THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | |
| Plaintiff and Respondent, | No. S080056 |
| vs. | Stanislaus Co. No. 133269 |
| MICHAEL LEON BELL, | |
| Defendant and Bell. | |



# APPELLANT'S OPENING BRIEF

## VOLUME II of II

APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF STANISLAUS COUNTY
THE HONORABLE DAVID G. VANDER WALL, JUDGE PRESIDING

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THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED BELL'S STATE AND FEDERAL CONFRONTATION RIGHTS BY ADMITTING DETECTIVE OLSON'S TESTIMONY ABOUT HIS DISCUSSIONS WITH PROBATION OFFICER MICHAEL MOORE, FROM WHICH THE JURY WOULD NECESSARILY HAVE INFERRED THAT MOORE IDENTIFIED BELL AS THE ROBBER AND MURDERER FROM THE VIDEOTAPE OF THE INCIDENT.

### A. The Factual Background:

Michael Moore is a Stanislaus County probation officer who supervised Bell on probation. (I CT 93.) Moore was a witness at Bell's preliminary hearing on the issue of identification. On January 21, 1997, Moore reportedly read an article in the Modesto Bee that was accompanied by a photograph of the suspect in the Quik Stop market robbery murder. (I CT 95.) Moore contacted police, who showed him both the videotape and still photographs of the robbery, taken by the store surveillance camera. The striding gait and voice of the suspect reminded Moore of Bell. (I CT 96-100.)

Before trial, the defense filed a motion objecting to the testimony of Michael Moore on multiple grounds, and seeking limitations on the scope of his testimony at trial. (III CT 727-729.) The People opposed the motion. (III CT 750-757.) At a hearing of the motion, the trial court provisionally denied the motion without prejudice to hold an Evidence Code section 402 hearing prior to Moore's testimony at trial. (2 RT 194-202.)

An *in limine* hearing was thereafter held at which Moore testified regarding his familiarity with Bell, and the circumstances attending his identification of Bell from the store surveillance videotape. (IX RT 1898-1908.) After this hearing, the trial court overruled all of trial counsel's objections, including an objection that the evidence was more prejudicial

than probative, with the proviso that the jury would not be informed that Moore was a probation officer. (IX RT 1909-1914.)

Before Moore testified, the court and parties were notified that Moore recognized a seated juror as a personal acquaintance, who might be familiar with Moore's occupation as a probation officer. (X RT 1947.) The prosecutor sought defense counsel's agreement to a stipulation in lieu of live testimony by Moore, but counsel declined to stipulate. (XII RT 2239A-2241A.) Ultimately, the prosecutors decided not to use Moore as a trial witness. (XII RT 2428.)

On cross-examination of Detective Lance Olson, during his testimony for the defense, the prosecutor approached the bench and asked to get "into the issue of the citizen informant, Mike Moore, without using his name" because Detective Olson had shown a picture of the perpetrator leaving the Quik Stop market to Moore. (XII RT 2418.) The prosecutor wanted to show "what happened the next day," i.e., that Olson "received information from [Moore] about how [Bell] looked, . . . and got the defendant's name." (XII RT 2418.) The court allowed the testimony, finding that defense counsel had "opened the door," by asking Olson about bringing the surveillance videotape "to someone the next day." (XII RT 2418.)

Defense counsel objected that he had not asked Olson about meeting with someone the next day. (XII RT 2418-2419.) The court ruled that the prosecutor could elicit testimony limited to the fact that Olson looked at the videotape the next day with someone who knew the defendant. (XII RT 2419.)

The prosecutor then elicited the following testimony from Olson about his conversations with Moore.

> MR. RAYNAUD: Detective, the following day, the day after this crime, you had this videotape in your possession, right?

A. That's correct.
Q. And you met with somebody the following day, a citizen informant, didn't you?
A. I did.
Q. This is a person who is not – was not up for any charges, right?
A. That's correct.
Q. A person who knew the defendant, an acquaintance of the defendant, right?
A. That's correct.
Q. A person who had met with the defendant on several occasions, at least five occasions, had talked to him, had seen him move and walk and so forth, right?
A. That's correct.
Q. And this was January 21, 1997, the day after the murder, you met with this person, right?
A. I did.
Q. That person came to your police station, and you showed that person the videotape and you played the audiotape, right?
A. I did.
Q. You showed him specifically photographs including this one, a photograph of the killer leaving the store, this photograph right here, did you not?
A. I did.
Q. You also played the audiotape, the tape of the crime for that person?
A. I did.
Q. And that person knew the defendant on a personal basis, right?
A. Yes, he did.
Q. What did that person tell you the day after the crime about this photograph as far as the description of how this person looked in relation to the defendant, if you recall?

(XII RT 2419-2421.)

At this point, the court took a brief recess, during which defense counsel objected to this line of questioning, stating that it was not his recollection that he asked the detective any questions about his meeting with Michael Moore. (XII RT 2421-2422.) The reporter's transcript reveals,

in relevant part, the following questioning of Olson by defense counsel during the direct examination.

> Q. When did you first see the crime scene videotape?
> A. Umm, I would say roughly within a half hour of my arrival. So I would say about roughly 4:45 to 5:00 in the morning. Soon after it happened.
> Q. ...Did you watch it more than once?
> A. I watched it several times.
> Q. When was the next time you watched it?
> A. The next morning.
> Q. And how many times did you watch it then?
> A. I don't remember exactly. It was – at least two times the next day.
> Q. Okay. And what was the purpose for you watching this videotape?
> ****
> A. The first day was to see what kind – see what we had. See if we could – for purposes of where the suspect went inside the store, where the victim was at, if possibly we could see if the suspect might have left any evidence behind. [¶] We also watched it because it had the audio to listen to, anything that was going on as far as when the suspect rang the front doorbell, when he left, the shots that were fired, the shots that were fired that we subsequently heard outside of the store. Any pertinent evidence that we could gather from the audio and visual portion of the video.
> Q. What was the purpose of watching it the next day?
> A. Umm, the purpose the next morning is because I had a person that wanted to look at it.

(XII RT 2395-2397 [direct testimony], 2425 [description of direct testimony].)

The court responded that defense counsel had opened the door by asking the question about the detective's reasons for watching the videotape the next day. (XII RT 2426.) Defense counsel objected that, inasmuch as counsel did not ask Olson what Moore had said, the question did not open the door to bringing in Moore's hearsay statements. (XII RT 2426.) The court opined that the prosecutor should be able to question Olson so that the

"jurors aren't left up in the air...." (XII RT 2427.) The court further opined: "you're trying to create a doubt; he [the prosecutor] has a right to respond to that." (XII RT 2427.) Counsel objected again that Detective Olson's testimony was "total hearsay" and "vouching for somebody who is not even a witness," as well as a "foundation . . . problem." (XII RT 2428, 2429.)[29]

The court suggested that the prosecutor, Mr. Raynaud, should call Moore as a witness. The prosecutor declined, explaining he did not want to "risk a mistrial" or "lose a juror." (XII RT 2429.) The prosecutor asked the court for permission to conduct additional limited questioning of Detective Olson, not identifying Moore or what he does for a living, but eliciting the fact that the person who viewed the videotape was familiar with Bell's size and height. (XII RT 2430.) The court responded that Moore's statements to Olson were hearsay. (XII RT 2430.) The prosecutor argued that Olson's testimony about Moore was not being offered for the truth of the matters asserted, but for the limited purpose of explaining what Olson did and why he did it. This caused the court to respond: "Come on. It's irrelevant." (XII RT 2430.) The court suggested they just "leave it alone at this point." (XII RT 2430.)

Defense counsel asked that the cross-examination of Olson about Moore be stricken, and that the jury be instructed to disregard it. (XII RT 2431.) The court indicated that the fact that Olson was looking at the videotape with a citizen informant was admissible, and not hearsay. (XII RT 2431.) The court also pointed out that defense counsel had not objected on hearsay grounds at the time the hearsay portion of the testimony was elicited, but rather, the court had stopped the testimony of Olson himself.

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[29] Counsel did not specifically mention the Confrontation Clause. However, counsel had filed a court-sanctioned "federalization" motion alerting the court that evidentiary objections were intended incorporate objections under provisions of the state and federal Constitution. (III CT 858-859.)

(XII RT 2431.) Counsel noted that he made an objection at sidebar as soon as the court stopped the questioning. (XII RT 2431.) The court ruled that defense counsel had waived the hearsay objection. (XII RT 2432.)

The court granted Mr. Raynaud permission to ask Olson what he did after viewing the videotape. (XII RT 2432.) Thereafter, the prosecutor asked Detective Olson what he did after showing the videotape to some one on the day following the murder. Olson responded: "I set up an appointment to meet with Michael Bell." (XII RT 2437.)

### B. Defense Counsel's Objection Was Sufficiently Timely To Preserve The Objection.

The trial court overruled defense counsel's objection, and denied the motion to strike based on counsel's failure to object while Olson was still testifying. The court's ruling was erroneous. Counsel's objection was sufficiently timely to preserve the hearsay issue according to the letter and spirit of California law.

Evidence Code section 353 provides in relevant part:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion....

"The reason for the rule is clear -- failure to identify the specific ground of objection denies the opposing party the opportunity to offer evidence to cure the asserted defect." (*People v. Holt* (1997) 15 Cal.4th 619, 666.) Evidence Code section 353 requires no particular form of objection. An objection "must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is

sought, and to afford the People an opportunity to establish its admissibility." (*People v. Williams* (1988) 44 Cal. 3d 883, 906.)

Here, defense counsel first objected that the prosecutor was proposing to ask questions exceeding the scope of the defense's direct examination of Detective Olson. The trial court overruled the objection, but indicated that Olson would be limited to testifying that he looked at the videotape the next day with someone who knew the defendant. (XII RT 2419.) Had the prosecutor abided by the limitation suggested by the court, there would have been no hearsay problem, and the jury would have received a sufficient explanation as to why the detective re-viewed the surveillance videotape on the day after the robbery. That was the limited area of defense counsel's inquiry. The ensuing cross-examination went significantly beyond the scope of the questioning authorized by the trial court, however. (XII RT 2419-2421.)

The trial court interrupted Olson's testimony at the precise juncture at which the prosecutor asked a question seeking to elicit evidence of Moore's verbatim statements to Olson. (XVII RT 2421.) During the recess that followed, counsel objected on hearsay grounds, moved to strike the testimony, and asked for an instruction telling the jury to disregard the evidence. (XII 2428-2429.) Counsel's objection clearly alerted the court and the prosecutor to the hearsay nature of the evidence to which counsel was objecting. Moreover, the People had ample opportunity to convince the court that the admittedly hearsay statements of Moore were admissible for the nonhearsay purpose of explaining Detective Olson's actions – or for some other purpose. The People's proffer of a ground for admission was rejected on the merits. (XII RT 2430.)

Accordingly, counsel's objection to the evidence was "made in such a way as to alert the trial court to the nature of the…evidence," and it afforded the prosecuting attorney an ample "opportunity to establish its

admissibility." (*People v. Williams, supra,* 44 Cal. 3d at p. 906.) The objection was timely, and possible remedial action was improperly denied on the ground of untimeliness.

### C. The Confrontation Clause Violation Should Not Be Deemed Waived By The Failure To Advance A Contemporaneous Constitutional Objection.

"The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence." (*Anderson v. United States* (1974) 417 U.S. 211, 220 [41 L.Ed.2d 20, 94 S.Ct. 2253]; see, 1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 558, pp. 533-534 [purpose of hearsay rule is to exclude untrustworthy statements not made under oath].) Defense counsel objected on hearsay grounds. Logically, this should have been sufficient to preserve an objection based on the ground that the admission of the substance of Moore's extrajudicial statements to Olson violated Bell's right to cross-examine Moore, under oath, a right guaranteed by the Confrontation Clause. (*People v. Monterroso* (2004) 34 Cal.4th 743, 763 [forfeiture issue not decided]; cf. *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19.)

In this case, moreover, no useful purpose would be served by declining to consider on appeal a Confrontation Clause claim based on the same testimonial hearsay admitted over Bell's hearsay objection. (*People v. Partida* (2005) 37 Cal.4th 428.) The court acknowledged that Moore's statements to Olson were hearsay, and inadmissible. The court's *ground* for overruling trial counsel's objection was *untimeliness*. Had counsel advanced a contemporaneous *constitutional* objection to the jury's consideration of Moore's extrajudicial statements, it is obvious the trial court would have overruled the Confrontation Clause objection as untimely

as well. Under the circumstances, making a constitutionally based objection in addition to the hearsay objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Furthermore, defense counsel "federalized" all state law objections advanced during the trial by filing a written motion to have the court deem that all objections would be preserved under both the federal and state constitutions. (III CT 858-859.) The trial court indicated that filing this motion would suffice to preserve federal objections. (VIII RT 1709.) Consequently, when defense counsel objected on hearsay grounds, he would have assumed that the objection incorporated constitutional objections under the state and federal Confrontation Clauses. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007.) Moreover, the Attorney General should be estopped from arguing forfeiture of federal constitutional grounds for appeal because the People failed to object to Bell's "federalization" motion in the trial court. (*People v. Castillo* (2010) 49 Cal.4th 145, 154-170; see also, *People v. Blacksher* (2011) 52 Cal.4th 769, 836, fn. 37.)

Accordingly, this Court should address Bell's Confrontation Clause argument on the merits.

### D. Introduction Of The Identification Statements Of Michael Moore Through The Testimony Of Detective Olson Violated The Hearsay Rule, Due Process, And The State And Federal Confrontation Clauses.

Both the prosecutor and the court acknowledged that the extrajudicial statements of Michael Moore to Detective Olson concerning his familiarity with Bell, and the similarities between Bell and the videotaped perpetrator were hearsay. (XII RT 2432; Evid. Code, § 1200.) As Bell has previously pointed out in Argument V, *ante*, whether the

admission of hearsay violates the Confrontation Clause is currently analyzed under the rubric of the United States Supreme Court's decisions in *Crawford v. Washington, supra,* 541 U.S. 36, and *Davis v. Washington, supra,* 547 U.S. 813. (*Whorton v. Bockting, supra,* 549 U.S. at p. 416; *People v. Cage, supra*, 40 Cal.4th at p. 970.)

*Crawford* holds that it violates the federal Confrontation Clause to admit the testimonial hearsay statements of a witness who does not appear at trial, *unless* the witness is unavailable to testify *and* the defendant had a previous opportunity for cross-examination. (*Crawford*, at pp. 53-54.) In this case, the witness was not unavailable; the court ruled that he could testify. (Evid. Code, § 240, subd. (a).) The prosecutor simply elected not to call Moore as a witness in order to avoid the need to replace the juror with whom Moore was personally acquainted and/or to avoid the risk of a mistrial. (XII RT 2429.)

Statements made during police questioning are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington, supra*, 547 U.S. at p. 822.) It cannot be disputed that the statements of Moore to Olson qualified as "testimonial hearsay." Moore contacted Olson the day after the robbery-murder, at a time when any ongoing emergency had passed. Olson's primary purpose in questioning Moore was to identify the perpetrator so he could be arrested – i.e., "to establish or prove past events potentially relevant to later criminal prosecution" of Bell. (*Ibid.*)

The Confrontation Clause does not bar admission of testimonial statements for purposes other than establishing the truth of the matter asserted. (*Crawford, supra*, at p. 59, fn. 9.) In the case at bench, however, the evidence was not received for a nonhearsay purpose. The prosecutor

argued that the evidence was being offered to explain the reasons underlying the detective's conduct, not for the truth of the matters asserted, but the trial court rejected the argument, correctly observing that the officer's *reasons* for acting were irrelevant. (XII RT 2430.) The trial court did not give a limiting instruction, *sua sponte*, for obvious reasons. It would have been pointless for defense counsel to ask for instructions limiting the jury's consideration of the evidence to explaining Olson's conduct, since the court had already ruled that the evidence was irrelevant, and thus inadmissible, for this purported nonhearsay purpose. (XII RT 2430.)

Even though Detective Olson never got to answer the question, "What did that person tell you the day after the crime about this photograph as far as the description of how this person looked in relation to the defendant, if you recall," the answer would have been obvious to the jury. The questions that *were* answered would have conveyed the following: (1) that Moore *told* the detective he was personally acquainted with Bell; (2) that Moore *told* the detective that he had met face-to-face with Bell five or more times, had the opportunity to talk to Bell, and watched him walk and move; and (3) that Moore watched the videotape and listened to the audio of the robbery with Olson, and related something to Olson, which prompted the detective to make an appointment to meet with Bell as a suspect. In other words, Moore watched the videotape, listed to the audio, and then *identified* Bell as the person heard and seen in the videotape. Why else would Moore's viewing of the surveillance videotape cause Olson to focus suspicion on Bell?

Olson never quoted Moore directly. Bell assumes that respondent may argue that Olson's general description of what he learned about the extent of Moore's exposure to Bell's appearance and way of moving did not really violate the *Crawford* rule. This argument, if made, should be rejected.

Before *Crawford*, the United States Supreme Court treated in-court descriptions of out-of-court statements, as well as verbatim accounts, as statements for purposes of the Confrontation Clause. (See, e.g., *Idaho v. Wright* (1990) 497 U.S. 805 [111 L.Ed.2d 638, 110 S.Ct. 3139].) Numerous federal circuit courts have held that testimony that communicates the substance of the unavailable witnesses' statements violates the Confrontation Clause, even when there is no verbatim account of the declarant's statement presented to the jury.

For example, the Ninth Circuit has held that, when the substance of an out-of-court testimonial statement is likely to be inferred by the jury, the statement is subject to the requirements of the Confrontation Clause. (*Ocampo v. Vail, supra*, 649 F.3d at p. 1110.) Certainly, Moore's identification of Bell was readily inferable from Olson's testimony. Many other Circuits that have addressed the issue are in accord. (See, e.g., *Ryan v. Miller* (2nd Cir. 2002) 303 F.3d 231, 250 ["If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible" under Supreme Court Confrontation Clause precedent.]; *Favre v. Henderson* (5th Cir. 1972) 464 F.2d 359, 364 [The Confrontation Clause was violated when "testimony was admitted which led to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged."]; see also, *Taylor v. Cain* (5th Cir. 2008) 545 F.3d 327, 335 ["Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant."]; *United States v. Silva* (7th Cir. 2004) 380 F.3d 1018, 1020 [Allowing police to refer to the substance of witnesses' statements as they "narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the

defendant's rights under the Sixth Amendment."]; *Hutchins v. Wainwright* (11th Cir. 1983) 715 F.2d 512, 516 ["Although the officers' testimony may not have quoted the exact words of the informant, the nature and substance of the statements suggesting there was an eyewitness and what he knew was readily inferred."]; see also, *Wheeler v. State* (Del. 2012) 36 A.3d 310, 318.)

Accordingly, the prosecutor's cross-examination of Detective Olson about Moore's familiarity with Bell, and his viewing of the video- and audio-tape of the killer, violated the state and federal Confrontation Clauses, as well as the state's evidentiary rules against hearsay.

Additionally, inasmuch as the trial court acknowledged that Moore's statements to Olson were hearsay, and inadmissible under California's evidence rules, the trial court's ruling amounted to the arbitrary refusal to apply a state rule of evidence to a clearly inadmissible extrajudicial identification. As such, Bell was denied a liberty interested protected by the federal Due Process Clause, pursuant to the United States Supreme Court's ruling in *Hicks v. Oklahoma, supra*, 447 U.S. 343.

### E. The Error Was Prejudicial Under The *Chapman* Or *Watson* Standard Of Review.

Constitutional errors, including *Crawford* error, are subject to harmless error analysis under the rule of *Chapman v. California, supra,* 386 U.S. 18. (*People v. Loy* (2011) 52 Cal.4th 46, 69.) Respondent bears the burden of proving that the error was harmless beyond a reasonable doubt. (*United States v. Nguyen, supra*, 565 F.3d at p. 675.) This, respondent cannot do.

Bell's theory of defense was that someone other than Bell committed the crimes, aided by Tory and Travis, or alternatively, that the Tory actually committed the murder with Travis and another man. (See, XII RT 2275-

2406.) The perpetrator was hooded, and the store surveillance videotape was too shadowy and of too poor resolution to permit a definitive identification of the person who committed the robbery. The identification of Bell as both robber and shooter was thus based largely on the testimony of Tory, who received an extremely favorable plea bargain in exchange for his testimony against Bell. The other confessed participant in the robbery, Travis, died before trial, and the only percipient witness – the man who saw the perpetrator fleeing from the scene – made no identification of either the shooter or the getaway car driver. (X RT 1858-1872.)

Because Tory was an accomplice, jurors were instructed that they could not return a guilty verdict based on the uncorroborated testimony of the accomplice alone. (XIII RT 2555.) During the guilt phase arguments, the prosecutor argued that there was ample independent evidence connecting Bell with the crimes. (XIII RT 2573-2576.)

Under the circumstances, hearsay evidence that a "citizen informant" who was "not up for any charges" (XII RT 2420) had identified Bell from the store videotape as the person who shot and killed the victim would have been critically important evidence to corroborate the self-serving testimony of Tory, pinning most of the blame for the killing on Bell, and deflecting blame from his mother and himself. (See, e.g., *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1444 [Confrontation Clause error not harmless where the one of two witnesses was untrustworthy and testified under a grant of immunity].) It is not "'clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error.'" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159; internal citation omitted.) Without the testimony of Olson, referring to the videotape identification of Bell by a neutral and detached "citizen informant," who knew Bell well, the jury may well have been left with a reasonable doubt regarding the actual identity of the person who was the shooter. (See, *United States v. Nguyen, supra*, 565

F.3d at p. 675.) The error was not harmless beyond a reasonable doubt. (See, *People v. Harris* (Mich. App. 1972) 200 N.W.2d 349, 392; *State v. Bankston* (N.J. 1973) 307 A.2d 65, 70.)

