 2005].) An evidentiary hearing, if one were ordered, might not occur for many years hence.

Long delays in the adjudication of Mr. Covarrubias' VCCR claim are certain to impede his ability to establish the prejudice resulting from the proven denial of consular assistance after his abduction from Mexico. Courts have recognized that extreme delays in the appellate process may amount to a violation of due process. (*In re Christopher S.* (1992) 10 CA4th 1337; *People v. Young* (2005) 34 Cal.4th 1149, 1230; *United States v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1382; see also *United States v. Loud Hawk* (1986) 474 U.S. 302.) In *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1546, for example, the Tenth Circuit Court of Appeals found that two-year delays in the processing of Oklahoma's state appeals was presumptively excessive; the court also found that in some cases, inexcusable or inordinate delays in processing claims for relief might make the state process ineffective to protect the defendant's rights, and excuse the requirement of exhaustion. Another federal circuit court has observed:

> "Delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused....The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly

> as time elapses between the original fact and its judicial determination."

(*Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 304.) The circuit courts' commentaries in *Rheuark, supra,* and *Harris, supra,* apply with equal force to claims arising from the deprivation of consular rights guaranteed by the Vienna Convention in a death penalty case. Justice delayed is likely to be justice denied.

Moreover, in appellant's case there is a particular risk of prejudice from delay because any examination of prejudice will likely have to consider testimony and other evidence regarding the circumstances of the abduction which brought appellant into United States custody. Because the abduction happened over 10 years ago there is a danger that evidence will be lost or forgotten if there is further delay.

3. Differences Between Habeas Corpus Review And The "Review And Reconsideration" Required By *Avena*

In addition, Mr. Covarrubias' habeas corpus petition, when finally filed, will undoubtedly include a multiplicity of claims apart from the violation of his VCCR rights. Under California's habeas corpus rules, there is no guaranteed right to evidentiary hearing or even an adjudication on the merits of individual habeas corpus claims. (See, *People v. Romero* (1994) 8 Cal.4th 728, 737-741; *In re Clark, supra,* 5 Cal.4th at pp. 763-797.) The vast majority of habeas corpus petitions that are filed in this Court are denied without an evidentiary hearing. Moreover, even if an evidentiary hearing were to be granted on one or more of Mr. Covarrubias' future habeas corpus claims, this Court would presume that the trial court proceedings were fair and accurate, and habeas corpus counsel would bear the burden of showing that any proven error resulted in a fundamentally unfair proceeding or unreliable judgment. (*In re Clark,*

supra, 5 Cal.4th at p. 766.)

In contrast, Mr. Covarrubias and other *Avena* nationals *must* be accorded "review and reconsideration" of their VCCR claims in state court, consistent with *Avena* and the President's proclamation.[455] Although this Court has never established a state standard for review of VCCR violations, in the context of deportation proceedings, the Ninth Circuit of Appeals has developed a three-prong test to assess whether a foreign national has sustained his or her *prima facie* burden of proving a violation of VCCR rights, requiring reversal of the judgment. (*U.S. v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 531; *U.S. v. Esparza-Ponce* (9th Cir. 1999) 193 F.3d 1133, 1139.) The 9th Circuit's standard has been cited with approval by numerous courts. (*Torres v. State* (Ct. Crim. App. Okla. 2005) 120 P.3d 1184, 1186-1187; *U.S. v. Wahalyore-Irawo* (E.D. Mich. 1999) 78 F.Supp.2d 610, 613; *U.S. v. Tapia-Mendoza* (D. Utah 1999) 41 F.Supp.2d 1250, 1254; *U.S. v. Briscoe* (D. Virgin Islands 1999) 69 F.Supp.2d 738, 747; *People v. Preciado-Flores* (Colo. App. 2002) 66 P.3d 155, 161; *Zavala v. State* (Ind. App. 2000) 739 N.E.2d 135, 142.)

Under the *Rangel-Gonzales* test, the foreign national has the initial burden to make a *prima facie* showing that: (1) he did not know of his right to contact consular officials; (2) he would have done so had he known; and (3)

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[455] The procedural posture of this case, including Mr. Covarrubias' status as one of the Mexican nationals whose consular rights were litigated in *Avena* makes it unnecessary for this Court to address the question left open in *Medellin, Breard,* and *Sanchez-Llamas*: whether the VCCR confers individual standing on foreign nationals to enforce their rights to consular notification. (See, *Sanchez-Llamas v. Oregon, supra,* 548 U.S. ___ [Slip Opinion, pp. 7-8]; *Medellin v. Dretke, supra,* 125 S.Ct. 2088, 2103-2104 [O'Connor, J., dissenting]; *Breard v. Greene, supra,* 523 U.S. at p. 376 ["The Vienna Convention – which arguably confers on an individual the right to consular assistance following arrest – has continuously been in effect since 1969].)

such consultation would have led to the appointment of counsel and/or assistance in creating a more favorable record to present to the court. Once the foreign national establishes a *prima facie* case, prejudice is presumed, and the state then must bear the burden of showing that contact with the consular officials would not have resulted in assistance. (*U.S. v. Rangel-Gonzales, supra*, 617 F.2d at pp. 529-533; *Torres v. State, supra*, 120 P.3d at p. 1186.)