The erroneous admission of hearsay that does not result in a federal constitutional violation is ordinarily analyzed in accordance with *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 813.) Even assuming Bell's Confrontation Clause claim was forfeited, he clearly preserved the hearsay issue by objecting, moving to strike, and asking for an instruction to the jury to disregard Olson's testimony about Moore's statements on hearsay grounds. (Cf. *People v. Szeto* (1981) 29 Cal.3d 20, 32.) The same fact circumstances that make it impossible for respondent to prove the error harmless beyond a reasonable doubt also support a finding of a miscarriage of justice. More than a century ago, this Court reversed several judgments where in-court witnesses were allowed to testify to descriptions of the defendant received from out-of-court declarants for the truth of the matters asserted. (*People v. McNamara* (1892) 94 Cal. 509, 514-515.) Here, the erroneously admitted hearsay substantially corroborated the generously rewarded testimony of a codefendant detailing the roles played by each of the participants in the murder. It is reasonably probable that the jury would have reached a more favorable judgment at either the guilt or penalty phases of Bell's trial had this significant piece of evidence been excluded. (*People v. Saling* (1972) 7 Cal.3d 844, 855; *People v. Varnum* (1967) 66 Cal.2d 808, 815.)

### F. The Error Also Violated Bell's Right To A Reliable Death Judgment.

As Bell has previously pointed out, the United States Supreme Court and this Court regard the death penalty as substantially different, i.e., much more severe and irreversible than all other penalties provided by law. (See,

*Gregg v. Georgia, supra,* 428 U.S. 153; *Ring v. Arizona, supra,* 536 U.S. at p. 606; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994; *Ford v. Wainwright, supra,* 477 U.S. at p. 411; *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Hollywood v. Superior Court, supra,* 43 Cal.4th at p. 728.) Bell is on trial for his life. The greater need for reliability in this type of case means that the trial must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.)

Bell's penalty phase jury was given the standard CALJIC jury instruction directing them to consider and be guided by the guilt phase evidence and the circumstances of the crime. (IV CT 1146.) The circumstances of the crime would necessarily include Bell's role in the robbery and murder, as described by Tory. The statements by Moore, introduced through the testimony of Detective Olson, would have lent substantial weight to the testimony of the young accomplice, who had everything to gain by painting Bell as the person primarily responsible for the robbery and murder. Under these circumstances, the reliability of the jury's death determination was severely compromised, resulting in a violation of the federal Eighth Amendment.

## VII

## BELL'S SIXTH AMENDMENT RIGHT TO EFFECTIVE CROSS-EXAMINATION WAS VIOLATED BY ALLOWING DEBRA OCHOA TO TESTIFY, THEN INVOKE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AS A BAR TO CROSS-EXAMINATION ABOUT HER DISPOSITION OF THE GUN.

### A. The Related Facts:

Prior to guilt phase opening statements, defense counsel called the court's attention to the probability that a prosecution witness, Debra Ochoa, was going to claim the Fifth Amendment privilege against self-incrimination when called as a witness for purposes of establishing that she was a conduit for the gun used in the robbery and murder. (VIII RT 1754.) Ochoa was on felony probation or parole, and her attorney was apparently advising her not to testify regarding ownership or possession of the alleged murder weapon. (VIII RT 1754.) The prosecutor, Ms. Fladager, indicated that Ochoa would be taking the stand to answer limited questions, calling for answers that would not incriminate her. (VII RT 1755.)

During the evidentiary phase of the guilt trial, Nick Feder testified that, in September of 1995, he purchased a .357 Smith & Wesson revolver, similar in appearance to the murder weapon (People's Exhibit 21), from Phillip Campbell. (XI RT 2128-2129.) He owned the gun for about five months, and then sold it for $350 in cash to a family acquaintance, Debra Ochoa. (XI RT 2127-2128, 2132.)[30]

Phillip Campbell then testified regarding his sale of the murder weapon to Nick Feder. In late 1995, Campbell purchased two Smith & Wesson .357 revolvers from his brother-in-law, Chuck Nagy. The guns had

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[30] Feder's testimony mirrored testimony given in an earlier Evidence Code section 402 hearing. (XI RT 2100-2105.)

serial numbers AVZ3852 and AVZ4073, respectively. Campbell sold the revolver bearing the serial number AVZ4073 (People's Exhibit 21) to Feder. (XI RT 2138-2140.)

Subsequently, a pre-testimonial hearing was held outside the jury's presence to determine the propriety of Ochoa's invocation of the Fifth Amendment. (*People v. Doolin* (2009) 45 Cal.4th 390, 442.) Ochoa testified briefly, that she had been friend with Bell for approximately 14 years. (XI RT 2179.) Under cross-examination by Bell's counsel, Ochoa asserted her Fifth Amendment privilege in response to a question about whether she gave, sold, furnished or provided Bell with a handgun. (XI RT 2180.) Defense counsel asked the court to instruct her to answer the question. The court declined. (XI RT 2180-2181.) Defense counsel objected that he was being denied an opportunity for effective cross-examination of Ochoa regarding the gun. (XI RT 2181.) The district attorney argued that the People only wanted to show the relationship between Bell and Ochoa so that they could argue the inference that Ochoa must have put the gun in Bell's hands. (XI RT 2183.) Defense counsel objected that the People had put the defense in an "untenable situation" by refusing to grant Ochoa immunity, and calling Feder and Campbell as witnesses, knowing that Ochoa would claim the Fifth Amendment privilege. (XI RT 2183.)

Counsel made a motion to strike the testimony of Campbell and Feder on the ground that he was being denied the ability to cross-examine Ochoa by the district attorney's actions. The request was denied. (XI RT 2184.) The trial court ruled that the district attorney could call Ochoa as a witness, and that there would be no invocation of the Fifth Amendment in front of the jury. (XI RT 2185, 2187.) Defense counsel requested, and the court refused to make, an order limiting Ochoa's testimony to the fact that she knew Bell, without allowing her to testify how long she had known him. (XI RT 2185.)

Thereafter, Ochoa testified in front of the jury that she had known Bell for approximately 14 years. (XI RT 2189.) Defense counsel did not cross-examine. (XI RT 2189.)

**B. Applicable Law:**

The Sixth Amendment Confrontation Clause guarantees a criminal defendant the right to cross-examine the witnesses against him. (*Davis v. Alaska, supra,* 415 U.S. at p. 315.) The importance of cross-examination is most crucial when the defendant seeks to cross-examine a government witness who provides a crucial link in the prosecution's case. (*Id.* at pp. 317-318; accord: *People v. Harris* (1989) 47 Cal.3d 1047, 1091.)

When a party's right of confrontation and cross-examination is rendered ineffective by the competing Fifth Amendment right of a testifying witness, California jurisprudence provides that all or a part of the direct testimony of the witness may be stricken, to rectify the denial of a party's confrontation rights. (*People v. Hathcock* (1973) 8 Cal.3d 599, 616; citing with approval *People v. Barthel* (1965) 231 Cal.App.2d 827, 834; *People v. Robinson* (1961) 196 Cal.App.2d 384, 390-391; *People v. McGowan* (1922) 56 Cal.App.587, 589-590.) If a party to litigation testifies on his or her own behalf and unjustifiably refuses to answer questions necessary to complete the cross-examination, the general consensus is that the party's entire direct testimony must be stricken. (*People v. Sanders* (2010) 189 Cal.App.4$^{th}$ 543, 554, citing 1 McCormick, *Evidence* (6$^{th}$ ed. 2006) Cross-examination, §19, p. 110.)

If, on the other hand, a nonparty witness invokes the privilege against self-incrimination, but the impeded cross-examination relates only to cumulative or collateral matters concerning credibility, the trial court may refuse to strike, and fashion other remedies to address the problem, such as giving a charge to the jury. (*Sanders, supra*, at pp. 554-555;

McCormick, *supra,* at p. 111.) When a nonparty witness completely refuses to be cross-examined on the merits of his or her direct-examination, the direct testimony of the witness should be stricken. (*Sanders*, at p. 555; 5 Wigmore, *Evidence* (Chadbourn rev. 1974) Conduct on Cross-examination, §1391, pp. 137-140: McCormick, *supra*, at pp. 110-111.) If, however, the witness refuses answer only a few of many questions asked on cross-examination, whether and what to strike from the witness's testimony is left to the discretion of the trial judge, who will consider the motive of the witness and the materiality of the answers that are being withheld. (*Ibid.*; Wigmore, *supra.*)

Federal jurisprudence is generally in accord. (See, *United States v. Cardillo* (2nd Cir. 1963) 316 F.2d 606 [hereafter, *Cardillo*], [referred to as the "leading case" by McCormick, *Evidence*, *supra*, Cross-examination, § 19, p. 111; see also, 5 Wigmore, *supra*, *Evidence*, § 1391, pp. 137-138, fn. 2.) In *United States v. Cardillo, supra*, for example, the government's case relied heavily on testimony by two participants in the defendants' stolen fur enterprise, Ohrynowicz and Friedman. (*Id.*, at p. 609.) Ohrynowicz asserted the Fifth Amendment privilege to several questions by defense counsel relating to his prior criminal activity, completely unrelated to the charged crimes. Friedman asserted the privilege when asked questions concerning the source of $5,000, which he earlier testified he lent to one defendant, Harris, to purchase stolen furs from another defendant, Margolis. (*Cardillo, supra*, at p. 610.)

The Circuit Court held that it was not error for the district court to refuse to strike Ohrynowicz's testimony because the unanswered questions "were purely collateral for they related solely to his credibility as a witness and had no relation to the subject matter of his direct examination." (*Cardillo*, at p. 611.) In contrast, the court held that the defense attorney's motion to strike the testimony of Friedman should have been granted.

The error of refusing to strike Friedman's direct testimony thwarted the defendants' rights to cross-examine their accusers, and resulted in reversible error. (*Id.*, at p. 613.)

The Ninth Circuit Court of Appeals utilizes the same approach when presented with a witness who testifies, then asserts the self-incrimination privilege as a partial or complete bar to cross-examination. (See, *United States v. Wilmore* (9th Cir. 2004) 381 F.3d 868.) When a government witness invokes the Fifth Amendment on cross-examination, the court must strike the witness's direct testimony unless the refusal to answer concerns only "collateral matters." (*Wilmore*, at p. 873.) For example, when a nonparty witnesses refuses to answer questions pertinent to prove the defendant's possession of a gun, and gun possession is material to determining the defendant's guilt, the unanswered questions do not relate to a "collateral matter," and the witness's testimony should be stricken on Sixth Amendment grounds. (*Ibid.*)

### C. Bell's Counsel Was Denied The Opportunity For Effective Cross-Examination Of Debra Ochoa In Violation Of The State And Federal Constitutional Rights Of Confrontation And Cross-Examination.

In Bell's case, the trial court conducted a pre-testimonial hearing to determine whether Ms. Ochoa had a legitimate claim to assert the Fifth Amendment privilege. At that hearing outside the presence of the jury, the witness would not answer counsel's question regarding the murder weapon, but rather, asserted the Fifth Amendment privilege. Defense counsel asked the court to order the witness to answer counsel's question about the gun, but the court implicitly, if not expressly, sustained Ochoa's assertion of the privilege. (XI RT 2180-2181.) The court directed all counsel not to ask questions that would cause Ochoa to invoke the Fifth Amendment in front

of the jury. (XI RT 2187.) For all intents and purposes, this amounted to an invocation of the Fifth Amendment to *any* questions by defense counsel about Ochoa's disposition of the murder weapon. (*United States v. Wilmore, supra*, 381 F.3d at p.872, fn. 5.)

During the pre-testimonial hearing, the prosecutor argued that she was only going to ask Ochoa about her relationship with Bell, and therefore, by asking the witness questions about the gun, defense counsel was exceeding the permissible scope of cross-examination. (XI RT 2181.) The prosecutor and the court suggested that defense counsel might have to call Ochoa as a defense witness, to ask whether she sold Bell the gun. (XI RT 2181, 2183.) This would have amounted to a pointless procedural exercise. Ochoa would have invoked the privilege regardless of whether such questions were asked on cross-examination, or on direct.

Counsel's objection to the witness testifying was well taken. The People were able to connect the gun that killed the victim to Nick Feder, the original buyer, and Phillip Campbell, the person who bought the weapon from Feder. Campbell testified that he sold the gun to Ochoa. Although Ochoa did not testify that she gave or sold the gun to Bell, and she refused to answer any questions about her disposition of the gun, the prosecutor relied on Ochoa's testimony establishing a 14-year friendship with Bell to prove that Ochoa must have sold or given the gun to Bell.

Proof of the exact source of the gun was of considerable import to appellant's theory of defense. The defense sought to prove, or at least raise a reasonable doubt, regarding whether it was Bell, and not Tory or a different companion of Tory's mother, who entered the Quik Stop Market and did the actual shooting. The murder weapon was found *not* in Bell's possession, but buried. Tory received a substantial *quid pro quo* to testify that Bell was the one who used the gun to commit the murder.

The implication that Bell went to Los Angeles to obtain Ochoa's gun was relied upon by the prosecutor to infer advance preparation and planning to commit a robbery with a gun.

The district attorney argued in relevant part:

> Phillip Campbell sold this gun to a man in Los Angeles, a man named Nick James Feder. [¶] Nick Feder had it for a few months, and Nick Feder had a family friend down in Los Angeles. Her name was Debra Ochoa. She was looking for a gun for protection. He showed her this gun. He said "It's a big gun. You should look for something else." But she wanted to buy the gun and so he sold it to her for a favor for $350.... [¶] Debra Ochoa had a friend, Michael Bell. A friend of 14 years. In December of 1996, the defendant went down to Los Angeles, and when he came back, he came back with that gun.

(XIII RT 2575-2576.)

Bell's procurement of the murder weapon was emphasized again during the penalty phase closing argument as an aggravating feature of the crime.

> He got this gun after a trip to Los Angeles where his friend of 14 years, Debra Ochoa, lived. [¶] Remember that this exact gun, this exact gun (indicating), serial numbers were matched and placed in the hands from Phillip Campbell to Nick James Feder to Debra Ochoa to the defendant. This gun, this very gun which the defendant showed off to his teenage groupies, probably with a little bravado.

(XVIII RT 3737.)

Defense counsel was denied any opportunity to effectively cross-examine Ochoa concerning whether Bell traveled to Los Angeles and, as alleged, obtained the gun from Ochoa for the specific purpose of committing a robbery. If Ochoa had testified that she sold or gave the gun to someone other than Bell, it would have helped to dispel the inference that Bell had *planned* the robbery. This, in turn, would have weakened the

inference that, because Bell engaged in planning activity, Bell must have been the one to commit the robbery and murder, and not Tory and/or someone else. Moreover, even if the jury concluded that Bell was the shooter, the inference of advance planning – founded upon Bell's traveling some distance to obtain a friend's gun – would have weighed negatively against a life verdict at the penalty phase of the trial.

*United States v. Cardillo, supra*, 316 F.2d 606, presents analogous, if not identical circumstances. In *Cardillo*, the Circuit Court explained why the accomplice's testimony about the source of the $5,000 used to buy stolen furs was crucial to the defendant's guilt, not simply collateral.

> The $5,000 was to enable Harris to guy the furs. Friedman in his testimony said that he had put that amount into Harris's hands. This financial transaction was not collateral but directly related to Harris's participation in the conspiracy and to Friedman's being present on the various occasions as to which he testified against Harris and Kaminsky. [¶] Had Friedman disclosed the name of the lender, there would have been several possibilities. The lender might not have been available as a witness, he might have confirmed the loan, he might have denied making it or the defense might have been able to introduce other proof to show that the alleged lender could not possibly have made the loan. If the proof were sufficiently convincing to induce a belief that the loan had never been made, the court's reaction to all of Friedman's testimony might have been so adverse that it would have accepted no part thereof....

(*Cardillo, supra*, at pp. 612-613.)

Similarly, had Ochoa not invoked her right not to testify, she might have admitted selling or giving the gun to someone other than Bell. Ochoa's answers might have been consistent with the prosecution's theory of the case – or *undermined it*. Since Bell's theory of defense was that Tory and Travis and another man committed the murder and robbery, Bell's trip to Los Angeles to procure Ochoa's gun was an important link in the

prosecution's proof. By inference, the testimony effectively corroborated the self-serving testimony of Tory.

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations.] To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

(*Alford v. United States* (1931) 282 U.S. 87, 692 [75 L. Ed. 624, 51 S.Ct. 218].)

It matters not that Ochoa's direct testimony was limited to identifying Bell as a person she had known for 14 years. (XI RT 2189.) The prosecuting attorney herself admitted that she needed Ochoa's testimony to "tie up the last loose end" with respect to the source of the murder weapon. (XI RT 2181.) The prosecutor's closing argument framed for the jurors exactly what they were meant to infer from Ochoa's identification of Bell as a long time friend – that she gave or sold him the gun. (Cf. *Ocampo v. Vail, supra*, 649 F.3d at p. 1113; XI RT 2575-2576.) But defense counsel was completely disabled from cross-examining the witness to determine whether this asserted fact was true. Since defense counsel was precluded from probing testimony vital to establishing Bell's active procurement of the gun used in the crimes, the testimony of Debra Ochoa should have been excluded as violative of the Sixth Amendment. (*United States v. Wilmore, supra,* 381 F.3d at p. 873.)

> Where a defense witness refuses to answer questions that go to the heart of the direct testimony on a central issue, however, the truth-seeking function of the court is impaired.

> "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."

(*Denham v. Deeds* (9th Cir. 1992) 954 F.2d 1501, 1505; internal citations omitted.)

### D. The Error Was Prejudicial As To Guilt And Penalty Phases Of The Trial.

The prejudicial effect of a violation of a defendant's right to effective cross-examination is measured in accordance with the *Chapman* standard. The People bear the burden of proving the error harmless beyond a reasonable doubt. (See, *United States v. Wilmore, supra*, 381 F.3d at p. 873.)

The error was no more harmless in this case than it was in the *Wilmore* and *Cardillo* cases, discussed above. The area in which defense counsel's cross-examination was precluded was vital to the issues of planning and identity – i.e., whether Bell traveled to Los Angeles for the purpose of procuring a gun from Debra Ochoa, or whether Ochoa sold the gun to someone else. For reasons previously noted, it is reasonably probable that the jury would have reached a more favorable judgment at either the guilt or penalty phases of Bell's trial had Ochoa's testimony been completely precluded. (*United States v. Wilmore, supra*, at p. 873; cf. *People v. Hathcock, supra*, 8 Cal.3d at p. 616 [error waived by failure to object in the trial court].) Furthermore, even if the error, standing alone, is deemed harmless, the cumulative prejudicial effect of the assaults on Bell's Sixth Amendment right to effective cross-examination cannot be ignored. (*People v. Hill, supra*, 17 Cal.4th at p. 847; see Arguments X and XI, *ante*.)

### E. The Error Also Violated Bell's Right To A Reliable Death Judgment.

As Bell has previously pointed out, the death penalty is different in its final nature from all other penalties provided by law. (See, *Gregg v. Georgia, supra,* 428 U.S. 153; *Ring v. Arizona, supra,* 536 U.S. at p. 606; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994; *Ford v. Wainwright, supra,* 477 U.S. at p. 411; *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Hollywood v. Superior Court, supra,* 43 Cal.4th at p. 728.) The greater need for reliability in capital cases means that the trial must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra,* 486 U.S. at pp. 262-263.)

Bell's penalty phase jury was given the standard CALJIC jury instruction directing them to consider and be guided by the guilt phase evidence and the circumstances of the crime. (IV CT 1146.) The circumstances of the crime necessarily included whether Bell planned far in advance to use a firearm to commit a robbery. If Bell went to Los Angeles and got the gun from Debra Ochoa, as was argued by the prosecutor based on Ochoa's brief, but untested testimony about the duration of her acquaintance with Bell, the jury may well have regarded this as evidence of advance planning, which would have weighed heavily on death's side of the scale. Under these circumstances, the reliability of the jury's death determination was severely compromised by the denial of any meaningful opportunity to cross-examine Ochoa, resulting in a violation of the federal Eighth Amendment.

## VIII

## ALLOWING THE REPEATED PLAYING OF A VIDEOTAPE AND AUDIOTAPE OF THE ROBBERY, INCLUDING BONE-CHILLING AUDIO OF THE VICTIM DYING, WAS AN ABUSE OF JUDICIAL DISCRETION, EVISCERATED BELL'S RIGHT TO FUNDAMENTALLY FAIR GUILT AND PENALTY PHASE TRIALS, AND VIOLATED THE EIGHTH AMENDMENT'S GUARANTEE OF RELIABILITY AND ACCURACY IN CAPITAL SENTENCING.

### A. The Facts:

#### 1. Guilt Phase:

The prosecutors planned to offer into evidence during their guilt phase case-in-chief an enhanced version of the surveillance videotape of the robbery and murder. Defense counsel initially moved to exclude the enhanced version of the videotape on *Kelly-Frye* grounds. (See, *People v. Kelly* (1976) 17 Cal.3d 24 and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014-1015.)[31] (II CT 551-552, 562-568; III CT 615-626; II RT 80-81.) After the court and the parties watched the original and enhanced videotapes outside the jury's presence, counsel withdrew his *Kelly-Frye* objection. (II RT 132-134.) Counsel indicated he was not waiving foundational objections to the videotape (II RT 133-134), but was still objecting to the playing of an audio of the videotape on the ground that the tape was of poor quality, and the noises made by the victim after he was shot were extremely prejudicial. (Evid. Code, § 352; II RT 135-136.)[32]

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[31] According to the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579 [125 L.Ed.2d 569, 113 S.Ct. 2786], in federal jurisdictions, the *Frye* case was superseded by the Federal Rules of Evidence. This Court now refers to the principles articulated in *Kelly* and *Frye* as the *Kelly* rule. (*People v Cowan* (2010) 50 Cal.4th 401, 469.)

[32] The District Attorney explained that the audio of the Quik Stop Market videotape could only be heard when the videotape was played on the

The prosecutor argued that the audio was relevant to the guilt phase because the sequence of the noises, including the door bell, the shots, the yelling and screaming, followed by a second door bell as the shooter was leaving, eliminated the possibility that more than one person was involved in the shooting. (II RT 136-137.) The prosecutor also argued that one could hear on the audiotape the two shots fired at the truck outside after the shooter left the store. (II RT 137.)

After the parties listened to the audiotape outside the presence of the jury, defense counsel argued that the portion of the audiotape after the victim is shot, where the victim is obviously distressed was "bone chilling, blood curdling," and not really probative of anything the jurors needed to decide in the guilt phase. (II RT 141.)

The court commented that the audiotape also captured the two later gunshots fired at the truck driver, which would be relevant to show the truck driver saw the actual shooter emerging from the market. (II RT 142.) The court tentatively ruled that the prejudicial effect of the evidence was outweighed by its probative value. (II RT 144-145.)

Counsel clarified that he was only objecting to the portion of the tape that included the victim's noises while dying. (II RT 144.) Mr. Faulkner argued that the sounds of the victim dying were not necessary to prove that shots were fired, or that the victim died of the gunshot wounds. (II RT 145.) The judge indicated he would think about it, and take the matter under submission. (II RT 146.)

On the seventh day of trial, the prosecutor informed the court that they now had a video player capable of playing the store surveillance videotape with the original audio playing at the same time. (VIII RT 1752.)

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market's own video machine. Detective Olson had brought a cassette tape to the market and made a duplicate audiotape as the original tape played on the market's machine. (II RT 135.)

The prosecutor was not allowed to *play* the video during opening argument, but emphasized the importance of the evidence by arguing: "You will experience a killing. You will hear a man dying." (VIII RT 1753-1754; IX RT 1783.)

The original videotape was played for the jury during the testimony of the Quik Stop Market owner, Henry Benjamin, who answered questions about what jurors were hearing and seeing as the videotape played. (People's Exhibit 11; IX RT 1886.) First, the district attorney showed a portion of the videotape, in which four camera angles showing different parts of the store could be seen on the single television screen. (IX RT 1886-1890.) Next, the prosecutor restarted the videotape, showing only one of the four camera views on the full screen. (IX RT 1890-1891.) The prosecutor stopped and restarted the videotape again, this time showing the videotape taken by a different surveillance camera. (IX RT 1891.)

At this point, when the prosecutor was about to play the entire videotape for the third time, Mr. Faulkner asked to approach the bench, and there was an unreported conference. (IX RT 1892.) During the conference, defense counsel apparently voiced the opinion that those in the courtroom should be warned they would have to watch the videotape two more times. (IX RT 1898.) After the conference, before the videotape played again, Mr. Faulkner stated to the district attorney on the record, "You really want to put all these people through this?" (IX RT 1892.)

The district attorney insisted she wanted to show the jury the surveillance videotape from two more angles. Defense counsel opined that they should suggest that family members might wish to leave. (IX RT 1892.) The court then took a brief recess. (IX RT 1893.) After the recess, the district attorney played the videotape on the full screen, from the last two camera angles. (IX RT 1893.)

During the next recess, the court asked the district attorney to explain for the record why the videotape was played three times, showing three different perspectives. (IX RT 1896.) The prosecutor explained that surveillance cameras were taking video from four different angles. She asserted that, if she had shown the videotape feed from all camera angles at once, the pictures would have smaller and more difficult for the jury to see. By showing one camera angle at a time on a full screen, they could see the video and hear the audio more clearly. (IX RT 1896-1897.)

On the fifteenth day of trial, during a side bar, defense counsel objected that prosecutors wanted to play the surveillance videotape again, with sound, during closing argument. He commented that the videotape was "very inflammatory," that there were family members in the courtroom, and there was "a lot of reaction before when it was played." (XIII RT 2542.) Defense counsel argued that the audio portion of the tape amounted to "an appeal to their sympathy and the passions of the jurors," and was "not necessary." (XIII RT 2542-2543.) The court commented that the sound on the videotape was relevant to voice identification. (XIII RT 2543.) Defense Counsel then asked that the audio be turned down after the suspect finished talking on the videotape so that the jury would not hear dying sounds again. (XIII RT 2543.) The court acknowledged having limited the number of times the videotape was played and replayed *with* sound during the trial, but indicated the court could not "restrict the People from commenting on the evidence and showing the evidence to the jurors..." (XIII RT 2543.)

During Mr. Raynaud's closing guilt phase argument, the videotape was played again for the jury. (XIII RT 2569.) Before it was played, the court commented that there had been an "emotional reaction" to the video when it was played earlier, and invited anyone who might be disturbed to leave the courtroom. (XIII RT 2569.)

During jury deliberations, the court received a note from the jury requesting to play the videotape in the jury room. (IV CT 1002; XIII RT 2649.)

The jury returned to the courtroom. With counsel seated in the audience, the videotape was replayed as it was played during the trial, except that the video was paused several times at jurors' requests. (XIII RT 2663-2667.) Subsequently, jurors returned to the jury room to continue their deliberations. (XIII RT 2667.) Less than a half hour later, the jury returned its guilt phase verdicts finding Bell guilty of all charges. (XIII RT 2668.)

**2. Penalty Phase:**

During the penalty phase trial, the prosecution filed a motion to play the entire audio and videotape of the robbery and murder during the penalty phase argument, as "circumstances of the crime." (IV CT 1023-1025.) The motion indicated that a two-minute segment of the videotape had not been played for jurors in the guilt phase, covering the time after the perpetrator fired shots at the passing trucker, until Mr. Faughn entered the market and found the victim. (IV CT 1025.) Prosecutors sought to play the videotape during penalty phase argument, including the two-minute audio track not previously played in which there could be heard moaning sounds from the dying clerk. (IV CT 1025.)

The court ruled that prosecutors could not play the videotape during penalty phase argument because the videotape had not been played as part of the People's penalty phase evidence. (XVII RT 3511.) The court offered to allow the People to reopen in order to play the videotape again. (XVII RT 3512.) Defense counsel objected to allowing the prosecution to reopen its case, and made a continuing objection to playing the portion of the tape with the audio of the victim dying. (XVII RT 3512.) The court opined that

the victim's "last minutes" of life were relevant to the penalty portion of the case. (XVII RT 3512.)

Ms. Fladager indicated that she would be "happy to use it twice" if the court so desired. (XVII RT 3513.) Counsel objected, "twice is too much." (XVII RT 3513.) The court gave defense counsel the choice: the prosecutor could show the videotape again twice; or the whole tape with the extra minutes on it would be made an exhibit, and the prosecutors could show it once and argue it during final argument. (XVII RT 3514.) Defense counsel agreed to the latter choice. (XVII RT 3514.) During the prosecution's penalty phase closing argument, the videotape of the robbery, including an extra two minutes with sound, was played for the jury. (XVIII RT 3754.)

### B. The Trial Court Abused Its Discretion And Denied Bell A Fundamentally Fair Trial By Denying Defense Counsel's Request To Redact The Sounds Of The Victim Dying From The Audio Of The Surveillance Videotape During The Testimonial Phase Of The Guilt Phase Trial.

Defense counsel couched his objections in the language of Evidence Code section 352, which allows a court to exclude evidence if its "probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The objection also served to preserve Bell's federal due process claim based on the same evidence. (*People v. Streeter* (2012) 54 Cal.4th 205, 236-237.)

"Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) Otherwise stated, evidence is prejudicial

within the meaning of Evidence Code section 352 if it "'uniquely tends to evoke an emotional bias against a party as an individual'" (*People v. Scheid* (1997) 16 Cal.4th 1, 19; internal citations omitted) or if it would cause the jury to "'"prejudg[e]" a person or cause on the basis of extraneous factors.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958; internal citations omitted.)

The sounds of the victim dying – described by Mr. Faulkner as "bone chilling" and "blood curdling" (II RT 141) – were not probative of any contested issues the jurors needed to decide in the guilt phase. (Cf. *People v. Streeter*, supra, at pp. 236-238 [evidence of victim screaming held relevant to prove the special circumstance of torture-murder, which requires proof of intent to inflict pain].) The primary contested issue at the guilt phase was the *identity* of the person who entered the store and killed the clerk. Playing the sounds of the victim dying would have had no probative value to prove the *identity* of the shooter, or any other contested issue for that matter.

The trial court's theory of relevance was that the audio, including the sounds of someone entering and leaving the store, and the sounds of shots being fired, was relevant to prove that the man who exited the store and shot at the truck driver before fleeing was the same person who had shot the clerk just moments earlier. (II RT 142.) The trial court also stated that the audio of the videotape was relevant to voice identification. (XIII RT 2543.) But counsel was not asking to redact the sounds of the doorbell, the suspect speaking to the clerk, or the shots being fired; his objection was to playing the "bone chilling" sounds of the victim dying.

Moreover, repeatedly playing a recording of the sounds the victim made while dying was tantamount to asking the jurors to imagine the suffering of the victim. A prosecutor's appeal to the jurors to put themselves in the victim's place and experience the victim's suffering is

misconduct at the guilt phase of a capital trial. (*People v. Jackson* (2009) 45 Cal.4th 662, 691; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1192.) Evidence of victim impact, which is relevant to establish the appropriate punishment once guilt has been proved, is normally regarded as irrelevant and prejudicial during the jury's determination of guilt. (*People v. Edwards* (1991) 54 Cal.3d 787, 836.)

Even when victim impact evidence is offered in the *penalty* phase of a capital trial, this Court has said that evidence "that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Edwards, supra.*) A jury "must face its obligation soberly and rationally, and should not be given the impression that emotion should rein over reason." (*Ibid.*)

Here, the sounds of the victim dying were played repeatedly – at least two or three times – while the district attorney showed the robbery in progress from multiple camera angles. The record shows that the videotape in fact invoked an observable "emotional response" from those who were watching. (XIII RT 2569.) In the context of the *guilt* phase of a capital trial, this evidence surely evoked an irrational emotional response against Bell (*People v. Scheid, supra, at p.* 19), and caused the jury to prejudge Bell's guilt on the basis of extraneous factors. (*People v. Zapien, supra, at p.* 958.) That is the definition of prejudice within the meaning of Evidence Code section 352. Furthermore, listening to the victim die, not just *once*, but two or three times, would surely have diverted "the jury's attention from its proper role" and invited "an irrational, purely subjective response," rendering *both the guilt and penalty phases* of the trial fundamentally unfair. Accordingly, the trial court's ruling was an abuse of discretion, and denied Bell a fundamentally fair trial.

### C. The Trial Court's Failure To Discharge Its Statutory Duty To Weigh The Prejudicial Effect Of Playing The Audio Of The Victim Dying During The Prosecutor's Penalty Phase Closing Argument Before Denying Counsel's Request To Turn Off The Sound Was Erroneous And Denied Bell A Fundamentally Fair Penalty Trial.

Even if allowing prosecutors to repeatedly play the audio of the victim dying was not prejudicial error, Bell was surely denied a fundamentally fair trial by the trial court's refusal to redact the sound of the victim dying when the prosecutor replayed the surveillance videotape *again*, during penalty phase closing argument.

When a court is faced with an objection on section 352 grounds, the record must affirmatively show that the trial judge did in fact weigh the potential prejudice to the accused against probative value. (*People v. Montiel* (1985) 39 Cal.3d 910, 924; *People v. Green* (1980) 27 Cal.3d 1, 24-27.) Here, the record gives no indication that the trial judge, when faced with counsel's objection to the playing of the audio *again*, during closing argument, weighed the potential prejudice to Bell in assessing whether the prosecutor should be permitted to play for the third or fourth time, the blood curdling sounds of the victim's painful death. (See, *People v. Leonard* (1983) 34 Cal.3d 183, 187-188.) When a judge fails to discharge his statutory duty by performing a balancing test, the receipt of evidence is an abuse of discretion. (*People v. Green, supra*, at p. 24; *People v. Leonard, supra*, at p. 189.)

In the case at bench, trial court appears to have erroneously believed that it could not "restrict the People from commenting on the evidence and showing the evidence to the jurors...." (XIII RT 2543.) To the contrary, it is the duty of a trial judge to "control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant

and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) Evidence Code section 352 permits the court to exclude mitigating evidence offered by either party if it is cumulative. (*People v. Brown* (2003) 31 Cal.4th 518, 576.) Likewise, a trial judge has broad discretion to limit the arguments of counsel whenever the argument becomes repetitive or redundant. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184.) Here, the replaying of the videotape with the audio of the victim dying was both repetitive and redundant, as well has highly inflammatory.

Moreover, a trial judge has a duty to safeguard both the rights of the public and the rights of the accused, as well as inherent authority to promote a just determination of the trial. (*Cooper v. Superior Court, supra,* 55 Cal.2d at p. 301; *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387.) Exposing jurors *again* to the chilling sounds of the dying grocery clerk, during penalty phase argument, was overkill. Repeated exposure of the jury to the victim audibly dying would effectively have

> shifted the jury's attention from the evidence to the all too natural response of empathizing with the victim's suffering and his family's resulting torment. Once such emotions are unbridled, they are hard to rein in.

(*People v. Ponce, supra,* at p. 1206.)

### D. The Prosecuting Attorney Compounded The Prejudice By Asking Jurors To Imagine The Victim's Subjective Experience While Dying During Closing Penalty Phase Argument.

During penalty phase closing argument, the prosecutor argued:

> What was he [the clerk] thinking?
> Was he in disbelief, hoping, hoping he would get out alive?

> Did he think of his wife or maybe his father or his other family members?
>
> Maybe he thought of his employer, Henry Benjamin. Did he think his employer would be unhappy with him because he hadn't made it to that panic button? He was letting money be stolen from the store.
>
> Lying down on the floor on his belly, he hears the explosion of that first gunshot and he feels it tear into his back, immediately followed by the second gunshot.
>
> What was he thinking then? Why? Why me? I did what he wanted. He got his money.
>
> Maybe he thought, can I get help? We know somehow he managed to struggle and move from his stomach to roll over onto his back. But that's all he could do. He couldn't move anymore. He couldn't get to the panic button. He couldn't get to the two-way radio. He couldn't get to the telephone. All he could do was lie on his back and look at the ceiling and wait, wait and hope that someone would come and help him and that it wouldn't be the shooter coming back to finish him off.
>
> As he lay on the floor and stared at the ceiling, he waited while blood from his pierced heart filled his chest. We can't say for sure how long he was conscious.
>
> We do know that Mr. Faughn thought that his eyes moved when Mr. Faughn came in and said, "hey, man, are you all right?

(XVIII RT 3736-3737.)

During the penalty phase of a capital trial, an assessment of the offense from the victim's viewpoint is considered germane to the task of sentencing. (§ 190.3, subd. (a).) Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. (*Gardner v. Florida, supra,* 430 U.S. at p. 358; *People v. Haskett* (1982) 30 Cal.3d 841, 864.) Where victim impact evidence is concerned, a trial court is supposed to strike a careful balance between the probative and the prejudicial. (*People v. Terry* (1964) 61 Cal.2d 137, 144-145; *People v. Love* (1960) 53 Cal.2d 843, 856.)

"[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Haskett, supra*, at p. 864.)

Here, the trial court erred by permitting the audio of the victim's dying noises to be played repeatedly during the guilt phase, and once more at the penalty phase of the trial. The prejudice was then compounded by the prosecutor's closing argument, which invited the jury to imagine what the victim was thinking and feeling while the dying sounds were being made. (Cf. *People v. Haskett, supra*, 30 Cal. 3d at p. 864.) The cumulative effect of exposing the jury repeatedly to the victim's dying noises, and the prosecutor's prolonged argument focusing on the victim's subjective experience, diverted the jury from its proper role and invited an irrational, purely subjective response. (*Ibid.*)

### E. The Error Violated Bell's Right To Due Process, A Fair Trial, And A Reliable Determination Of The Penalty, In Violation Of The Eighth And Fourteenth Amendments.

Here, the jury was exposed to an audiotape of the victim dying multiple times during the guilt phase of the trial. If that were not enough to impair the fairness and accuracy of factfinding at the trial, the prosecutor insisted on playing the video and audiotape of the victim dying again – and for a more protracted period of time – during the prosecutor's penalty phase closing argument. During penalty phase argument, the district attorney focused for a prolonged period on the victim's thoughts and feelings as he was dying.

Repetitious exposure of the jury to the blood-curdling sounds of the dying clerk during the guilt phase of the trial was, for all intents and purposes, the same as allowing the prosecutor to make an emotionally evocative verbal appeal to jurors to put themselves in the victim's place and

experience the victim's pain and suffering. (*People v. Jackson, supra,* 45 Cal.4th at p. 691; *People v. Vance, supra,* 188 Cal.App.4th at p. 1192.) This Court has held that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial, because an appeal for sympathy for the victim is out of place during an objective determination of guilt. (*People v. Fields* (1983) 35 Cal.3d 329, 362.) The court should have barred playing the audio of the victim's dying sounds during the guilt phase of the trial, not given the prosecutor free rein to play it repeatedly.

While victim impact evidence is admissible at the penalty phase of a capital trial, its use is not without limits. (*People v. Edwards, supra,* 54 Cal.3d at pp. 835-836.) As appellant has previously argued, victim impact evidence that diverts attention or "invites an irrational, purely subjective response should be curtailed." (*People v. Haskett, supra,* 30 Cal.3d at p. 864.) By allowing the jury to listen to the macabre sounds of the victim dying as many as four times, the court far exceeded any reasonable exercise of discretion to admit evidence of the victim's suffering. Bell was denied any semblance of a fair trial.

Death is "profoundly different from all other penalties." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Hollywood v. Superior Court, supra,* 43 Cal.4th at p. 728.) The Eighth Amendment imposes a heighted need for reliability in the determination that death is the appropriate punishment in a specific case. (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 340.) Because of the increased need for reliability in death penalty cases, capital trials must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra,* 486 U.S. at pp. 262-263.) The taking of a life is irrevocable; accordingly, in capital cases "'the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.'" (*Depew v. Anderson, supra,* 311 F.3d at p. 751, quoting *Reid v. Covert, supra,* 354 U.S. at pp. 45-46.)

The trial court failed to give due weight to Bell's interest in a fair trial of guilt phase issues, and a reliable penalty determination. The error was clearly prejudicial.

Bell's identity as the shooter depended heavily on the testimony of an accomplice who received lenity to help convict Bell. There was defense witness testimony suggesting that someone other than Bell may have done the shooting. Repeatedly playing the victim's dying sounds would have made it impossible for the jury to weigh the totality of guilt phase evidence in a rational manner.

At the penalty phase, there was substantial evidence presented to the jury that Bell suffered from debilitating mental impairments, almost from the moment of birth. The cumulative effect of playing the robbery audiotape *over and over and over again* would have made it nearly impossible for the jury to give any weight to Bell's social and mental health history in determining penalty; the purely emotional impulse to see Bell die must have been overwhelming.

The prosecutor compounded the prejudice in the penalty phase by focusing a significant portion of his argument on the victim's experience of dying. In fact, the record clearly suggests that the surveillance videotape with the victim's dying sounds played a prominent role in the jury's decision-making. During deliberations, the jury requested, and was permitted to watch and hear the videotape again. (XIII RT 2663-2667.) Less than a half-hour afterward, the jury found Bell guilty of all charges. (XIII RT 2668.) The heart-wrenching sounds of the victim dying – over and over again – undoubtedly made it impossible for the jury to weigh the evidence on each and every count and enhancement "soberly and rationally." (*People v. Edwards, supra*, 54 Cal.3d at p. 836.) The result was a miscarriage of justice. (*People v. Ponce, supra*, at p. 1207, citing *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Accordingly, the trial court's rulings compromised the accuracy of the jury's factfinding and the reliability of the verdict of death and violated the Eighth and Fourteenth Amendments.

## IX

## BELL SUFFERED PREJUDICE AS A RESULT OF THE TRIAL COURT'S ERROR ADMITTING THE TESTIMONY OF REGINA FAY ALSIP REGARDING HER OPINION OF KENNETH ALSIP'S TRUTHFULNESS, AND HIS REPUTATION IN THE COMMUNITY FOR UNTRUTHFULNESS.

### A. The Underlying Facts:

Nineteen-year-old Kenneth Alsip was called as a witness on Bell's behalf. Alsip testified in relevant part that three years earlier, he was confined in Juvenile Hall in the same cell with Tory for a period of a week or two. (XII RT 2274.) Tory bragged to Alsip about the killing at the Quik Stop market, and told Alsip that he was going to let Michael Bell "take the fall" for him. (XII RT 2275, 2279.)

In rebuttal, prosecutors called Regina Faye Alsip, Alsip's mother, as a character witness. (XII RT 2471.) Mrs. Alsip had raised Kenneth until he was thirteen, but had infrequent contact with him after that. (XII RT 2472-2472.) She had visited him in jail several weeks prior to her testimony. (XII RT 2473.) Mrs. Alsip testified that she knew her son "well," but not "really well." (XII RT 2474.) She knew other family members that knew Kenneth, but did not know many of his friends or any of his neighbors. (XII RT 2474.) Over several defense objections on foundational grounds, the prosecutor elicited Mrs. Alsip's personal opinion of her son's veracity honesty. (XII RT 2472, 2474, 2475.) Mrs. Alsip initially stated she did not "really" have an opinion. (XII RT 2474.) On further questioning, she stated that Kenneth "had been known to lie...but most of the time...he's truthful as far as I am concerned." (XII RT 2475.) Mrs. Alsip acknowledged that in the past, Kenneth had lied to gain something for himself. (XII RT 2476.)

Mrs. Alsip, offering a nonresponse answer to a question about her son's reputation for truthfulness, stated of family members that she did not

think, "most of them would trust [Kenneth] to tell them the truth." (XII RT 2476.] Defense counsel belatedly objected that the question – did Kenneth have a reputation for truthfulness with family members – called for speculation. (XII RT 2476.) The trial court noted that the witness had not answered the question, and sustained an objection on the basis that the answer was nonresponsive. (XII RT 2476.) Mrs. Alsip was then permitted to testify that Kenneth's family members "would probably think that he wasn't truthful." (XII RT 2477.) In some situations, Kenneth would lie; in others, he would not. (XII RT 2477.)

### B. The Trial Court Erred And Abused Its Discretion By Overruling Counsel's Foundational Objections To Mrs. Alsip's Personal Opinion, And Her Opinion About Kenneth Alsip's Reputation In The Community For Truth-Telling.

As a general rule, a "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to…[h]is character for honesty or veracity or their opposites." (Evid. Code, § 780, subd. (e).) "Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule." (Evid. Code, § 1324.)

Before a lay witness may offer an opinion about another witness's honesty and veracity, foundational facts must be established showing that the lay witness's opinion is based on sufficient opportunities for personal observation. (*People v. McAlpin* (1991) 52 Cal.3d 1289, 1307.) Mrs. Alsip admitted that she had infrequent contact with Kenneth, who had not resided

with her for approximately six years. Mrs. Alsip initially stated she had no opinion about her son's truthfulness, but was then pressed to testify that Kenneth "had been known to lie." (XII RT 2475.) To the extent Mrs. Alsip offered her opinion, it was manifestly *not* based on her personal observations.