Under the third prong of *Rangel-Gonzales*, the defendant need only show what efforts his consulate would have made to assist in his criminal case. It is not necessary to show that consular assistance would have produced a different outcome. (*Torres v. State, supra,* at p. 1186.) As the Oklahoma appeals court explained in the *Torres* case:

> "We reject any construction of the third prong of the test which would require a defendant to show that the consular assistance would, or could, have made a difference in the outcome of the criminal trial....[¶] The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government. Even if that assistance cannot, ultimately, affect the outcome of the proceedings, it is a right and privilege of national citizenship and international law. The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has an opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens. It is often impossible to say whether a particular action in a criminal trial could affect the outcome. However, it is possible to show what particular assistance, if any, a government would offer its citizen defendant against a crime in a foreign country. That is the right and privilege safeguarded by the Convention. This Court is unwilling to raise the bar beyond what the Convention guarantees. If a defendant shows that he did not know he could have contacted the consulate, would have done so, and the consulate would have taken specific actions to assist in his criminal case, he will have

> shown he was prejudiced by the violation of his Vienna Convention right."

(*Id.*, at p. 1187.)

In *Torres v. State, supra*, the case of a Mexican national was remanded for an evidentiary hearing in the Oklahoma trial courts to determine whether the defendant had been prejudiced by the state's proven violation of VCCR rights, as well as ineffective assistance of counsel. The trial court found prejudice, applying the *Rangel-Gonzales* test. On appeal, the Oklahoma Criminal Appeals Court reversed. Considering the unusual circumstance that Torres' death sentence had been commuted by Governor Brad Henry of Oklahoma, the appellate court concluded that Torres had not shown that he was actually prejudiced by the state's failure to inform him of his rights under the Vienna Convention. (*Torres v. State, supra,* 120 P.3d at p.1188.) The court explained that, at the evidentiary hearing, "[a]ll the evidence presented supports the conclusion that consular assistance, in Torres's particular circumstances, would have focused on obtaining a sentence of less than death. Evidence did not specifically show how consular assistance would have assisted in the guilt phase of the trial." (*Ibid.*)

In support of Mexico's petition in *Avena*, Mr. Covarrubias submitted a declaration under penalty of perjury attesting to his lack of knowledge of consular rights, and the fact that he would have sought consular assistance had he been informed of his rights. In addition, the Director General for Protection and Consular Affairs in the Mexican Ministry of Foreign Relations submitted a detailed affidavit describing Mexico's policy and practice of providing extensive consular assistance in U.S. capital cases. (See 2 Memorial of Mexico, Avena and Other Mexican Nationals (Mex. v. U.S.) Annex 7 (Declaration of Roberto Rodríguez Hernández) (June 20, 2003).) In most cases, including Mr.

Covarrubias' case, the United States did not challenge the Mexican nationals' asserted lack of knowledge. (Avena, ¶ 76.) Based on the evidence submitted, the ICJ determined that Mr. Covarrubias was a Mexican national, and that the United States had breached its obligation to notify him of his right to consular notification and access, as well as its obligation to advise the consular post of his detention. In addition, it held that these violations led to a breach of art. 36(1)(a), under which Mexican consular officers have the right to communicate with and have access to their detained nationals, as well as art. 36(1)(c), regarding the right of consular officers to visit their detained nationals. All that remains to be adjudicated by this Court is whether Mr. Covarrubias suffered prejudice according to the third prong of *Rangel-Gonzales*. Mr. Covarrubias must show what assistance the Mexican Consulate would have provided had timely consular notification been given. Assuming Mr. Covarrubias can make such a showing, the burden should shift to the state to show that consular officials would not, or could not, have provided assistance bearing on the guilt and/or penalty phase proceedings.