Similarly, a lay witness may not offer testimony about another witness's reputation for honesty without a sufficient foundation showing that the lay witness knows the other witness's general reputation in the community. A sufficient foundation is not established when a witness bases his opinion about a person's reputation on contacts with a restricted group of persons. (*People v. Cobb* (1955) 45 Cal.2d 158, 163 [questioned on unrelated grounds in *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1485; *People v. Carnavacci* (1953) 119 Cal.App.2d 14, 17.)

Here, counsel's foundational objections were erroneously overruled. Mrs. Alsip was not acquainted with Kenneth's reputation for honesty in the general community. Mrs. Alsip only knew other family members; she did not know Kenneth's friends or neighbors. (XII RT 2474.) Under the circumstances, a proper foundation for her testimony regarding Kenneth's reputation in the community was wholly absent.

### C. The Error Was Prejudicial, And Violated Bell's Right To A Fundamentally Fair Trial, Due Process And Reliable Determination Of Guilt And Punishment.

The error, though seemingly small, was extremely prejudicial. Bell's entire defense rested on convincing the jury that Tory and Travis committed the Quik Stop robbery and murder with someone other than Bell, or that Tory was the person who entered the market and shot the clerk. Kenneth Alsip's testimony that Tory intended to let Bell "take the fall" was the lynchpin of Bell's defense. Unfounded testimony by Kenneth's own

mother that family members took a dim view of his propensity to tell the truth significantly undermined Bell's entire guilt phase defense, and deprived him of a fundamentally fair trial. In fact, the prosecutor underscored Mrs. Alsip's testimony in his closing argument:

> Kenneth Alsip's mom came in here. And nobody's mom is going to come in here and say, "yeah, my son is a big fat liar," but she did say people who knew him would not find him trustworthy.

(XIII RT 2616.)

Additionally, the trial court's arbitrary and unwarranted construction of sections 780, subdivision (e) and 1324 of the state's evidence rules was not merely a matter of state procedural law. The state's failure to abide by its own evidentiary rules also violated Bell's liberty interest, which is protected by the federal Due Process Clause. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

More importantly, the death penalty is different in its final nature from all other penalties provided by law. (See, *Gregg v. Georgia, supra*, 428 U.S. 153; *Ring v. Arizona, supra*, 536 U.S. at p. 606; *Harmelin v. Michigan, supra*, 501 U.S. at p. 994; *Ford v. Wainwright, supra*, 477 U.S. at p. 411; *Gardner v. Florida, supra*, 430 U.S. at p. 357; *Hollywood v. Superior Court, supra*, 43 Cal.4th at p. 728.) The greater need for reliability in capital cases means that the trial must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.)

Improper impeachment of a key defense witness would have skewed the jury's guilt phase deliberations, and during the penalty phase, weighed heavily on death's side of the scale. Under these circumstances, the reliability of the jury's death determination was severely compromised the

unfounded testimony of Regina Faye Alsip, culminating in a violation of the federal Eighth Amendment.

## ARGUMENT SECTION 4

## ERRORS IN INSTRUCTION DURING THE GUILT PHASE

## X

## THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE ADJUDICATION OF GUILT AND PENALTY, BY REFUSING A DEFENSE INSTRUCTION ON THE CREDIBILITY OF A DRUG ADDICT AS A WITNESS.

### A. The Facts:

Several important prosecution witnesses admitted using contraband drugs at the time of certain described events. Bell's accomplice, Tory, testified that he and his friend Robert Dircks had been drinking alcohol and smoking marijuana all day on the day of the robbery. (X RT 2062.) Dircks testified too. He described preparations for the robbery allegedly undertaken by Bell, Travis and Tory, up to the time they left together in Travis' Chevy Beretta. (XI RT 2108-2115.) Dircks admitted that he and Tory had been smoking marijuana and drinking all day. (XI RT 2113, 2125-2126.) He also admitted selling drugs for Bell and Travis. (XI RT 2118.)

Daniel Herrera testified to establish a link in the chain of proof regarding Bell's possession of the murder weapon. (XI RT 2118-2120.) During cross-examination, Herrera admitted telling a district attorney investigator that he did not recall who gave him the gun because he was "using quite a bit of marijuana and some acid...." (XI RT 2122.) Herrera smoked "a lot of weed" the day before he spoke with the investigator. (XI RT 2122.) He acknowledged smoking a half-ounce of marijuana the day before he testified in court. (XI RT 2122-2123.) Herrera admitted he was "feeling the effects" as he testified. (XI RT 2123-2124.) Herrera also

admitted taking LSD, a hallucinogen, "every so often, when it comes around." (XI RT 2124-2125.)

Gary Wolford testified during the guilt phase of the trial that he had an incriminating conversation with Bell sometime after the Quik Stop robbery. (XII RT 2467-2469.) Wolford's conversation with Bell was emphasized by the prosecution in guilt phase closing argument, as corroboration for Tory's version of the events. (XIII RT 2581.)

On cross-examination, Wolford admitted that he was in the process of going through "cold turkey" heroin withdrawal at the time the conversation occurred. (XII RT 2469.) Up until a day or two before he spoke with Bell, Wolford had been injecting heroin two to three times per day. (XII RT 2470.)

Wolford testified again at the penalty phase trial, claiming that Bell had imprisoned and assaulted him, and forced him to use drugs. (XV RT 3028-3033.)

During an instructional conference regarding guilt phase instructions, defense counsel requested an instruction, which read:

> The testimony of a drug addict must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs. [¶] The jury must determine whether the testimony of the drug addict has been affected by the drug use or the need to obtain drugs.

(IV CT 1040; XII RT 2337.) The instruction was refused as an incorrect statement of the law. (IV CT 1040; XII RT 2338.)

### B. The Trial Court Committed Prejudicial Error By Denying The Requested Instruction.

The trial court's refusal to give the proposed defense instruction on the credibility of drug-addicted witnesses was erroneous. Several federal cases have held that it is error for a trial court to refuse to instruct the jury

that the testimony of an addict-informant is inherently suspect and should be weighed with great caution. (See, e.g., *United States v. Kinnard* (D.C. Cir. 1972) 465 F.2d 566; *United States v. Collins* (5th Cir. 1972) 472 F.2d 1017.) These cases recognize that the addiction of a witness, and the potential for indictment or prosecution, increase the danger that he will color his testimony to make the defendant look guilty for his own benefit.

> [A] trial court should be prepared to caution the jury to weigh with extreme caution the testimony of an addict-informer that is uncorroborated in some material respects, because of the possibility of the addict's special interest and motive to fabricate.

(*United States v. Kinnard, supra*, at p. 572.)

For all intents and purposes, the credibility of the described witnesses – Tory, Dircks, Herrera, and Wolford – was just as inherently suspect as that of a typical addict-informant. In addition to being an admitted drug abuser, Tory was an accomplice who received immunity for testifying against Bell. Dircks admitted he was a drug user and vendor. Herrera, a self-professed expert on the long-term effects of various drugs (see, XI RT 2124-2126), was suffering from a marijuana hangover in court. (XI RT 2123.) Wolford admitted being an addict and an informant, although his police informant status was not disclosed until the penalty phase of the trial. These drug-abusing witnesses all had similar vulnerabilities to police pressure, or possible motives for revenge, braggadocio, self-exculpation, or the hope of compensation. (*People v. Kurland* (1980) 28 Cal.3d 376, 393.) A cautionary instruction on the credibility of drug addicts should have been given.

This Court has not yet addressed whether a defendant is entitled to a cautionary instruction on a drug addict witness. On several occasions, years ago, the Court of Appeal considered requests for similar instructions on the credibility of narcotic drug users. (See, *People v. Garcia* (1963) 222

Cal.App.2d 755, 758; *People v. Meyer* (1963) 216 Cal.App.2d 618, 628-629; *People v. Litle* (1927) 85 Cal.App. 402, 405.) In each case, the appellate court ruled that the defendant was not entitled to the requested instructions. (*Ibid.*)

In the *Garcia* and *Litle* cases, the reviewing courts posited that it would invade the province of the jury to weigh the evidence. (*Garcia, supra*, at p. 758; *Litle, supra*, at p. 405.) However, instructions are routinely given admonishing jurors that the testimony of accomplices and in-custody informants should be viewed with caution. (See, CALCRIM Nos. 334 & 336.) Logically, if required cautionary instructions on incriminating accomplice and informant testimony (see, *People v. Brown, supra,* 31 Cal.4th at p. 555) do not intrude on the jury's function, neither would cautionary instructions on the credibility of a witness who abuses, or is addicted to, drugs. This Court should reject the reasoning of the Court of Appeal in the above-referenced cases and follow federal precedent, requiring a cautionary instruction on request. (*United States v. Kinnard, supra; United States v. Collins*, *supra*, 472 F.2d 1017.)

Generally, the prejudicial effect of a trial court's denial of cautionary instructions is evaluated under the *Watson* standard of review. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Carrera* (1989) 49 Cal.3d 291, 314-315.) Applying that standard, the trial court's refusal to instruct cannot be deemed harmless. At the guilt phase of the trial, Tory's testimony was the lynchpin of the prosecution's case against Bell. Because of Tory's accomplice status, the prosecutor was forced to place great reliance on drug-using witnesses for the necessary corroboration. (§ 1111.) Hence, the credibility of Dircks, Herrera and Wolford could very well have been a material factor in the jury's assessment of whether Tory was telling the truth, or merely engaging in self-exculpation. Wolford's testimony would have been particularly potent if statements he attributed to Bell were

credited and interpreted by the jury as an implied admission that Bell was the shooter. Under the circumstances, it is reasonably probable that the jury would have given less credence to Tory's testimony, and possibly reached a more favorable outcome at either guilt or penalty phase, had it not been for the denial of a cautionary instruction. (*United States v. Kinnard, supra*, at p. 576.)

Furthermore, as Bell has previously pointed out, the United States Supreme Court and this Court regard the death penalty as substantially different from other penalties provided by law. (See, *Gregg v. Georgia, supra,* 428 U.S. 153; *Ring v. Arizona, supra,* 536 U.S. at p. 606; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994; *Ford v. Wainwright, supra,* 477 U.S. at p. 411; *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Hollywood v. Superior Court, supra,* 43 Cal.4$^{th}$ at p. 728.) Bell is on trial for his life. The greater need for reliability in death penalty cases means that the trial must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.) The trial court's denial of an instruction that would have properly empowered the jury to discredit a witness's testimony on the basis of addition or abuse of drugs violated Bell's right to a fair trial, and undermined the reliability of the verdicts in violation of the Eighth Amendment.

## XI

## THE TRIAL COURT'S VIOLATION OF ITS SUA SPONTE DUTY TO GIVE AN INSTRUCTION ON THE OFFENSE OF DISCHARGING A FIREARM IN A GROSSLY NEGLIGENT MANNER, AS A LESSER-INCLUDED OFFENSE OF DISCHARGING A FIREARM AT AN OCCUPIED VEHICLE WAS PREJUDICIAL ERROR, AND VIOLATED BELL'S RIGHT TO A RELIABLE DETERMINATION OF PENALTY.

### A. The Trial Court Had A Sua Sponte Duty To Give Instructions On The Offense of Discharging A Firearm In A Grossly Negligent Manner, As A Lesser-Included Offense Of Discharging A Firearm At An Occupied Vehicle.

> " '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.] ...' [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given."

(*People v. Breverman* (1998) 19 Cal.4th 142, 154, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715–716.)

Bell was charged and convicted with maliciously discharging a firearm at an occupied motor vehicle (§ 246) in connection with shots allegedly fired at Lucky Store delivery driver Daniel Perry. (I CT 192; Count III.) Section 246 provides in relevant part:

> Any person who shall maliciously and willfully discharge a firearm at an...occupied motor vehicle...is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and

> not exceeding one year. As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

A related statute, section 246.3, subdivision (a), makes it a crime to willfully discharge a firearm in a grossly negligent manner, which could result in injury or death to a person. The only difference between the crimes of maliciously shooting at an occupied motor vehicle and discharging a firearm in a grossly negligent manner is that the greater offense requires that an occupied vehicle be the defendant's target. (*People v. Ramirez* (2009) 45 Cal.4th 980, 990; former CALJIC No. 9.03.) Accordingly, the crime of discharging a firearm in a grossly negligent manner is a necessarily lesser-included offense of the crime of maliciously discharging a firearm at an occupied motor vehicle. (*Ibid.*)

The trial court therefore had a *sua sponte* duty to instruct the jury on the lesser-included offense of discharging a firearm at an occupied motor vehicle, unless there was no evidence that the offense was less than that charged. In the case at bench, there was evidence to support a conviction of either the greater or the lesser-included offense.

The alleged target of the shooting, Daniel Perry, "saw the person with the big jacket on" and "heard a couple of shots." (IX RT 1864-1865.) Subsequently, a fresh dent was observed on the passenger door of Perry's truck. (IX RT 1868-1869.) That dent may or may not have resulted from being struck with a bullet.

Codefendant Tory testified that he saw a big truck coming, which Bell "shot at it like, twice...." (X RT 2050.) Inside the getaway car, Bell reportedly told Tory that the trucker was a witness, so he shot at him to make him go away. (X RT 2059.)

But Tory had significant credibility problems. He was an admitted participant in the robbery, and murder charges against him were dropped in

exchange for his testimony against Bell. (II CT 485-487; X RT 2074.) Furthermore, Kenneth Alsip testified that Tory bragged to Kenneth Alsip about the killing, and told Alsip that he was going to let Bell "take the fall" for him. (XII RT 2275, 2279.)

In short, based on the testimony of the only neutral and detached witness – Mr. Perry – the jury could have determined that Bell discharged a gun in a grossly negligent manner, with the intent to scare, but with no intent to strike Mr. Perry's truck or its occupant. If so, Bell was guilty of the lesser but not the greater offense. (See, *People v. Alonzo* (1993) 13 Cal.App.4th 535, 540; CALCRIM No. 965; IV CT 956 [CALJIC no. 9.03].) Under such circumstances, the court erred by failing to give lesser-included offense instructions on discharging a firearm in a grossly negligent manner.

**B. The Error Was Prejudicial.**

In *People v. Sedeno*, *supra*, 10 Cal.3d 703, disapproved on other grounds in *People v. Breverman, supra,* 19 Cal.4th at p. 165, this Court held that the failure of the trial court to instruct the jury *sua sponte* on a lesser included offense was harmless beyond a reasonable doubt under circumstances in which

> the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury.

(*Sedeno, supra*, at p. 721; see also, *People v. Wright* (2006) 40 Cal.4th 81, 97-98.) This Court has applied this principle in evaluating the prejudicial effect of other instructional errors. (*People v. Garrison* (1989) 47 Cal.3d 746, 778-779; *People v. Mayberry* (1975) 15 Cal.3d 143, 157-158.) In

Bell's case, the factual question posed by the omitted instruction – i.e., whether Bell was aiming at Mr. Perry's vehicle – was not resolved adversely to Bell under other properly given instructions. Hence, the error was prejudicial.

### C. The Instructional Error Compromised The Reliability Of The Jury's Penalty Determination In Violation Of The Eighth and Fourteenth Amendments.

This Court has declined to hold that necessarily lesser-included offense instructions are mandated as a constitutional matter in a *noncapital* case. (*People v. Breverman, supra,* 19 Cal.4th at p.169; see, *Keeble v. United States* (1973) 412 U.S. 205 [36 L.Ed.2d 844, 93 S.Ct. 1993].) This is a capital case, however.

In *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392] [*Beck*], the United States Supreme Court held that Alabama could not constitutionally impose a death sentence after applying a state statute, limited to capital cases, that prohibited the jury from considering a lesser noncapital offense necessarily included within the capital charge and supported by the evidence. The court noted the "value to the defendant of this procedural safeguard," as evidenced by "the nearly universal acceptance...in both state and federal courts" that a defendant is entitled to instructions on lesser-included offenses warranted by the evidence. (*Id.* at p. 637.) Such protection, the high court reasoned, is "especially important" in a capital case, and the risk that a jury will convict of the charged offense as an alternative to complete acquittal when it believes the evidence shows only some lesser crime "cannot be tolerated in a case in which the defendant's life is at stake." (*Id.* at p. 637.)

> Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction,

> [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case.

(*Id.* at p. 638.)

In *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 2504-2505, 115 L.Ed.2d 555] [*Schad*], a five-justice majority rejected a capital defendant's contention that, although his jury was instructed on the lesser included offense of second degree murder, he was additionally entitled to instructions on the lesser included offense of robbery. The *Schad* majority explained that the Eighth Amendment concerns at issue in *Beck* are focused entirely on the reliability of the capital verdict itself, i.e., whether the jury may have been forced, by an all-or-nothing verdict option, to convict of a capital crime against its view of the evidence in order to avoid complete acquittal. (*Schad,* at pp. 646-647.) Hence, the majority reasoned, *Beck* was satisfied if a capital jury receives only a single noncapital third option between the capital charge and acquittal, since this relieves the all-or-nothing pressure to return an inaccurate capital verdict in order to avoid acquitting the defendant entirely. (*Schad*, at p. 647.)

Here, the issue is not whether instructions on offenses necessarily included in capital felony-murder should have been given.[33] Rather, the problem is that the jury convicted Bell of shooting at an occupied motor vehicle when conviction of a less serious and necessarily lesser-included offense was possible.

The lack of lesser-included offense instructions thereby compromised the reliability of the jury's determination of penalty. In the penalty phase, the jury was instructed to weigh and consider the

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[33] Defense counsel told the court he was not going to be asking for instructions on theft, a necessarily lesser-included offense of robbery. Counsel agreed that this was either felony-murder or it was not. (XII RT 2365-2366.)

"circumstances of the crime of which the defendant was convicted in the present proceeding...." (IV CT 1146; XVIII RT 3690.) The circumstances of the crime would necessarily have included the discharging of a firearm *outside* the Quik Stop Market. The jury would certainly have assigned greater moral culpability to Bell if they believed he intended to shoot *at* the truck or its occupant, Mr. Perry, than if they believed Bell fired shots with intent to scare. For this reason, the absence of the lesser-included-offense instruction diminished the reliability of the jury's death determination for purposes of the Eight Amendment. (See, *People v. Geiger* (1984) 35 Cal. 3d 510, 518-520; overruled in *People v. Birks* (1998) 19 Cal.4th 108, 136, to the extent that the decision in *Geiger, supra,* had previously held that a defendant's unilateral request for a *related-offense* instruction must be honored over the prosecution's objection.) Accordingly, the death judgment, in addition to the conviction of discharging a firearm at an inhabited dwelling should be reversed or reduced.

## ARGUMENT SECTION 5

## PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE

## XII

## THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DETERMINATION OF THE PENALTY BY TRIVIALIZING THE REASONABLE DOUBT STANDARD DURING CLOSING ARGUMENT.

### A. The Facts.

During guilt phase closing argument, the prosecutor made the following argument, which promptly drew an objection from defense counsel that it incorrectly characterized reasonable doubt. (XIII RT 2617-2618.)

> If I take this quarter and flip it up in the air over a hard surface, it's possible it could land on heads or it's possible it could land on tails. It's reasonable either way. It's reasonable because it's based on physics, logic and reason. But if I flip this coin up in the air and expect it to land smack dab on its side and stay standing still, is it possible? Sure it's possible. Anything is possible, but is it reasonable?

(XIII RT 2617.)

The trial court ruled that there was no "problem in argument," and directed the district attorney to continue. (XIII RT 2618.) During a recess, the court stated for the record that he had ruled for the district attorney on defense counsel's objection, but the district attorney had not argued the point any further. (XIII RT 2631.)

**B. The District Attorney Committed Misconduct By Trivializing The Reasonable Doubt Standard, Comparing Reasonable Doubt To The Odds Of A Coin Being Flipped And Landing On Its Side.**

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged..., and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements....

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [124 L.Ed.2d 182, 113 S.Ct. 2078]; internal citations omitted."

The Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated; the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. (*Sullivan v. Louisiana, supra,* at p. 278.) These interrelated constitutional requirements apply in state as well as federal criminal proceedings. (*Id.*, at p. 278.)

In California, the prosecution's burden of proof in a criminal case is governed by section 1096, the substance of which has been incorporated into the standard reasonable doubt instructions. (See, CALJIC No. 2.90 and CALCRIM No. 220; *People v. Aranda* (2012) 55 Cal.4th 342, 353.) At the time of Bell's trial, reasonable doubt was defined in the following manner:

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(CALJIC No. 2.90; 4 CT 931.) When a *court* misdirects a jury on the definition of reasonable doubt, the jury's findings are vitiated and the

resulting error is structural. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282.)

Here, the trial court instructed on reasonable doubt in accordance with the standard CALJIC instruction. The prosecutor, however, effectively trivialized the burden of proof beyond a reasonable doubt by analogizing the flipping of a coin to the jury's assessment of reasonable doubt. This constitutes misconduct. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36.) It is misconduct for prosecutors to attempt to absolve themselves of the prima facie obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215, superseded by statute on another point as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

In *People v. Nguyen, supra*, the prosecutor argued that reasonable doubt was the same standard used by people every day to make important decisions, such as whether to get married, or whether to change lanes while driving. (*Id.*, at p. 35.) The Court of Appeal declared that the prosecutor's argument that people apply a reasonable doubt standard "'every day,'" and that the reasonable doubt standard is used by people to decide whether to change lanes "trivializes the reasonable doubt standard." (*Id.*, at p. 36.) The court, quoting from this Court's decision in *People v. Brannon* (1873) 47 Cal. 96, 97, explained:

> "The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence.... But in the decision of a criminal case involving life or liberty, something further is required.... There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence."

(*People v. Nguyen, supra*, at p. 36.)

Similarly, in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1265-1266, a reviewing court held that it was misconduct for the prosecutor

to show jurors a PowerPoint presentation of a puzzle, and to argue that reasonable doubt standard would be met when several puzzle pieces were still missing but you could see that the puzzle obviously depicted the Statue of Liberty. The court found that the prosecutor's argument inappropriately suggested a specific quantitative measure of beyond a reasonable doubt. (*Id.*, at p. 1267-1268.)

A similar result was reached in *People v. Wilds* (N.Y.App.Div. 1988) 141 A.D.2d 395, 397–398 [529 N.Y.S.2d 325, 327]. There, a trial court, not the prosecutor, used the analogy of a jigsaw puzzle of Abraham Lincoln to illustrate the concept of reasonable doubt. The appellate court in *Wilds* held this was error because "the average American juror would recognize a jigsaw puzzle of Abraham Lincoln long before all of the pieces are in place," and this was "not the quantum of proof required in a criminal case." (*Ibid.*) The appellate court reversed and remanded for a new trial because the instructions diminished the prosecution's burden of proof. (*Ibid.*)

In *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171-1172, a court rather than a prosecutor embellished the reasonable doubt standard by stating:

> A doubt that has reason to it, not a ridiculous doubt, not a mere possible doubt. Because we all have a possible doubt whether we will be here tomorrow. That's certainly a possibility. We could be run over tonight. God, that would be a horrible thing, but it's a possibility. It's not reasonable for us to think that we will be cause we plan our lives around the prospect of being alive. We take vacations. We get on airplanes. We do all these things because we have a belief beyond a reasonable doubt that we will be here tomorrow or we will be here in June, in my case, to go to Hawaii on a vacation.

(*Id.*, at p. 1171.) The error resulted in reversal of the judgment because the court's remarks trivialized the burden of proof and effectively reduced the

prosecutor's burden to the preponderance of the evidence standard. (*Id.*, at p. 1172.) In this case, the prosecutor's argument trivialized the reasonable doubt standard by comparing the jury's determination of whether the evidence established Bell's guilt of the charged crimes and special circumstances beyond a reasonable doubt, to an assessment of the likelihood that a flipped coin might land on its side. Counsel correctly objected that the prosecutor had misstated the reasonable doubt standard, and the trial court erred by overruling the objection.

### C. The Error Was Prejudicial, And Violated Bell's Constitutional Rights Guaranteed By The Fifth, Sixth, Eighth, And Fourteenth Amendments, To Have The Jury Find Guilt Beyond A Reasonable Doubt.

As Bell has previously pointed out, the requirement that a jury determine a defendant's guilt beyond a reasonable doubt is a mandate of the Fifth, Sixth and Fourteenth Amendments. (*Sullivan v. Louisiana, supra*, at p. 278.) Additionally, because the misconduct occurred in the context of a death penalty case, in which Bell's eligibility for a death sentence rested on the jury's findings of guilt and special circumstance allegations, the error impinges upon Bell's Eighth Amendment right to reliability in the death judgment. (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) Accordingly, the standard of review is the "harmless beyond a reasonable doubt" standard of *Chapman v. California, supra*, 386 U.S. 18. (*People v. Katzenberger, supra*, 178 Cal.App.4$^{th}$ at p. 1269.)

The prosecutor's trivialization of the burden of proof was not harmless beyond a reasonable doubt, and violated Bell's rights to due process, a fair trial, to have a jury make findings beyond a reasonable doubt, and to a reliable death verdict. Proof of Bell's role as shooter depended on testimony by Tory, who received an extremely lenient

sentence as a *quid pro quo* for testifying at Bell's trial. A wealth of other guilt phase errors also occurred, including – to name only one example – the repeated playing of an inflammatory audio track of the victim's dying sounds during the guilt and penalty phases of the trial. (See, *ante*.) Hence, even if the prosecutor's misconduct was not sufficiently egregious, standing alone, to require reversal of the judgment, the cumulative effect of guilt phase errors resulted in a miscarriage of justice. (*People v. Hill, supra*, 17 Cal.4$^{th}$ at p. 847.) Accordingly, the judgment should be reversed.

## ARGUMENT SECTION 6

## PENALTY PHASE ERRORS STEMMING FROM DEPUTIES' SCUFFLE WITH BELL WITHIN THE EARSHOT OF THE JURY DURING THE PENALTY PHASE OF THE TRIAL.

### INTERRELATED FACTS

#### The Scuffle With Bell

According to the testimony of Deputies Beverly Bentley and Jim Ridenhour, Bell became upset when he saw his mother crying, and began pounding the counsel table with his fists. (XVII RT 3452, 3470.) Bailiffs thought Bell was going to tip the table over, so they jumped on Bell to restrain him. Bell resisted, stood up and started moving towards the aisle. It took multiple deputies to restrain Bell and get him in leg irons and handcuffs. (XVII RT 3453-3473.)

During the skirmish, Deputy Bentley sustained injuries including a sore head, from having her hair pulled, a sore jaw and sore ear. (XVII RT 3466.) Deputy Ridenour was kicked in the shin, causing a minor scrape and redness. (XVII RT 3474.)[34]

#### Proceedings Outside Bell's Presence Immediately Following The Incident In The Courtroom

Following the above incident, Bell was taken from the courtroom. Afterwards, in Bell's absence, the judge and counsel discussed what had occurred. (XV RT 3073-3087.)

Next, the court informed counsel that he had received a letter from Bell's wife, Debra Ann Firestone-Bell. (XV RT 3087; ACT 1341-1368.)

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[34] The prosecution presented testimony about this incident without apparent objection by defense counsel. Counsel indicated he would "not pitch a fit" so long as the People called only two witnesses to testify about the incident. (XVII RT 3448.)

The letter, dated April 3, 1999, asserted, in essence, that videotape of the robbery had been doctored and Bell was being framed. In Bell's absence, the court and counsel discussed the letter briefly and defense counsel averred that he would probably not be calling Firestone-Bell as a witness. (XV RT 3088.)

Immediately thereafter, penalty phase jury instructions were discussed. Bell was not brought back into the courtroom and no waiver of the right to be present during the instructional conference was sought. (XV RT 3088-3096.)

Before recessing for the evening, a short discussion was held in Bell's absence regarding the admissibility of Bell's courtroom outburst as penalty phase evidence, and anticipated defense witnesses. (XV RT 3098-3099.)

**The Decision To Proceed With Penalty Phase Testimony In Bell's Absence**

The following morning, Friday, April 9, 1999, Bell appeared in court in a wheelchair. (XVI RT 3104.) The trial court stated for the record that Bell was restrained in his wheelchair by chains and wearing a stun belt at the recommendation of the sheriff's department and bailiffs. (XVI RT 3104.)

Defense counsel informed the court that Bell was having severe pain in his back and legs, was not alert and responsive at this time, and could not assist in his defense that day. (XVI RT 3102.) Bell confirmed that he could not walk and was suffering from pain in the leg, back and neck. (XVI RT 3104.)

When the court inquired why Bell was not wearing his suit to court, counsel explained that the suit had been "messed up" in the previous day's scuffle. (XVI RT 3103.) Defense counsel objected to having the jury see

Bell in his jail clothes. (XVI RT 3104.) The court commented that, if his suit was "messed up," it was Bell's own fault. (XVI RT 3105.) The court expressed its disinclination to continue the case just because Bell needed a different suit. (XVI RT 3105.)

Defense counsel advised that he had an "ethical duty" not to proceed if he felt that Bell was incapable of assisting in his own defense, or not aware of what was going on. (XVI RT 305.) Following a recess, Mr. Faulkner advised the court that Bell did not want to be present in court and was willing to miss the testimony that day. Counsel added that he did not think Bell's presence was necessary for him to effectively present the day's testimony. (XVI RT 3106.) Mr. Faulkner explained further that Bell's "physical condition is such that he's going to be in pain, probably making some noise from having pain, moving around," which would distract counsel and disrupt the courtroom. Counsel suggested that the court could excuse Bell for that reason. (XVI RT 3107.)

Acknowledging the source was hearsay, the trial court stated that the bailiff had checked with the nurse in the jail who had checked on Bell the evening before and in the morning and found him to be fine. (XVI RT 3107.) Defense counsel opined, based on his observation of the incident in the courtroom the prior evening, that Bell's report of his own condition was credible. Defense counsel further stated that, although Bell had promised he would not be intentionally disruptive, he was going to have problems that would "distract and disrupt the proceedings." (XVI RT 3107.) Counsel again suggested this furnished an adequate basis upon which to proceed in Bell's absence, which counsel wanted to do for tactical reasons. (XVI RT 3107-3108.)

The deputy district attorney voiced the opinion that it would be error to proceed in Bell's absence, albeit possibly not reversible error under the harmless error standard applicable pursuant to the *Watson* decision. (XVI

RT 3108; *People v. Watson, supra,* 46 Cal.2d 818.) The trial court responded, "I'm not inclined to commit error with the idea that maybe I won't get reversed." (XVI RT 3108.) The court observed that Bell was present and hadn't "disrupted anything." (XVI RT 3108.)

The Court sought clarification of what counsel was saying.

> Clearly, from yesterday, I think I could have excluded him. But now he's here today and saying he's in too much pain and just can't comply with the proceedings – are you saying that things might get disrupted again today, Mr. Faulkner?

(XVI RT 3109.) Mr. Faulkner responded, "I am." (XVI RT 3109.)

When the prosecutor mentioned the problem of Bell's lack of a suit, defense counsel stated, and Bell verbally agreed, that Bell did not want to be present, dressed in street clothing or otherwise. (XVI RT 3109.) Then the court stated.

> THE COURT: ...
>
> On that basis do you think – there's certainly grounds to, seems to me, grounds to exclude the Defendant. First of all, he voluntarily wants to be gone, which by itself wouldn't be appropriate. But he disrupted things once during the guilt phase, which wasn't that significant, but yesterday seriously disrupted the proceedings. And that's all on the record.
>
> He's chosen not to appear today in his street clothes.
>
> And Mr. Faulkner has now indicated if I don't excuse him from these proceedings there's a very strong possibility there will be further disruptions of these court proceedings by Mr. Bell.
>
> Seems to me that based on those factors, all those factors together, there's a basis to grant his wish to exclude him from the courtroom. And even if he didn't wish it, to exclude him from the courtroom based on the fact he might disrupt proceedings.

(XVI RT 3109-3110.)

The district attorney voiced the opinion that this was reasonable. Then the trial court addressed Bell:

THE COURT:...

Is that what you want to do today? You don't want to be present for these proceedings?

THE DEFENDANT: I'm in a lot of pain, Your Honor.

THE COURT: Okay. I don't want you to – if you're in a lot of pain and that's the reason you don't want to be here, I don't want to exclude you for that reason. I want to put the matter over so you felt better on Monday. Because I think this is your case, and I don't really like to proceed without you being here and not knowing what's going on.

Mr. Faulker has indicated – yesterday –

THE DEFENDANT: If you could do that, put it off to Monday, that would be fine with me.

THE COURT: That would be better for you?

THE DEFENDANT: Yes.

THE COURT: Now, Mr. Faulkner, I know, has his witnesses here and from out of town and wants to proceed with those witnesses.

Mr. Faulkner, I mean, I can't continue if Mr. Bell really wants to be here and the only reason he doesn't want to be here is that he's in a lot of pain. This is a capital case.

MR. FAULKNER: I think you're right. At this point I think the questions that the Court asked have made that clear.

THE COURT: Okay. So can your people be back here Monday?

MR. FAULKNER: I don't know.

MS. RILEY [the witness]: I have patients scheduled at the hospital on Monday.

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THE COURT: You're a psychologist?

MS. RILEY: Neuropsychologist. I could be hear [sic] Tuesday, but Monday would be very difficult especially with this late notice.

THE COURT: How long is her – yeah, I can't really delay things until Tuesday. How long is her testimony going to take, Mr. Faulkner?

MR. FAULKNER: An hour to an hour and a half.

THE COURT: There's some way Mr. Bell could be here for that testimony? I doubt if the People would be that long cross-examining her.

MR. FAULKNER: In the shape that he's in? No. I think that – I think it's pretty clear that he's not able to participate and now we want to keep him around?

THE COURT: Okay. Then your witness will have to be back Monday. Because I will not delay things. And – I mean, you got another case coming up after this one. Right?

MR. FAULKNER: I'm not going to be ready to proceed with that witness on Monday. You're putting me in a position that I can't be put in that's untenable if she has patients at Stanford that she has to attend to.

THE COURT: I'll order her to be here. How's that.

...Those aren't life or death situations with regard to your patients.

MS. RILEY: No, they're not like that. If I'm ordered to be here, I'll be here.

THE COURT: Okay.

I don't like to do that but we told the jurors we would be done by the 16th. We thought we'd be well ahead of schedule, but now we're just kind of coming in there.

MR. FAULKNER: Your Honor, for the record, I mean, Mr. Bell indicated that he would like to have it put over until Monday, but, I mean, is that the standard, just because he wants it put over because he doesn't feel good?

If the Court makes a finding – I think the Court did make a finding.

THE COURT: I was prepared to until I asked him that question. If you think there is going to be disruption if I –

MR. FAULKNER: That's what I stated, I thought.

THE COURT: But then I asked Mr. Bell if he agreed to that then he said that he would rather have it be put over until Monday.

***

MR. FAULKNER: Mr. Bell has indicated to me that he feels he's upset and that he would probably make noise because of his pain. I think that would be disruptive to the proceedings.

THE COURT: You think it will be disruptive for you too as his attorney?

MR. FAULKNER: Absolutely.

THE COURT: All right. I'll make a finding, then, Mr. Faulkner has had a further opportunity to consult with his client.

And Mr. Bell, you don't object if we proceed without you today with regard to this witness from Palo Alto?

THE DEFENDANT: No.

THE COURT: Okay. And Mr. Faulkner has indicated that he feels that there may be further disruptions if the defendant was present. And I assume that would also be true on Monday, right, Mr. Faulkner, that possibility?

MR. FAULKNER: I think we have to revisit that issue on Monday.

THE COURT: But looking at it from today's perspective.

MR. FAULKNER: I think you're right. It's certainly a strong possibility. And just for the record there is going to be more than one witness today.

THE COURT: Right. I understand that.

You understand that, Mr. Bell, these two psychologists testifying?

THE DEFENDANT: Yes.

THE COURT: And you're willing to – even though I'm going to make a finding you are willing to absent yourself from being here for those two witnesses, correct?

THE DEFENDANT: Yes.

THE COURT: Okay. And I think that based on all the circumstances there's a strong possibility that proceedings could be disrupted. Mr. Faulkner is worried about that and, in addition, wants to proceed with his witnesses today.

The neuropsychologist has scheduling problems with her patients on Monday, was expected to testify yesterday, I think, and had to come back again today. And certainly from the Court's stand point I want to proceed and don't want matters disrupted.

And from your standpoint, Mr. Faulkner, you don't want a repeat of yesterday's incident, although the Defendant is restrained and has a stun belt on today, things could be disrupted verbally or otherwise.

MR. FAULKNER: Correct.

THE COURT: So based on all of the things that have been presented to me and looking at all those factors, I'm going to exercise my discretion and have the Defendant removed from the courtroom. It's also his wish to do that. So we can proceed with these witnesses....

(XVI RT 3110-3115.)

Bell was thereupon removed from the courtroom. (XVI RT 3116.)

**The Note From The Jury And The Denial Of A Defense Motion For Mistrial**

After Bell's removal, the court announced that a note had been received from jurors, which stated:

> To whom it may concern: We the jury are concerned with walking past the Defendant while he is not restrained. Yesterday's event could have caused injury to some jurors that were rushed into the jury room during the incident.

(XVI RT 3116: see ACT 1340.) The court indicated that the jurors had not been in the courtroom when the incident occurred, but acknowledged that jurors "might have heard the incident." (XVI RT 3116.) The court also mentioned there had been a factually inaccurate article in the newspaper about the incident that morning. (XVI RT 3116.) The court further noted that jurors would know about the incident since the People were "going to call somebody as a witness to recount what happened." (XVI RT 3117.)

Defense counsel suggested talking to the jurors as a group. (XVI 3117.) The jury returned to the courtroom, and the court inquired of the foreperson whether jurors had heard the incident. The jury foreperson stated, yes. (XVI RT 3117.) The judge reminded jurors about their promise not to read any newspapers, or to watch any media reports, and confirmed that the jurors' note was based on what the jury heard from the jury room, not media reports. The foreperson acknowledged that this was correct. (XVI RT 3118.)

The court briefly explained to jurors that they had been sent out of the courtroom because the witness was crying and the bailiff thought that they were going to take a break; at that point the incident in the courtroom occurred. The court admonished jurors not to speculate about what happened, and informed them, "the People will be calling a witness in the

case now to describe the incident to you...." (XVI RT 3118.) The court stated:

> I want to make sure that because of what happened yesterday no one is feeling biased or prejudiced in the case at this point in time and feels they could not make a fair decision based on the evidence. So if anyone is having those thoughts, you should either express that to me in a note or you can raise your hand now and we'll talk to you individually.

(XVI RT 3118-3119.)

Juror 5 then addressed the court, stating that the disruption in the courtroom had occurred before jurors were inside the jury room. "So there was shoving and pushes to get the rest of the jurors in. And it was basically the women were still behind us.... And they were scuffling to try and get in the room." (XVI RT 3119.)

At this point the court admonished:

> Well, I understand that now. As you can see today, the Defendant is not present. Again, from that, the fact the Defendant is not present, you can't use that fact to consider the case. All right? So don't use the fact that he's not present today to consider the case.
>
> But I don't think – it's not going to be a problem for you today. Okay, if he's back here on Monday, we'll work it out logistically so there won't be a problem with you – take care any fears you might have.
>
> Does that solve the problem you think?

(XVI RT 3119-3120.) Jurors nodded their assent. (XVI RT 3120.)

Defense counsel queried whether jurors had discussed the incident in the jury room. (XVI RT 3120.) The court asked Juror 11, the jury foreperson, and Juror 5, for a response. The foreperson responded affirmatively, that there had been discussion about "trying to get everybody in hearing the scuffle and shutting the door and locking it and then hearing a lot of noise." (XVI RT 3120.) The court volunteered that, when he went

to excuse the jurors for the day, they had demanded his identification before unlocking the jury room door. (XVI RT 3120.) The court asked of Juror 5 and Juror 11, "But you didn't discuss the facts of the case though?" (XVI RT 3120.) After both jurors responded, "no," the court admonished jurors to "write a note or something" if "something is bothering them." (XVI RT 3120.)

On advice of his co-counsel, Ms. Kelly, Mr. Faulkner then made a motion for mistrial at the sidebar. (XVI RT 3121-3123.) Ms. Kelly argued, in effect, that jurors should not have been discussing any aspect of the case, including Bell's personality, prior to deliberations. (XVI RT 3121.) The court suggested that defense counsel "talk to [jurors] when the case is over." (XVI RT 3121.) When defense counsel pointed out that the jury's note indicated they were afraid of Bell, the court responded: "He brought that on himself." (XVI RT 3121.)

The court suggested that the defense could "design a special jury instruction to deal with this issue," telling jurors not to consider the incident. (XVI RT 3121-3122.) As anticipated, however, the prosecutor introduced testimony about the courtroom incident and argued that that the jury should consider it an aggravating circumstance supporting the death penalty. (IV CT 1023-1023; XV RT 3087; XVII RT 3449-3475; XVIII 3745-3746.)

After further discussion at the sidebar, the court questioned Juror 11. In response to the court's questions, Juror 11 disclosed that unnamed jurors who had been "shoved into the room" so the door could be closed were "shaken about that." (XVI RT 3123.) The jurors heard "screaming and yelling," and discussed safety measures in the event another incident were to happen while they were walking to and from the courtroom. (XVI RT 3133.) Bell's request for a mistrial was again denied. (XVI RT 3123.)

**Testimony and Additional Proceedings In Bell's Absence**

Dr. Nell Riley, the neuropsychologist testified as a defense witness in Bell's absence. (XVI RT 3124-3207.) Dr. Riley's testimony was followed by the testimony of defense witnesses Scheron Bell (XVI RT 3208-3214), and Leatha O'Halloran (XVI RT 3214-3221). At one point the lunch recess, the court reminded jurors that Bell was absent and that they should not speculate, draw conclusions or consider this circumstance in any way. (XVI RT 3156.)

After the testimony, a discussion of jury instructions and several evidentiary issues continued in Bell's absence. (XVI RT 3224-3243) Afterward, court was recessed.

**Discussion Outside The Jury's Presence Regarding The Reasons For Bell's Absence**

Bell was present in the courtroom when proceedings resumed the following Monday. (XVI RT 3245.) The trial court stated for the record that Bell had been absent on the previous Friday because Mr. Faulkner had indicated there was a strong possibility Bell would engage in disruptive behavior because he did not want to be present. The court noted that Bell had been extremely disruptive on Thursday, and they did not want that to happen again. (XVI RT 3288.) Mr. Faulkner corrected the court, explaining that the disruption he had been concerned about "could have resulted from [Bell's] physical pain, which would have been disruptive to the jury and defense counsel." (XVI RT 3288.)

A discussion ensued, during which the court expressed concern that the record not reflect that Bell had been excluded only because he was pain.

> THE COURT: I didn't get that from what you said on Friday, that his disruptive behavior would only be because of the pain. My indication – because if you will recall at that

point, I indicated that I was prepared to put the case over till Monday to see if he felt better.

You didn't want to put the case over because you had your witnesses here and then you talked to Mr. Bell again and my indication from you was that – at least this is my interpretation of what you were saying is that, while he might be disruptive because of his pain, he might also be disruptive because I wasn't going to let him go back to his jail cell.

I don't want anything on the record here to indicate that we excluded him from the trial against his will or just because he was in some pain after that incident on Thursday. I mean, if that's the case, you can call your witnesses back here and we will put them back on again but – which you didn't want to do.

That was one of the things that I was considering when you made the request that he go back to his jail cell, that it was your portion of the case and he wouldn't be having to – wouldn't be here – he would not be here and not able to confront the witnesses against him who are the witnesses presented by the People.

I just wanted to make sure we're all on the same page here, that there won't be any basis later to claim that he wasn't present for that portion of the trial and, therefore, the case ought to be reversed for that purpose.

MR. FAULKNER: Your honor, I think it's clear from the record that was taken on Friday that Mr. Bell did not want to be here, that I think the disruption – yes, I probably indicated that the disruption could have come from two sources. I am not now trying to back pedal on what I said on Friday.

THE COURT: Good. I wanted to make sure of that.

MR. FAULKNER: Whatever I said on Friday is what happened. My recollection of what happened on Friday is not as good this morning as when I said it.

(XVI RT 3288-3290.)