I. Right To Appointment Of Counsel And Fair Opportunity To Investigate And Discover Factual Maters Relevant To The Consular Violation

To afford appellant due process at this hearing he should be appointed counsel and provided a fair opportunity to investigate and discover all factual matters relevant to the Vienna Convention violation. The denial of a fair opportunity to litigate the *Avena* claim through denial of discovery and an evidentiary hearing would violate the Due Process Clauses of the state (Article I, section 16) and federal (14th Amendment) constitutions. Both the California and federal constitutions require a fair opportunity to be heard.(*Futentes v.*

Shevin (1972) 407 U.S. 67, 80 [the opportunity to be heard is one of the immutable principles of justice which inhere the very idea of free government and is a central component of procedural due process]; (See *Wilson v. United States Dist. Ct.* (9th Cir. 1998) 161 F.3d 1185, 1186-87 [affirming district court order staying a prisoner's execution on the grounds that his clemency hearing violated due process]; *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [California Due Process Clause protects against arbitrary adjudications].)

J. Conclusion

In sum, under the authority conferred by Rule 8.252, Mr. Covarrubias requests a hearing, after an opportunity for discovery and investigation, on whether he suffered prejudice resulting from the proven violation of his VCCR rights.

CLAIM 96

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

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of

Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]; see also Claims 78, 95 and 96, incorporated herein.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political

Rights, which limits the death penalty to only "the most serious crimes."[456] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

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

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[456]See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

CLAIM 97

EXECUTING APPELLANT AFTER A LENGTHY DELAY WOULD VIOLATE INTERNATIONAL LAW

The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. (*Pratt v. Attorney General for Jamaica* (1993) 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom* 11 E.H.R.R. 439, ¶ 1111 (Euro. Ct. of Human Rights). *Soering* specifically held that, for this reason, it would be inappropriate for the government of Great Britain to extradite a man under indictment for capital murder in the state of Virginia, in the absence of assurances that he would not be sentenced to death.

In an earlier generation, prior to the adoption and development of international human rights law, this Court rejected a somewhat similar claim. (*People v. Chessman* (1959) 52 Cal.2d 467, 498-500.) But the developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling appellant to relief for that reason as well. Further, the process used to implement appellant's death sentence violates international treaties and laws that prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the

General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. *(United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) The length of appellant's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

Article I of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. (*United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984).) Pain or suffering may only be inflicted upon a person by a public official if the punishment is incidental to a *lawful* sanction. (*Id.*) Appellant has made a prima facie showing that his convictions and death sentence were obtained in violation of federal and state law. In addition, he has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death." (Camus, *Reflections on the Guillotine, in Resistance, Rebellion and Death* 173,200 (1961).) The international community has increasingly recognized that prolonged confinement under a death sentence is cruel and unusual, and in violation of international human rights law. (*Pratt v. Attorney General for Jamaica*, 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom*, 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights) [United Kingdom refuses to extradite German national under indictment for capital murder in Virginia in the absence of

assurances that he would not be sentenced to death].)

The violation of international law occurs even when a condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death, and with the expectation that they will be used by death-sentenced prisoners. Appellant's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-term confinement under judgment of death. The death sentence must be vacated permanently, and/or a stay of execution must be entered permanently.[457]

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[457] This Court previously has rejected international law claims directed at the death penalty in California. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-79.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *U.S. v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 (Norris, J., dissenting).) Thus, appellant requests that the Court reconsider and, in the context of this case – in which the defendant is a Mexican national – find appellant's death sentence violates international law. (See *Smith v. Murray* (1986) 477 U.S. 527, 534 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

CONCLUSION

For the foregoing reasons the judgment should be reversed.

Dated: March _____, 2007

Respectfully submitted,

Thomas Lundy
Attorney for Appellant
DANIEL SANCHEZ COVARRUBIAS

CERTIFICATION OF WORD COUNT

As attorney of record herein, and pursuant to California Rules of Court, Rule 8.204(c)(1), I hereby declare and certify that this brief contains 213,236in *WordPerfect* computerized format, and I have separately applied for permission to file an enlarged brief under Rule 8.630(b)(1)(A).

I declare the foregoing is true and correct to the best of my knowledge under penalty of perjury this 29th day of March, 2007, at Santa Rosa, California.

Thomas Lundy
Attorney for Appellant
DANIEL COVARRUBIAS

PROOF OF SERVICE

I DECLARE THAT:

I am a resident of Sonoma County and employed in the County of Sonoma, State of California. I am over the age of eighteen and not a party to the within action. My business address is: 2777 Yulupa Avenue, PMB 179, Santa Rosa, CA 95405. On March 28, 2007, I served the within: **APPELLANT'S OPENING BRIEF** on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon, fully prepaid, in the United States mail, at Santa Rosa, California, addressed as follows:

Daniel Sanchez Covarrubias
P.O. Box P-19600
San Quentin State Prison
San Quentin, CA 94974
[not served per waiver]

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The Honorable Robert F. Moody
Salinas Courthouse
240 Church Street
3rd Floor, West Wing
Salinas, CA 93901

I declare under penalty of perjury that the foregoing is true and correct and executed on March 28, 2007, at Santa Rosa, California.

Thomas Lundy