The Clerk's Minutes for Friday, April 9, 1999, include the following entry:

Mr. Faulkner makes the request of the Court that the Defendant be excused from the courtroom as he has not dressed for Court and may not be able to help himself from

> being disruptive during the proceedings because of the pain he is suffering. After much discussion, the Court finds good cause to exclude the Defendant from the proceedings and he is taken back to the jail.

(IV CT 1021.)

**Security In The Courtroom And The Decision To Use Restraints**

During the guilt phase of the trial, Bell was not required to wear restraints. (XV RT 3077.) Unbeknownst to the court, after the guilt phase verdict, but before the commotion in the courtroom, security had been "beefed up" to include four deputies. (XV RT 3084.)

Following the disturbance on April 8, 1999,the trial court announced that Sergeant Sweatman, the sergeant in charge of the bailiffs, was present and was concerned about preventing another incident. (XV RT 3077.) The court opined that the disruption in his courtroom was "the most serious...in ...17 years." (XV 3077.) Noting that Bell was "very strong," the court indicated that the bailiffs wanted restraints. (XV RT 3078.) The judge stated that there were "ample grounds" for restraints based on what he had seen earlier that day, and voiced some concern for the safety of court personnel and counsel. (XV RT 3078.) The court stated:

> In this portion of the case, you hate to do anything too visible. But when the defendant provokes it, I mean, I have got to follow the advice of, you know, the people in charge of security.

(XV RT 3079.)

Sergeant Sweatman offered three options to the court: to "totally chain" Bell; to arm a deputy with a Taser;[35] or to put Bell in a REACT belt, a type of stun belt. (XV RT 3079.) The sergeant explained that the two deputies who were qualified to operate the stun belt were on vacation, and

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[35] A Taser, as described by Deputy Schmidt, shoots projectiles that send an electrical charge. (XV RT 3082-3083.)

therefore its use would depend upon their availability to come to court. (XV RT 3079.)

The court's bailiff, Deputy Schmidt, advocated using full chains and a Taser. (XV RT 3079-3080.)

The judge reiterated that he was "not a security person" and would do "whatever the bailiffs feel is appropriate." (XV RT 3081.) The court opined that Bell had been "stoic the whole time," and "when his mother broke down crying at the end of her testimony, that must have done something for him." (XV RT 3080.) Defense counsel agreed that the "outburst was precipitated to a very great extent by his mother's emotional outburst," and opined, "that's not going to happen again." (XV RT 3080.) Counsel stated that he would not "object to some kind of restraint," but objected to full chains, because they could not be made "entirely invisible." (XV RT 308-3081.) Deputy Schmidt indicated that they could get full chains on Bell without the chains being seen by the jury. (XV RT 3081.) Responding to defense counsel's concern that chains would be seen, the court commented, "They know he's in custody anyway. Let's face it." (XV RT 3081-3082.)

Sergeant Sweatman suggested the possibility of "cuffing" Bell to the chair with a deputy with a Taser at his back. (XV RT 3083.) Defense counsel inquired whether the Taser would be visible, and Sergeant Sweatman responded that it would be kept concealed unless a deputy had to raise the Taser to shoot it. (XV RT 3083.) The court stated that, if the bailiffs wanted full chains, that is what the court intended to order. (XV RT 3083-3084.) Sergeant Sweatman and Deputy Schmidt expressed a preference for the stun belt and handcuffs, and both assured counsel and the court that the stun belt would not be visible. (XV RT 3085.)

After a short discussion about jury instructions, the court noted that they still had to make a final decision about the restraint situation. (XV RT

3097.) Defense counsel stated: "I think it depends on what's available. I think we are going to try to get the belt." (XV RT 3097.) The court indicated they would try to get the belt, but because they only had "a couple of people trained on it," the court was not going to order that the stun belt be used. (XV RT 3097.)

The following day, Bell was brought into court outside the presence of the jury. He was chained to a wheelchair and wearing a stun belt "at the recommendation of the sheriff's department and the bailiffs." (XVI RT 3104.) Because Bell was excused for the duration of the proceedings that day, jurors had no opportunity on this occasion to see Bell chained and wearing the stun belt. (XVI RT 3116, 3117.)

After the jurors returned to the courtroom, responding to the jurors' note expressing concern about jurors' safety if Bell were not restrained (XVI RT 3117), the trial court gave assurances that, if Bell was in court the following Monday, "we'll work it out logistically so there won't be a problem with you – take care of any fears you might have." (XVI RT 3119-3120.)

The following Monday, Bell was in court wearing a stun belt and chains. (XVI RT 3290-3291.) The court stated for the record that the incident in the courtroom the previous Thursday was the reason for the restraints.[36] (XVI RT 3290.) The court, referring to the restraints,

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[36] The court described the incident in dramatic, but not entirely accurate terms. "[W]e had nine bailiffs take him to subdue him. He threw up the counsel table. And by the time nine people finally got him under control, he was in the spectator section. Luckily, the spectators fled the courtroom." (XVI RT 3290.) In fact, the judge left the courtroom when the fracas began, fearing Bell might get lose and come after him. (XV RT 3074.) According to the testimony of Deputies Bentley and Ridenhour, when Bell began pounding the counsel table with his fists, bailiffs grabbed his arms to subdue him. They were concerned he might tip over the counsel table. Bell was standing hunched over the counsel table. Bell resisted deputies, stood

commented, "you can't really see it." (XVI RT 3291.) Later, however, the court commented that the restraints were noticeable. The court asked counsel if he wanted anything said to the jury about "their safety" or the restraints on Bell. (XVI RT 3293-3294.) This colloquy ensued.

> THE COURT: I can see a handcuff on him.
> MR. FAULKNER: I can see the handcuffs.
> THE COURT:I can see a belt on him. It's not a cummerbund.
> MR. FAULKNER: They probably don't know that.
> THE COURT: It's pretty innocuous, but the change is in there, Mr. Faulkner.
> MR. FAULKNER: I understand that. If there is some way we could keep them from seeing that, but I don't see how.
> THE COURT: He is going to be here for a while, moving around. If you don't want me to say anything, that's fine.
> There is legal authority to give that kind of an instruction, but there is also authority that you don't want it brought to the jurors' attention.
> MR. FAULKNER: I don't think I want to draw their attention to it right now. If I think it's a problem, I will ask for it.
> THE COURT: The only thing I thought of in regards to the note they wrote, they were concerned about their personal safety.
> ...
> THE COURT: That may be why you want to say something to them.
> MR. FAULKNER: Me?
> THE COURT: I am not going to share with them that – of their personal safety without telling them the defendant's restrained.
> Because I am the person that on Thursday morning said I don't think there is going to be any problems because

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up and a struggle began. It took up to nine deputies to finally restrain Bell and get him in leg irons and handcuffs. Deputies obtained control by forcing Bell's body over the railing so that half of his body was on the spectator side. (XVII RT 3452-3473.)

we're in the middle of your case and there wouldn't be any incident. And then Mr. Bell did what he did.

MR. FAULKNER: We haven't heard anything from the jurors regarding – to follow up on that, have we?

THE COURT: Do you just want to leave it alone? That's fine. Start fresh.

MR. FAULKNER: They were admonished on Friday about why he wasn't there.

Is that –

MS. FLADAGER: They were told not to speculate.

THE COURT: They were told not to consider it.

MR. FAULKNER: I think we will leave it at this point. If they raise the issue, which they might, then we can address it.

(XVI RT 3293-3295.)

## XIII

## THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT WILFULLY VIOLATED BELL'S STATUTORY, AND STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE PERSONALLY PRESENT AT ALL CRITICAL PHASES OF THE PROCEEDINGS IN A PROSECUTION FOR A CAPITAL OFFENSE.

### A. Bell's Right To Be Personally Present Is Guaranteed By State Statute And The Due Process, And The Confrontation Clauses Of The State And Federal Constitutions.

> A criminal defendant, broadly stated, has a right to be personally present at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment itself; section 15 of article I of the California Constitution; and sections 977 and 1043 of the Penal Code.

(*People v. Waidla*, *supra*, 22 Cal.4th at p. 741.)l

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." (*Lewis v. United States* (1892) 146 U.S. 370, 372 [36 L.Ed. 1011, 13 S.Ct. 136].) The defendant's right to be present at every stage of trial "is scarcely less important to the accused than the right of trial itself." (*Diaz v. United States* (1912) 223 U.S. 442, 455 [32 S.Ct. 250; 56 L. Ed. 500].) The United States Supreme Court recognizes that "the right to personal presence at all critical stages of the trial" is a fundamental federal constitutional right. (*Rushen v. Spain* (1983) 464 U.S. 114, 118 [78 L.Ed.2d 267, 104 S.Ct. 453].)

One of the most basic rights guaranteed by the Sixth Amendment's Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. (*Illinois v. Allen* (1970) 397 U.S. 337, 338 [25

L.Ed.2d 353, 90 S.Ct. 1057]; *People v. Rundle, supra,* 43 Cal.4th at p.134.) Under the Sixth Amendment's confrontation clause, a criminal defendant has a right to be personally present at a particular proceeding if his appearance is necessary to prevent interference with the opportunity for effective cross-examination. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745 [96 L.Ed.2d 631, 107 S.Ct. 2658]; *People v. Waidla, supra*, 22 Cal.4th at p. 741.)

Even when witnesses are not testifying, the Fourteenth Amendment's due process clause independently guarantees a criminal defendant the right to be personally present at any proceeding which is critical to the outcome, or where personal presence would contribute to the fairness of the proceeding. (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745; *People v. Waidla, supra*, 22 Cal.4th at p. 742.) The presence of a defendant is a condition of due process if a fair and just hearing would be thwarted in his absence. (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 107-108 [54 S.Ct. 330; 78 L. Ed. 674]; see also *Campbell v. Rice* (9th Cir. 2002) 303 F.3d 892.)

California's Constitution also contains provisions, which independently guarantee due process and the right of confrontation in state criminal proceedings. (Cal. Const., Art. I, §§ 7, 15.) "Our state Constitution guarantees that 'the defendant in a criminal cause has the right…to be personally present with counsel, and to be confronted with the witnesses against the defendant.'" (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202; quoting Cal. Const., Art. I, § 15.) "A defendant's right to presence is 'fundamental to our system of justice and guaranteed by our Constitution.'" (*People v. Gutierrez, supra*, at p. 1209; quoting *People v. Lewis* (1983) 144 Cal.App.3d 267, 279.)

Sections 977 and 1043 implement the foregoing state and federal constitutional protections. (*People v. Gutierrez, supra*, 29 Cal.4th at p.

1202.) Section 977 provides that in all cases in which a felony [other than a capital felony] is charged, the accused "shall" be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of imposition of sentence, unless the accused, with leave of the court, executes in open court a written waiver of the right to be personally present. This Court has held that, as a matter of both federal and state constitutional law, a capital defendant "may waive his right to be present even at critical stages of a trial." (*People v. Edwards, supra,* 54 Cal.3d at p. 810; accord: *People v. Rundle, supra,* 43 Cal.4th at pp.134-137; *People v. Jackson* (1996) 13 Cal.4th 1164, 1210.) However, as a state statutory matter, a capital defendant may *not* voluntarily waive his right to be present during the proceedings enumerated in section 977. (*People v. Jackson, supra, at p.*1211; § 1043, subd. (a)(2).)

Section 1043 requires that a defendant in a felony case be present at a trial. Only two exceptions are provided: (1) any defendant, even a capital defendant, may be removed from the courtroom for disruptive, disorderly or disrespectful behavior; and (2) a defendant in a prosecution for an offense, which *is not punishable by death* may be voluntarily absent. (*People v. Jackson, supra,* 13 Cal.4th at p. 1210.) However, section 1043 severely circumscribes exclusion of all felony defendants, capital or not, based on disruptive courtroom behavior. A defendant may be excluded for disruptive behavior only "after he has been warned by the judge that he will be removed if he continues his disruptive behavior [and] nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom." (§ 1043, subd. (b)(1).) A defendant may "reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts

and judicial proceedings." (§ 1043, subd. (c); see *Badger v. Cardwell* (9th Cir. 1978) 587 F.2d 968.)

### B. Bell Did Not Voluntarily Waive His Right To Be Personally Present; Nor Was He Excluded From The Proceedings For Disruptive, Disorderly, Or Disrespectful Behavior.

Bell was initially removed from the courtroom for a sudden emotional outburst that was apparently provoked when Bell's mother broke down on the witness stand while testifying. Disruptive courtroom behavior was, accordingly, the original justification for removing Bell from the courtroom. After the disturbance was quelled, however, proceedings continued in Bell's absence without any effort on the court's part to determine Bell's current status, and his willingness or ability to remain in the courtroom without further disruption. Penalty phase instructions and the potential admissibility of evidence about the incident in the courtroom as aggravating evidence were both discussed in Bell's absence. No attempt was made to obtain a waiver of Bell's right to be present during either the instructional conference or discussion of the admissibility of potentially aggravating evidence. Manifestly, there was no compliance with section 1043 on the date of the incident. Bell was given no opportunity to reclaim his right to be present once deputies subdued him and the initial disturbance had passed. (§ 1043, subd. (c).)

On the day *after* the outburst, proceedings, including the taking of testimony, were held in Bell's absence, but not because he insisted "on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial [could] not be carried on with him in the courtroom." (§ 1043, subd. (b)(1).) Bell told Mr. Faulkner that he would *not* be intentionally disruptive, and this information was related to the

court. (XVI RT 3107.) Rather, defense counsel felt that Bell was *suffering from so much pain* he would be moving around and making enough noise that it would likely distract counsel and disrupt the court. (XVI RT 3107.) The court clearly understood that this was the situation, too. The court stated on the record that Bell *was present and had not disrupted the proceedings*; the court further reiterated, and obtained confirmation from defense counsel that Bell was "in too much pain and just can't comply with the proceedings...." (XVI RT 3108, 3109.) The district attorney recognized, and warned the court and defense counsel, that it would be error to proceed in Bell's absence under the circumstances. (XVI RT 3108.)

Bell eventually agreed to be excused from Friday's proceedings. However, it does not necessarily follow that he *voluntarily* waived his right to be personally present. First and foremost, a capital defendant may not voluntarily waive his right to be present during the proceedings listed in section 977, including those portions of the trial in which evidence is taken. (*People v. Jackson, supra,* 13 Cal.4th 1164 at p. 1211.)

Secondly, "[v]oluntary choice presupposes meaningful alternatives. Put another way, a voluntary waiver of the right to be present requires true freedom of choice." (*State v. Garcia-Contreras* (Ariz. 1998) 953 P.2d 536, 539.) Because Bell and his attorney were without meaningful alternatives, the "choice" to be absent for Friday's proceedings was involuntary. Bell's agreement to have proceedings continue during his absence was the product of duress produced by the following circumstances.

Bell was in too much pain to sit attentively in court. (XVI RT 3102-3104.) The sincerity of Bell's pain complaint went unchallenged, even if the record does not clearly establish that the pain-causing injuries were inflicted in the previous day's scuffle. (Cf. *People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1043 [defendant's self-inflicted injury were "apparently caused in order to feign incompetence and obstruct the

proceedings"].) Bell was in a wheelchair. Regardless of the source of Bell's crippling pain, it was defense counsel's genuine belief that Bell was incapable of meaningfully assisting in his defense that day. (XVI RT 3104-3105.)

Secondarily, additional coercive pressure was brought to bear because an important defense witness, Dr. Riley, had made it clear she had a conflict which would make it difficult for her to appear the following Monday. (XVI 3110-3112.) The witness indicated that she could, however, return and testify the following *Tuesday*. (XVI RT 3112.) But the judge refused to delay the proceedings until Tuesday because he had promised jurors the trial would be done by April 16th, and he was afraid the delay until Tuesday would put the trial behind schedule. (XVI RT 3113.)

This created an ethical conundrum for defense counsel. (XVI RT 3112.) Mr. Faulkner did not wish to force his client to endure the pain of sitting through the proceedings while chained to his wheelchair with a stun belt and chains, incapable of paying attention to the proceedings. On the other hand, counsel did not wish to force a key defense witness – Dr. Riley – to attend court on Monday under the compulsion of a court order. Obviously, it would *not* have been a viable option to forego using Dr. Riley as a witness. Her testimony was central to the penalty phase defense.

Compelled by the court to choose between the conflicting interests of his client and a crucial defense witness, defense counsel waffled, but did not clearly waive Bell's presence. At one point, counsel queried whether the potential risk of disruption caused by Bell's pain might suffice as lawful justification to take witness testimony in Bell's absence. (XVI RT 3107.) Somewhat inconsistently, counsel agreed when the court suggested that it would be improper to proceed in Bell's absence if the "only reason he doesn't want to be here is he's in a lot of pain." (XVI RT 3111.)

In the end, the court's decision to exclude Bell from Friday's proceedings was made on a pretext: (1) Mr. Faulkner was worried about a "strong possibility" that proceedings might be disrupted if Bell were present; (2) the defense neuropsychologist had scheduling problems with patients; and (3) it was Bell's "wish" to be excluded. (XVI RT 3110-3115.) Bell was not excluded because – in the words of the statute – he had insisted "on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court" that the trial could not be carried on. (*Ibid.*; see *Badger v. Cardwell, supra*, 587 F.2d 968 [*pro se* defendant was not "disruptive" for purposes of expulsion from proceedings where his examination of witnesses was inartful, inept, argumentative irrelevant, and repetitious, and where the defendant seemed incapable of letting others finish speaking].) Moreover, counsel's worry about Bell's distracting noise-making due to pain *and* Dr. Riley's need to see patients on Monday could easily have been addressed by a very brief delay in what was otherwise a typically long death penalty case trial.

Most importantly, the record shows that it was *not* Bell's "wish" to be absent from the trial. It was Bell's "wish" to postpone the presentation of the defense until the following Monday. (XVI RT 3111; cf. *People v. Rundle, supra*, 43 Cal.4th at pp. 135-136 [in which the defendant *wanted* to be absent during his mother's guilt phase testimony.].) Presentation of the defense case constitutes a stage of a criminal trial that is "critical for a defendant." (*United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 998.) Waiting until Monday and Tuesday to present defense witness testimony would have been minimally disruptive to the proceedings. Yet this brief delay would have effectuated Bell's right to be personally present during proceedings with a reasonably substantial relationship "'to the fullness of his opportunity to defend against the charge.'" (*Kentucky v. Stincer, supra*,

482 U.S. at p. 745, quoting *Snyder v. Massachusetts, supra*, 291 U.S. at pp. 105-108.)

Additionally, a brief delay would have insured that Bell was not denied the right to assist counsel in his own defense.

> The right to be present is distinct from the right to be represented by counsel. The right to be present would be hollow indeed if it was dependent upon the lack of representation by counsel.... [S]uch a rule would ignore the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.

(*United States v. Novaton, supra*, at p. 1000.)

> ...[d]efense may be made easier if the accused is permitted to be present,...for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.

(*Snyder v. Massachusetts, supra*, 291 U.S. at p. 106.)

Consistently, the United States Supreme Court has held that an order preventing a criminal defendant from just *consulting* his attorney during a 17-hour overnight recess between the defendant's direct and cross-examination deprived the defendant of his right to the assistance of counsel in violation of the Sixth Amendment. (*Geders v. United States* (1976) 425 U.S. 80 [47 L.Ed.2d 592, 96 S.Ct. 1330]; see also *People v. Zammora* (1944) 66 Cal.App.2d 166.) Here, Bell was not only absent; he was also effectively denied an opportunity provide input to counsel during the presentation of portions of his own defense. (See, e.g., *Blackwell v. Brewer* (8th Cir. 1977) 562 F.2d 596, 600 ["Blackwell's exclusion from the courtroom at that time prevented him from consulting with his attorney, particularly with respect to whether any of the jurors had obtained an impression that Blackwell himself had precipitated the altercation."].)

A third, equally significant coercive factor was present, negating the voluntariness of Bell's consent. Bell's suit had been rumpled or damaged in

Thursday's scuffle, so he was wearing jail garb in the courtroom. (XVI RT 3103.) Counsel objected to the jury seeing Bell in jail attire and averred that he would have to obtain some new court clothing before Monday. (XVI RT 3104.) The trial court indicated that the case would not be continued to allow Bell to get a different suit because, in the court's opinion, the need for replacement attire was Bell's own fault. (XVI RT 3105.)

The United States Supreme Court long ago recognized that an accused "should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption [of innocence] so basic to the adversary system." (*Estelle v. Williams* (1976) 425 U.S. 501, 504 [48 L.Ed.2d 126, 96 S.Ct. 1691].) A state cannot, consistent with the Fourteenth Amendment, compel an unwilling defendant to stand trial before a jury while dressed in identifiable prison clothes. (*Estelle* at p. 512.) A due process violation does not occur where a defendant, for tactical reasons, does not object to being tried in jail clothes (*id.* at p. 508); but here there *was* a clear objection on Bell's behalf by counsel. (XVI RT 3104.)

Respondent will no doubt argue that Bell engaged in volitional misconduct that effectively waived his right to be personally present during penalty phase proceedings. This argument should be rejected. In *People v. Lewis and Oliver, supra,* 39 Cal.4th at p.1043, one defendant, Lewis, made an ineffectual attempt to slash his wrists during penalty phase deliberations. The defendant's own attorney, as well as the trial court, opined that Lewis was feigning incompetence for purposes of disrupting the trial. Lewis still was on suicide watch when the jury reached its verdict, so, with defense counsel's consent, the court took the verdict in Lewis' absence. On appeal, this Court found that Lewis' self-inflicted injuries constituted volitional conduct, which effectively waived his right to be personally present when the verdict was read. (*Id.* at pp. 1042-1043.)

Bell did not volitionally absent himself from the proceedings for an indefinite period, as did the defendant in *People v. Lewis and Oliver*. (*Id.* at p. 1043.) Rather, distraught by the sight of his mother crying, Bell began pounding on the counsel table. (XVII RT 3452.) When Bell began to stand, and it appeared he might tip over the table, bailiffs jumped to restrain him and a scuffle ensued. (XVII RT 3453-3457.) Bell was injured during the scuffle, and in too much pain the next day to meaningfully participate in his defense. (XVI RT 3102-3115.) Additionally, Bell's suit was damaged in the melee and neither he nor his attorney wanted him to appear before the jury until a replacement could be obtained. (XVI RT 3103-3105.)

The so-called choice to allow proceedings to continue in Bell's absence was not volitional. Bell could have remained in the courtroom; however, doing so would have resulted in relinquishment of his constitutional right not to appear before the jury dressed in identifiable jail garb – a right guaranteed by the Fourteenth Amendment's Due Process Clause. Moreover, Bell was not threatening to be disruptive. Rather, he was in pain, chained to a wheelchair, and his presence in the courtroom ran the risk of distracting defense counsel, which would have resulted in possible interference with the right to effective counsel during the penalty phase of the trial.

Consequently, in the face of the court's refusal to delay the matter, Bell elected the second of two equally unacceptable options: to be excluded from a portion of the proceedings, including presentation of defense witness testimony. In effect, Bell was forced to surrender the right to be personally present with counsel at a critical stage of his death penalty trial, i.e., the taking of penalty phase defense evidence, in order to secure the right not to impair both the effectiveness of counsel and the presumption of innocence. (*Estelle v. Williams, supra.*) It is "intolerable that one constitutional right should have to be surrendered in order to assert

another." (*Simmons v. United States* (1968) 390 U.S. 377, 394 [19 L.Ed.2d 1247, 88 S.Ct. 967].) Accordingly, Bell did not voluntarily relinquish his right to be personally present during the penalty phase trial.

### C. The Trial Court Erred And Abused Its Discretion, And Violated Bell's Due Process Right To Be Present, By Denying A Continuance Sufficient To Permit Dr. Riley To Testify On Tuesday In Bell's Presence.

California has codified the standards governing continuances in section 1050. Generally, the statute imposes a duty on the courts, the prosecution, and the defense, to expedite criminal proceedings to the "greatest degree that is consistent with the ends of justice." (§ 1050, subd. (a).) Continuances are permitted "only upon a showing of good cause." (§ 1050, subd. e).) A continuance in a criminal case may be granted "only for that period of time shown to be necessary by the evidence considered at the hearing on the motion." (§ 1050, subd. (i).)

A key factor to be considered by a court in granting or denying a continuance is whether the requested continuance would be useful, such as, for example, whether an improvement in trial counsel's or a defendant's mental or physical health is likely to occur within the time requested. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) An equally important consideration is whether "substantial justice" will be accomplished or defeated by the granting of more time. (*People v. Zapien, supra,* 4 Cal.4th at p. 972.)

Of course, a court may also consider the burden that will result on witnesses, jurors and the court if a continuance is granted. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1038.) The fact is, however, that "[d]elay is always disruptive to some degree." (*People v. Concepcion* (2008) 45 Cal.4th 77, 83.) Hence, a trial court should carefully balance all interests involved

and the court's convenience should never be the sole decisive factor. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1399.)

The federal courts apply a similar balancing approach to determining whether the denial of a continuance constitutes an abuse of discretion. Courts will consider: (1) whether the defendant was diligent in preparing his defense, or whether the request for a continuance appears to have been a delaying tactic; (2) how likely is it that purpose of the continuance would have been achieved had it been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) whether the defendant was prejudiced by the denial. (*United States v. Kloehn* (9th Cir. 2010) 620 F.3d 1122, 1127; *United States v. Flynt* (9th Cir. 1985) 756 F.2d 1352, 1359-1361.)

In some instances, the denial of a continuance will violate due process. A court's "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [11 L.Ed.2d 921, 84 S.Ct. 841].)

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

(*Ungar v. Sarafite, supra*, at p. 589; quoted in *People v. Byoune* (1966) 65 Cal.2d 345, 347.) Bell respectfully submits that the denial of a brief delay to permit Bell to be present denied him due process.

On Friday, April 9th, Bell was temporarily in pain, confined to a wheelchair, and incapable of assisting counsel or listening attentively to the proceedings. Nothing in the record suggests a lack of diligence on the part of the defense, or that Bell's wish to put the matter over a day was a mere delaying tactic. The purpose of a short delay – to allow Bell to be present

for his own defense – would clearly have been achieved. At the time the decision to proceed in Bell's absence was made, the court had no reason to assume Bell would not be able to participate in the proceedings after a brief period of healing. Indeed, the court had been advised that a nurse had examined Bell on Thursday night *and* Friday morning, and found no serious injury. (XVI RT 3107.) In fact, as anticipated, Bell *was* present and able to participate when the trial resumed on April 12, 1999. (XVI RT 3245.)

A short delay to allow Bell to participate would not have burdened the prosecution or its witnesses. It was the *defense's* witnesses who would have been inconvenienced. Furthermore, the prosecuting attorney argued that it would be error to proceed in Bell's absence! (XVI RT 3108.)

The court's refusal to hear Dr. Riley's testimony on Tuesday because of a pretrial promise to jurors that the trial would end by April 16th was unreasonable under the circumstances. Bell's trial had been ongoing for more than a month. The selection of the jury began on March 8, 1999. The decision to proceed in Bell's absence was made on April 9, 1999, *on the twenty-second day of the trial.* Why, if the court was so concerned about the schedules of the jurors, did the court not bother to inquire whether any of the jurors would actually suffer hardship or inconvenience if the trial went a day or two beyond its estimated length?

Importantly, granting a delay would have effectuated Bell's statutorily and constitutionally protected right to be personally present during a critical phase of a capital trial. Bell's presence would have contributed to the fairness of the proceeding in several respects. First, Bell could have actively assisted counsel during the examination of important defense witnesses. (*United States v. Novaton, supra*, at p. 1000.) More importantly, a fair and just hearing was likely to be thwarted in his absence. (*Snyder v. Massachusetts, supra,* 291 U.S. at pp. 107-108.) The jury was

likely to have drawn damaging inferences from Bell's unexplained absence at a trial. (See, e.g., *Blackwell v. Brewer, supra*, 562 F.2d at p. 600 ["Blackwell's exclusion from the courtroom may well have led some of the jurors to suspect that Blackwell himself bore some responsibility for the altercation."]; *Commonwealth v. Kane* (Mass. App. 1984) 472 N.E.2d 1343, 1348 ["A jury may raise very damaging inferences from the bare fact that the defendant has someone flown."]; *State v. Garcia-Contreras, supra*,, 953 P.2d at p. 541 ["No one can tell what the prospective jurors might have thought when all of the key players were introduced save the defendant, whose whereabouts were left mysteriously unexplained."].) Furthermore, the error was not cured a curative instruction, telling the jury that Bell had been "voluntarily excused for good cause." (Cf. *People v. Jackson, supra,* 13 Cal.4th at p. 1212.)

Here the jury was admonished not to consider Bell's absence in deciding the case. Nonetheless, given Bell's unexplained absence on the day following the jury's frightening exposure to "screaming and yelling" coming from the courtroom (XVI RT 3123), it is very likely the jury concluded that Bell was continuing to engage in behavior that posed a physical threat to persons in the courtroom. It is almost impossible under the circumstances to "quantify the resulting harm." (*State v. Garcia-Contreras, supra,* at p. 541.) Accordingly, the court's "myopic insistence upon expeditiousness in the face of a justifiable request for delay" rendered Bell's right to defend with counsel an "empty formality." (*Ungar v. Sarafite, supra,* 376 U.S. at p. 589.)

### D. The Entire Judgment Must Be Reversed Because Bell Was Denied The Right To Be Personally Present At Critical Phases Of His Trial.

#### 1. The Error Was Structural; Accordingly, Bell Is Entitled To *Per Se* Reversal Of The Penalty.

While federal courts generally apply harmless error analysis to alleged "absence error" that violates the federal constitution, they also recognize that in "egregious circumstances" a violation of the right to personal presence may amount to structural error, immune from harmless error review. (*Yarborough v. Keane* (2nd Cir. 1996) 101 F.3d 894, 897.)

> In the usual case, such an error will be susceptible to harmless error analysis, but a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal.

(*United States v. Feliciano* (2nd Cir. 2000) 223 F.3d 102, 112.) A defendant's absence from proceedings may be structural if it calls into question the fundamental fairness of the framework within which the trial proceeds. (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 307-310; cf. *Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141.)

In this case, the error should be regarded as "structural" and reversible *per se* because Bell's fundamental right to the assistance of counsel, as well as his right to personal presence, was impaired. When counsel is functionally absent, it renders the verdict so unreliable that a case-by-case inquiry for prejudice is unnecessary. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 490 [55 L.Ed.2d 426, 98 S.Ct. 1173]; *United States v. Gonzalez-Lopez, supra,* 548 U.S. 140; *Mickens v. Taylor, supra,* 535 U.S. 162, 167, fn. 1.)

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

(*United States v. Cronic* (1984) 466 U. S. 648, 659, fn. 29 [80 L.Ed.2d 657, 104 S.Ct. 2039].)

Here, Bell made it amply clear to the court that he wanted to attend his own penalty phase trial and be present during the testimony of the defense's expert witnesses. The trial court denied a reasonable continuance for two days, which would have permitted Bell to be present during a plethora of significant penalty phase proceedings, as well as the testimony of defense witnesses. "The Supreme Court has repeatedly held that a defendant's Sixth Amendment right to counsel is violated if the defendant is unable to communicate with his or her counsel during key preparation times. (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1197.)

> We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.... The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 144 [118 L.Ed.2d 479, 112 S.Ct. 1810].)

The sentencing stage is well known to be a critical stage of a capital trial. During this phase,

> the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight, and perhaps be determinative.

(*Riggins v. Nevada, supra*, at p. 144.)

In *Riggins*, *supra*, the conviction was reversed where the forced administration of antipsychotic drugs during trial prevented effective communication between a defendant and his lawyer during trial. Here, Bell was similarly denied the opportunity to communicate with his attorney during the evidentiary phase of a capital sentencing proceeding. Furthermore, just as antipsychotic medication may inhibit a defendant's "capacity to react and respond to the proceedings and to demonstrate remorse and compassion," (*Riggins* at pp. 143-144), Bell's unexplained absence was likely to be perceived by the jury as a sign of Bell's dangerousness or lack of contrition. The error was, accordingly, structural, and requires *per se* reversal of the penalty. (*Ibid.*)

**2. The Error Was Prejudicial, Even If Not Structural.**

Even if the error is not deemed structural, Bell's exclusion from penalty phase witness testimony was prejudicial, and requires reversal of the death judgment.

In state court proceedings, this Court has applied the harmless error test of *People v. Watson, supra,* 46 Cal.2d 818, to evaluate the prejudicial impact of "absence error" which is alleged to have occurred in violation of state statute. (*People v. Jackson, supra,* 13 Cal.4th at p. 1211; see also *People v. Anderson* (2001) 25 Cal.4th 543, 595-596 [Error excluding counsel and the defendant from an *in camera* hearing on the need for physical restraints was harmless].) Admittedly, this Court has rarely, if ever, reversed a judgment based on a defendant's absence from instructional conferences and discussions occurring outside of the jury's presence on questions of law. (*People v. Cole* (2004) 33 Cal.4th 1158, 1231; *People v. Perry* (2006) 38 Cal.4th 302, 312 [jury instructional conference]; *People v. Davis* (2005) 36 Cal.4th 510, 532 [admissibility of evidence]; *People v. Jackson* (1980) 28 Cal.3d 264 [mistrial motion].)

According to the decisions of this Court, sections 977 and 1043 generally do not require a defendant's presence, or even a written waiver of presence, at proceedings, which do not impinge on the opportunity to defend. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.)

Here, however, Bell's absences violated the federal constitution as well as state statute. Federal confrontation and due process rights are denied if a defendant's absence occurs while witnesses are testifying, *or* if the defendant's exclusion from proceedings impairs the "fullness of his opportunity to defend against the charge." (*United States v. Gagnon* (1985) 470 U.S. 522, 526.) When a defendant's exclusion from trial implicates the Sixth Amendment and Fourteenth Amendment rights, the more stringent *Chapman* test applies. (*Chapman v. California, supra*, 386 U.S. 18.) "The burden of proving harmless error is a heavy one and the state must so prove beyond a reasonable doubt." (*Blackwell v. Brewer, supra*, 562 Fed.2d at p. 600.)

Bell was excluded from *numerous* proceedings during the penalty phase of *a death penalty trial* when significant issues of law were being discussed. Missed proceedings included not only an instructional conference (XV RT 3088-3096), but also, discussions regarding a letter from Bell's wife and whether the wife should be called as a penalty phase witness (XV RT 3087-3088), and the admissibility of evidence concerning Bell's outburst as aggravating evidence (XV RT 3098-3099), and a hearing of a motion for mistrial based on the prejudicial effect of the jury's frightening exposure to the sounds of a ruckus in the courtroom. (XVI RT 3116-3121.) Bell's absence at these critical junctures directly impinged upon the fullness of his opportunity to defend against the charges. He was effectively denied any opportunity to consult with counsel, or to be consulted, on issues having great potential to influence the outcome of the

penalty phase trial. (*Riggins v. Nevada, supra*, 504 U.S. 127; *Blackwell v. Brewer, supra*, at p. 600.)

Furthermore, the trial court's intentional disregard of state laws governing Bell's right to be personally present and/or regarding the granting of continuances also violated his state-created liberty interest, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Hewett v. Helms* (1983) 459 U.S. 460, 466 [74 L.Ed.2d 675, 103 S.Ct. 864]; *Ford v. Wainwright, supra*, 447 U.S. at p. 428 [Concurring op., O'Connor, J.].)[37]

Most importantly, Bell was absent for the testimony of three defense witnesses. (XVI RT 3124-3221.) Even assuming, *arguendo*, Bell's exclusion from discussions *outside* of the jury's presence on questions of law was harmless error, his exclusion during the presence of penalty phase defense witness testimony was not. First and foremost, Bell was denied any opportunity to assist counsel during the examination of important defense witnesses. (*Riggins, supra*; *United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1000.) Even worse, because obviously frightened jurors were *not* told that Bell had been voluntarily excused for good cause (cf. *People v. Jackson, supra*, 13 Cal.4th at p. 1212), the jury very likely drew "damaging inferences" (*Commonwealth v. Kane, supra,* 472 N.E.2d at p. 1348) from his "mysteriously unexplained" absence. (*State v. Garcia-Contreras, supra*, 953 P.2d at p. 541.)

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[37] Appellant recognizes that a similar argument was rejected in *People v. Rundle, supra*, 43 Cal.4th at pp. 136-137. In *Rundle*, this Court suggested that no federal due process violation occurred based solely on a violation of sections 977 and 1043 because the defendant's interest in freedom from restraint was not implicated. Appellant respectfully disagrees. His freedom from the death penalty is implicated by his exclusion from evidentiary phases of a capital proceeding.

Respondent will certainly argue the absence of prejudice. In *People v. Mayfield* (1997) 14 Cal.4th 668, for example, this court found nonprejudicial statutory error, but no constitutional error, where a defendant *expressly waived his right to be personally present* while the jury visited a service station where the crime occurred, knowing in advance that the visit to the crime scene would also encompass a ballistics demonstration and testimony by the service station's owner. But in *Mayfield*, the defendant's decision to be absent during *testimony* was knowing and voluntary – not the product of coercion – as it was here. Moreover, in *Mayfield*, defense counsel and the defendant apparently had expressed the view that the defendant's trial interests would be "better served" if he did not attend the jury view. (*Id.* at pp. 738-739.) Here, Bell's preference was to be present, and his attorney first tried to convince the court to delay proceedings to allow Bell a day or two to heal. Plainly, Bell would have been better served had he returned to court for the testimony of penalty phase witnesses. He could have participated meaningfully in his defense, as it was his right to do, and additionally, jurors would not have been left to draw highly damaging inferences from his failure to appear.

For these reasons, the error was at least prejudicial, even if not structural. (*Blackwell v. Brewer, supra*, 562 F.2d at p. 600.)

## XIV

## BELL WAS DENIED THE RIGHT TO DUE PROCESS, A FAIR TRIAL, THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM, AND A RELIABLE ADJUDICATION OF PENALTY BY THE TRIAL COURT'S DENIAL OF THE MOTION FOR MISTRIAL.

### A. The Trial Court's Denial Of The Motion For Mistrial Was An Abuse Of Discretion And Violated Bell's Right To Due Process, A Fair Penalty Trial, An Impartial Jury, And A Reliable Determination Of The Penalty.

The "abuse of discretion" standard of review ordinarily applies when a trial court denies a motion for mistrial. A mistrial need not be granted based on a jury's exposure to a prejudicial incident or information unless the prejudice from exposure is incurable by admonition or instruction. (*People v. Elliot* (2012) 53 Cal.4th 535, 575.) Generally, a trial court has broad discretion to decide whether prejudice is incurable, or curable. (*People v. Haskett*, supra, 30 Cal.3d at p. 854; *Wilson v. Woodford* (C.D. Cal. 2009) 682 F. Supp. 2d 1082, 1089-1090.)

This Court has explained:

> Because the trial court is generally better able than an appellate court to make this determination, a ruling denying a motion for mistrial is reviewed under the deferential abuse of discretion standard.

(*People v. Elliot, supra.)*

Bell's case does not involve a garden-variety motion for mistrial, however. Here, jurors were not just exposed to a highly prejudicial incident in the courtroom. They were *personally involved* in, and frightened by, the fracas, *which was used as aggravating evidence at the penalty phase trial.* The jurors plainly perceived themselves to be victims, or threatened victims, of Bell's allegedly violent outburst. Jurors heard the noise of the disturbance in the courtroom, including screaming and yelling. In a state of

panic, they pushed and shoved their way into the jury room, nearly causing injury to one another, and locked the door. They expressed concern to one another about how to protect themselves from Bell in the future. Jurors also communicated to the judge, in writing, that they would feel endangered if Bell were not *restrained.* (XVI RT 3116.)

Before the trial judge denied the mistrial motion, he *knew* that the prosecutors intended to use the incident as evidence of aggravating violent conduct. (XV RT 3087.) In fact, the prosecution did use the incident in aggravation of the sentence. Consequently, the *same* jurors who felt personally victimized by Bell's outburst were allowed to sit in judgment on the issue of penalty. In theory, jurors were supposed to fairly and impartially weigh the aggravating and mitigating circumstances, *without the influence of passion or prejudice*, to determine whether a sentence of death was warranted. (V CT 1221, 1224; *People v. Stanley* (1995) 10 Cal.4th 764, 831-832.) Yet, how could the jurors *not* be influenced by passion or prejudice, having the perception that, they narrowly escaped injury at Bell's hands? Realistically, jurors' assessment of the eyewitness accounts of Deputies Bentley and Ridenour, who testified about the incident, would have been colored by each individual juror's personal, frightening experience of the incident.

There is no way that, in these circumstances, an admonition or instruction could have cured the harm. (Cf. *People v. Elliot, supra*, 53 Cal.4th at p. 575-576.) What if defense counsel had, *as the court suggested*, requested an instruction advising the jury *not to consider the incident in the courtroom.* (XVI RT 3122.) The request for an admonition would have been denied. The prosecutor introduced testimony about the courtroom incident and the jury was invited by the instructions and the prosecutor's argument to consider Bell's courtroom conduct an aggravating circumstance supporting the death penalty. (IV CT 1023-1023; XV RT

3087; XVII RT 3449-3475; XVIII 3745-3746.) Any "curative" admonition to disregard the incident would have been contrary to the other penalty phase instructions.

When a party's chances of receiving a fair trial have been irreparably damaged by exposure to a prejudicial incident, a mistrial should be granted. (*People v. Ayala* (2000) 23 Cal. 4th 225, 282.) In the case at bench, denial of the motion for mistrial was an abuse of discretion and denied Bell due process and a fair trial.

As the United States Supreme Court has explained:

> Due process means a jury *capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.*

(*Smith v. Phillips* (1982) 455 U.S. 209, 217 [71 L.Ed.2d 78, 102 S.Ct. 940]; italics added.) For the penalty phase of Bell's trial, percipient witnesses to an alleged aggravating act of criminal conduct sat as jurors. Hence, the entire jury lacked "the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 982 [hereafter, *Dyer*].)

Moreover, because Bell's punishment was selected by jurors whose judgment may have depended more on the jurors' own emotional sensitivities than actual evidence regarding the aggravating features of Bell's conduct in the courtroom, the reliability of the death sentence is irremediably compromised in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. (*Saffle v. Parks* (1990) 494 U.S. 484, 493 [108 L.Ed.2d 415, 110 S.Ct. 1257] ["It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding

recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."]; cf. *People v. Page* (2008) 44 Cal.1, 42.)

### B. The Denial Of A Mistrial Also Denied Bell The Rights To An Impartial Jury, And Confrontation And Cross-Examination In Violation Of The Sixth Amendment.

Although here, the issue of jury bias arises in the context of a motion for mistrial, California's statutory scheme governing the disqualification of jurors for cause during jury selection, and discharge of sitting jurors for cause are instructive in determining whether Bell was denied his constitutional rights to confrontation and an impartial jury.

> Code of Procedure section 233 provides in relevant part,
>
> [I]f, before the jury has returned its verdict to the court, a juror becomes sick or, upon other *good cause* shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged.

(Emphasis added.) A juror's bias, including bias resulting from exposure to outside influences, constitutes good cause to discharge a sitting juror within the meaning of the statute. (*People v. Wilson* (2008) 44 Cal.4th 758, 823; *People v. Riggs* (2008) 44 Cal.4th 248, 279.)

Code of Civil Procedure section 229 is enlightening because it allows prospective jurors to be challenged for "implied bias," and describes eight specific circumstances in which a challenge for "implied bias" will lie. This Court has held that a prospective juror may be excused for "implied bias" only for one of the reasons set forth in Code of Civil Procedure section 229, and "'for no other.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 670; internal citation omitted.) Once the existence of facts establishing "implied bias" is ascertained, the impliedly biased juror is disqualified as a matter of law. (Code of Civ. Proc., § 225, subd. (b)(1)(B).)

If the facts fail to establish a statutory ground for "implied bias," a juror may nonetheless be excused for "actual bias" pursuant to Code of Civil Procedure section 225, subd. (b)(1)(C), if the trial court finds that the juror's state of mind would prevent him or her from being impartial. (*People v. Ledesma, supra.*)

A judge's refusal to disqualify a prospective juror for bias is subject to a different standard of review on appeal than the standard applied when a trial court merely denies a motion for mistrial. In reviewing claims predicated on juror bias, reviewing courts will accept a trial court's "credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) Whether prejudice results from the refusal to disqualify, however, is a mixed question of law and fact subject to an appellate court's independent determination. (*Ibid.*)

The enumerated definitions of "implied bias" set forth in Code of Civil Procedure section 229 are also relied upon by courts determining whether a sitting juror suffers from "implied bias," which renders the juror incapable of performing his or her duty within the meaning of Code of Civil Procedure section 233. (See, e.g., *Herrera v. Hernandez* (2008) 164 Cal.App.4th 1386, 1391.) By statute, a challenge for "implied bias" will lie if a juror has "an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or some of them" or harbors "a state of mind . . . evincing enmity against, or bias towards, either party." (Code of Civ. Proc., § 229, subds. (e) & (f).)

Although there are a dearth of state cases adjudicating the existence of "implied bias" on facts comparable to the facts presented here, the record includes facts demonstrating that Bell's jurors suffered from "implied bias" under both of these subsections of the statute. The jurors were witnesses to aspects of the skirmish in the courtroom, and several jurors, particularly

those who were pushed and shoved trying to escape to the jury room, perceived themselves as having come close to suffering injury at Bell's hands. The jury's note, and the statements of Jurors 5 and 11, strongly suggest that jurors harbored an "unqualified opinion or belief" in Bell's dangerousness, based wholly or partially on their own frightening experience during the incident in the courtroom. In other words, the jurors had *personal knowledge of material facts* regarding an alleged criminal act about which penalty phase testimony was to be presented. This constitutes "implied bias," which is disqualifying as a matter of law.

Even if jurors' personal knowledge of facts surrounding the alleged aggravating incident of violent conduct in the courtroom was not automatically disqualifying under California's "implied bias" statute, "actual bias" should certainly have been *presumed* under such circumstances. By analogy to cases decided in the juror misconduct context, receipt of information about a case that is not a part of the evidence received at trial leads to a presumption of actual juror bias that must be rebutted. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 578.) The reason for the presumption is well understood.

> The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.... [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

(*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [13 L.Ed. 2d 424, 85 S.Ct. 546]; cited with approval in *People v. Nesler*, *supra*, at p. 578.)

Here, the jury was exposed to an incident in the courtroom that was to be used as aggravating evidence at the penalty phase trial. The jurors,

having borne witness to the commotion, should have been disqualified from judging the evidence proffered to prove that the incident occurred in the manner posited by the prosecution. To the extent the penalty phase decision was bolstered or shaped by jurors' own personal experience of the courtroom incident, rather than deputies' testimony given in the courtroom, jurors were, in effect, silent witnesses – but not subject to the full judicial protection of Bell's right of confrontation, of cross-examination, and of counsel. (*Turner v. Louisiana, supra,* 379 U.S. at pp. 472-473; *People v. Nesler, supra*, 16 Cal.4th at p. 578.)

To imply bias under such circumstances is consistent with federal doctrine, which, "[i]n extraordinary cases…may presume bias based on the circumstances." (*McDonough Power Equip. v. Greenwood, supra,* 464 U.S. at pp. 556-557 (Blackmun, Stevens and O'Connor, JJ., concurring, accepting doctrine of implied bias in exceptional circumstances); see also, *Dyer v. Calderon, supra,* 151 F.3d at pp. 981-982.) In *Smith v. Phillips, supra,* 455 U.S. 209, Justice Sandra Day O'Connor offered examples of situations in which bias is implied, including: "a revelation that the juror… *was a witness or somehow involved in the criminal transaction.*" (*Smith* at p. 222; emphasis added.)

The Ninth Circuit Court of Appeals in *Dyer* explains the rationale for the doctrine of implied bias.

> Of course, a juror could be a witness or even a victim of the crime, perhaps a relative of one of the lawyers or the judge, and still be perfectly fair and objective. Yet we would be quite troubled if one of the jurors turned out to be the prosecutor's brother because it is highly unlikely that an individual will remain impartial and objective when a blood relative has a stake in the outcome. Even if the putative juror swears up and down that it will not affect his judgment, we presume conclusively that he will not leave his kinship at the jury room door.... There is no way to know, but permitting such a juror to serve would introduce into the jury room an

> extraneous influence that could materially color the deliberations. The juror in question would be lacking the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror.

(*Dyer v. Calderon, supra*, at p. 982.) Under the federal doctrine of "implied bias," a juror's bias is conclusively presumed once the potentially biasing fact, for example, the fact that the juror is a victim of, or witness to, the charged crime, is established. (*Ibid.*) Similarly, according to California law, a prospective juror is disqualified as a matter of law once the existence of facts establishing "implied bias" is ascertained. (See, Code of Civ. Proc., § 225, subd. (b)(1)(B).)

Here, of course, the biasing fact is that jurors were percipient witnesses to Bell's actions, which formed the basis for the prosecution's charge that Bell had committed an aggravating violent crime. "Percipient," as used here, means that the jurors were "capable of perceiving the underlying transaction which serve[d] as the basis for the prosecution...." (See, *United States v. Apker* (Dist. Ct., D. Neb. 1991) 139 F.R.D. 129, 138; see also, Black's Law Dictionary (8th ed. 2004), p. 4948.) No juror testified, but jurors certainly *could* have been called as witnesses to the allegedly aggravating nature of Bell's conduct, had they not been seated jurors.

In Bell's case, there is nothing in the record to rebut the presumed prejudice caused by the jurors' exposure to an incident causing so much personal fright. Jurors were asked to voluntarily report to the court if any felt they could not be "fair and impartial." (XVI RT 3120.) Even *if* the silence of jurors in the face of the court's directive implies that jurors *believed themselves* to be "fair and impartial," one cannot assume the jurors understood this to mean that they were to disregard their personal observations of the incident, and personal opinions about Bell, in adjudging both (1) whether Bell's conduct in the courtroom was proven beyond a

reasonable doubt to be a crime of force or violence (see, IV CT 1159), and (2) whether Bell's behavior in the courtroom should be assigned morally inculpatory weight favoring death. (V CT 1221.) Indeed, jurors were never asked if they could base their penalty determination on testimony alone, and disregard their own personal perceptions of, and emotional response to, the ruckus. Consequently, it is highly improbable that the jurors assessment of the credibility of deputies' testimony, and their weighing of Bell's moral culpability in the incident, was *not* based in some part on jurors' own personal perceptions about what occurred.

Frightened, traumatized jurors, witnesses to the event about which testimony was offered, judged Bell at the penalty trial. The entire jury was impliedly biased, which denied Bell a fair penalty trial before an impartial trier of fact, in violation of the Fourteenth Amendment and Article I, sections 7, 14 and 15. (*Dyer v. Calderon*, *supra*, 151 F.3d at p. 982.) Furthermore, Bell was denied his right to confront and cross-examine the jurors about their perceptions, which violated his rights guaranteed by the Sixth Amendment and Article I, section 15 of the California Constitution. (*Turner v. Louisiana, supra,* 379 U.S. at pp. 472-473; *People v. Nesler, supra*, 16 Cal.4$^{th}$ at p. 578.) Accordingly, the motion for mistrial of the penalty trial should have been granted. (See, *United States v. Scott* (5$^{th}$ Cir. 1988) 854 F.2d 697, 698-700; *Williams v. Netherland* (E. D. Va. 2002) 181 F.Supp.2d 604, 606-617.)

## XV

## COURT'S FAILURE TO CONDUCT ADEQUATE QUESTIONING OF THE JURY TO RULE OUT PREJUDICIAL EFFECT OF INCIDENT IN COURTROOM VIOLATED BELL'S RIGHT TO AN IMPARTIAL JURY, AND A RELIABLE DETERMINATION OF THE DEATH PENALTY BASED SOLELY ON EVIDENCE PRESENTED IN COURT.

When during trial, a court is put on notice that there may be external influences being brought to bear on a juror or jurors, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the impartiality of the jury has been affected. (*People v. Fulava* (2012) 53 Cal.4th 622, 702; see also, *People v. Davis* (1995) 10 Cal.4th 463, 547; § 1089.) Similarly, once the court is alerted to the possibility that a juror cannot properly perform his or her duty to render an unbiased verdict, it is obligated to make reasonable factual inquiry to determine whether the juror in fact remains impartial – i.e., capable and willing to decide the case based solely on the evidence produced at trial. (*People v. Cleveland* (2001) 25 Cal.4th 466, 477: *People v. Nesler, supra*, 16 Cal.4th at p. 581.) "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838; cited with approval in *People v. Cleveland, supra.*)

Federal cases are in accord. A judge must insure that *voir dire* examination of a potentially prejudiced juror "affords a fair determination that no prejudice as been fostered." (*Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 637-638.) A juror's own opinion of his or her impartiality is not controlling. (*United States v. Williams* (5th Cir. 1978) 568 F.2d 464, 471.) A juror's protestation of impartiality in the face of exposure to outside information is "best met with a healthy skepticism from the bench." (*Williams v. Griswald* (11th Cir. 1984) 743 F.2d 1533, 1539, fn. 12; internal citation omitted.)

Here, jurors were exposed to a frightening incident in the courtroom, which caused them to push and shove their way into the jury room and lock the door. In Bell's absence, jurors were collectively invited to tell the judge, by sending a note, or raising a hand, if any juror was "feeling biased or prejudiced" as a consequence of the incident. (XVI3118-3119.) Additionally, jurors as a group were given assurances that, when Bell reappeared in court, the court would "work it out logistically so there won't be a problem with you – take care of any fears you might have." (XVI RT 3119-3120.) The court's inquired whether jurors this would "solve the problem," and jurors nodded. (XVI RT 3119-3120.)

At trial counsel's request, the court also asked jurors whether there had been any discussion of the courtroom incident while jurors were inside the jury room. (XVI RT 3117-3121.) But there were no questions asked, inquiring whether individual jurors could disregard their own personal experience of the incident, or their fear of Bell, when it came to weighing and evaluating *testimony* to be offered regarding what occurred. In other words, the court conducted no inquiry to determine if jurors would still be able and willing to decide the penalty *based solely on evidence produced at trial*. (*People v. Cleveland, supra,* 25 Cal.4th at p. 477: *People v. Nesler, supra*, 16 Cal.4th at p. 581.)

*United States v. Thompson* (10th Cir. 1990) 908 F.2d 648, 650, is exemplary. In *Thompson*, the Tenth Circuit Court of Appeals concluded that a trial court failed to conduct specific enough questioning to detect juror bias. (*Id.* at pp. 650-653.) There, the trial court asked, "Let me inquire, before you begin your deliberations, has anything occurred during the weekend that would in any way affect your ability to continue to serve as fair and impartial jurors in this case? ... Is there any matter that you would wish to call to the Court's attention as perhaps bearing on your ability to

continue to serve as fair and impartial jurors?" (*Ibid.*) This very generalized inquiry was found to be inadequate to elicit bias.

*People v. Burgener* (1986) 41 Cal.3d 505 (overruled on unrelated grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753), is similarly apt. In *Burgener*, the jury foreman reported his suspicion that a juror was intoxicated during deliberations. The court questioned the foreman, but not the purportedly intoxicated juror, about the intoxication allegation. The trial court briefly questioned the juror who was accused of intoxication, but only asked whether the juror could disregard information received outside the case and decide the case on the evidence presented. (*Id.* at pp. 517-519.) The trial court's failure to make further inquiry was held to be error. (*Id.* at p. 521.) The questions propounded by the court in this case were, for all intents and purposes, just as inadequate as those asked in the *Thompson* and *Burgener* cases.

Respondent will no doubt argue that a trial judge has broad discretion to decide whether and how to conduct an inquiry to determine whether a juror should be discharged, and that this Court's assessment of the adequacy of the trial court's inquiry is deferential. (*People v. Clark* (2011) 52 Cal.4th 856, 971; *People v. Cleveland, supra*, at p. 472.) This Court has held that, except when bias is apparent from the record, the trial judge is deemed to be in the best position to assess the juror's state of mind during questioning. (*People v. Clark, supra.*) This standard of review assumes, however, that the trial court actually engaged in questioning directed at determining jurors' real states of mind.

In the case at bench, conspicuously absent from the record are any questions by the trial judge, inquiring whether or not each juror would be able to disregard his or her own *personal experience* of the incident in weighing penalty phase evidence *about* the incident. Moreover, the trial court's invitation to jurors to report any "feelings" of bias was an

inadequate means of detecting bias or prejudice attributable to Bell's noisy flare-up in the courtroom, and jurors' frenzied effort to escape into the jury room. The court deferred to the jurors themselves. Each juror was left to form an opinion regarding whether he or she could be impartial following the disturbance. (Cf. *People v. Cleveland, supra,* 25 Cal.4th at p. 477.) A court's inquiry is not sufficient when jurors alone are left to evaluate the facts and decide whether exposure to outside information will interfere with jurors' impartiality. (*People v. Cleveland, supra,* 25 Cal.4th at p. 477; *People v. McNeal, supra,* 90 Cal.App.3d at p. 838.)

Respondent will no doubt argue that the lack of a more thorough inquiry to elicit bias did not prejudice Bell. But this is a capital case; more extensive precautions must be taken in a capital case to assure that jurors can be fair and impartial. (See *Morgan v. Illinois, supra,* 504 U.S. at pp. 735-736; *Turner v. Murray* (1986) 476 U.S. 28, 36 [90 L.Ed.2d 27, 106 S.Ct. 1683]; *People v. Armendariz* (1987) 37 Cal.3d 573, 583; *Hovey v. Superior Court, supra,* 28 Cal.3d at p. 80.) Capital cases must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra,* 486 U.S. at p. 263.) Here, inadequate safeguards were employed to guarantee Bell's right to impartial jurors during the penalty phase of a *capital* trial. Where, as here, Bell's life was at stake, and no specific questioning was done to determine whether jurors, as the result of their exposure to the incident in the courtroom, would be predisposed to impose a death sentence, "the [trial court's] finding of impartiality does not meet constitutional standards." (*Irvin v. Dowd* (1961) 366 U.S. 717, 727-728 [6 L.Ed.2d 751, 81 S.Ct. 1639].) The penalty phase verdict must be reversed because it cannot be said with any certainty that the court's inadequate inquiry did not result in a biased jury, with a predilection to impose a death sentence.

## XVI

## THE LACK OF A CLEAR ADMONITION OR INSTRUCTION DIRECTING JURORS NOT TO CONSIDER THEIR PERSONAL EXPERIENCES OF THE INCIDENT IN THE COURTROOM IN ADJUDICATING WHETHER BELL COMMITTED VIOLENT CRIMINAL CONDUCT USABLE AS AGGRAVATING EVIDENCE VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, TO CONFRONTATION, AND A RELIABLE DEATH PENALTY DETERMINATION.

After the incident in the courtroom, jurors expressed fear that Bell could hurt them if he were not restrained (XVI RT 3116); the court responded with an implied promise to use restraints on Bell – i.e., to "work it out logistically" when Bell returned to the courtroom – to take care of jurors' fears. (XVI RT 3119-3120.) The court's response would have given jurors the impression that the court *agreed* that Bell was dangerous and required restraints.

A defendant's appearance in shackles or restraints "almost inevitably implies to a jury as a matter of common sense, that court authorities consider the offender a danger to the community," and "inevitably undermines the jury's ability to weigh accurately all relevant considerations...when determining whether a defendant deserves death." (*Deck v. Missouri* (2005) 544 U.S. 622, 633 [161 L.Ed.2d 953, 125 S.Ct. 2007].) Shackles become a "'thumb [on] death's side of the scale.'" (*Ibid*; internal citation omitted.)

Accordingly, when visible restraints are imposed on a criminal defendant, the trial court has a *sua sponte* duty to instruct the jury that the restraints should have no bearing on the determination of the defendant's guilt. (*People v. Duran* (1976) 16 Cal.3d 282, 291-291; *People v. Jacla* (1978) 77 Cal.App.3d 878, 889.) Admonishing the jury is particularly

important when restraints are visible to the jury at the *penalty* phase of a capital trial. (See, *Deck v. Missouri*, *supra*, 544 U.S. at p. 633; *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1452 [error that the trial court gave no cautionary instruction to disregard shackling at sentencing hearing]; *People v. Virgil* (2011) 51 Cal.4th 1210, 1271.)

Where, as occurred here, jurors are exposed to an incident involving the defendant, and jurors conclude – based on their personal perceptions of what occurred – that the defendant poses a danger to the jury and should be shackled, this would equally undermine the jury's ability to fairly and accurately weigh evidence received at the sentencing hearing to determine whether the defendant deserves to die. In such circumstances, the trial court has an equally compelling duty to caution jurors to disregard their personal perceptions of the event in question, and the personal fears produced thereby, in weighing the evidence for and against the penalty of death.[38]

In the case at bench, not only did the trial court fail to caution the jurors not to consider their own personal experience of the incident, and base their sentencing decision on evidence presented in the courtroom. Additionally, the instructions that *were* given would have given jurors the impression that their own perceptions and opinions about the incident *could* be given weight in the calculus of death.

During the guilt phase of the trial, the jury was instructed:

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[38] The trial court invited both prosecution and defense to design a jury instruction telling jurors "they can't consider the incident." (XVI RT 3122.) Neither party proposed an instruction, but that is not surprising. A request for an instruction telling jurors they could not consider the incident would have been pointless. As anticipated, the prosecutor introduced testimony about the incident in the courtroom. In closing argument, the prosecutor reminded jurors that they had "heard what happened" (RT XVIII 375), and argued that this incident, along with other instances of criminal conduct, demonstrated Bell's "[e]scalating violence...." (XVIII RT 3746.)

> The nontestimonial conduct of the defendant during the trial is not evidence that may be considered by you in determining guilt or innocence. You are to disregard the defendant's conduct in the courtroom, as it has no tendency in logic or reason to prove or disprove a material issue at trial.

(IV CT 977.) During the penalty trial, jurors received the usual instruction to ignore the instructions given during the guilt phase of the trial. (4 CT 1120; XVIII RT 3679, 3689.) It must be presumed that the jury obeyed this instruction. It is an "oft-stated presumption that the jury does as it is instructed to do." (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.)

At the penalty phase, the jury was directed to decide whether to impose life or death based on its consideration of "all of the *evidence* which has been received during any part of the trial of this case." (IV CT 1146; emphasis added; XVIII RT 3690.) But the term "evidence" was broadly defined for the jury to include "...anything presented to the senses and offered to prove the existence or nonexistence of a fact." (IV CT 1127; XVIII RT 3683.) From the totality of instructions given, jurors would logically have inferred that the nontestimonial conduct of Bell during the trial – *including conduct jurors had personally heard or perceived* – could properly be considered in determining the appropriate penalty.

This perception would have been reinforced by the prosecutor's penalty phase argument. When referring to Bell's outburst as aggravating evidence, the district attorney reminded jurors that they had "heard what happened in the courtroom where the defendant began banging on the table...." (XVIII RT 3745-3746.) Jurors would necessarily have assumed from the instructions and the prosecutor's argument that their own sense impressions of the incident could be considered, not just testimony about the incident presented in the courtroom.

As Bell has previously pointed out, greater care must be taken in a capital case to guarantee a fair and impartial jury. (See *Morgan v. Illinois,*

*supra,* 504 U.S. at pp.735-736; *Turner v. Murray, supra,* 476 U.S. at p. 36; *People v. Armendariz, supra,* 37 Cal.3d at p. 583; *Hovey v. Superior Court, supra,* 28 Cal.3d at p. 80.) Courts must police capital cases for procedural fairness and accurate factfinding at both guilt and penalty phases. (*Satterwhite v. Texas, supra,* 486 U.S. at p. 263.) Here, the trial court first conducted inadequate questioning to identify jurors who might be incapable of ignoring their own personal experience of the incident, and their personal fear of Bell, in weighing penalty phase evidence. The court then compounded that error by failing to admonish or instruct jurors of the duty to base their penalty decision *on evidence received in the courtroom,* disregarding any perceptions of, or opinions formed by jurors as the result of, the incidents in the courtroom and jury room.

It cannot be proven beyond a reasonable doubt that the lack of a cautionary admonition did not contribute to the death verdict. (*Deck v. Missouri, supra,* 544 U.S. at p. 635; *Chapman v. California, supra,* 386 U.S. at p. 24.) At the penalty phase of Bell's trial, defense evidence in mitigation was substantial. There was expert testimony that Bell suffered from low birth weight, and that he was separated from his mother with little human contact as a newborn – events beyond his control which predisposed him to suffer from low intellectual functioning, developmental and learning disabilities, dyslexia, attention deficit disorder, impaired executive and social functioning, hyperactivity, and a host of other cognitive, emotional and behavior problems. (XVI RT 3124-3145, 3157- 3169.) Expert testimony was even adduced suggesting that Bell's uncontrollable outburst in the courtroom was symptomatic of his brain dysfunction, consequent to Bell's low birth weight and separation from his mother at birth. (XVI RT 3168-3169.)

Because there was no admonition telling the jurors to disregard their own personal perceptions and fears stemming from the incident in the

courtroom, jurors' personal feelings of near-victimization by Bell would have become a "'thumb [on] death's side of the scale.'" (*Deck v. Missouri*, *supra*, 544 U.S. at p. 633; internal citation omitted.) As a consequence of the court's failure to admonish jurors, Bell was denied any semblance of a fair and impartial jury at the penalty phase of his trial, and a reliable determination – based on admissible evidence – that he deserved to die. The penalty of death should, accordingly, be reversed.

## XVII

## THE TRIAL COURT VIOLATED BELL'S RIGHT TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DETERMINATION OF THE DEATH PENALTY, AND INTERFERED WITH BELL'S RIGHT TO THE ASSISTANCE OF COUNSEL, BY DEFERRING TO COURTROOM SECURITY PERSONNEL THE DECISION TO USE CHAINS AND A STUN BELT TO RESTRAIN BELL DURING THE PENALTY TRIAL, AND BY FAILING TO INSTRUCT JURORS NOT TO CONSIDER BELL'S PHYSICAL RESTRAINTS FOR ANY PURPOSE.

### A. Law Governing The Use Of Restraints At Trial:

Under California law, a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of "manifest need" for such restraints. (*People v. Duran, supra,* 16 Cal.3d at pp. 290-291 [hereafter, *Duran*]; *People v. Stevens* (2009) 47 Cal.4th 625, 633 ["visible restraints must survive heightened scrutiny"].) Similarly, the federal Constitution forbids the use of shackles during the guilt or penalty phase of a trial unless the use of such restraining devices is "'justified by an essential state interest' such as the interest in courtroom security – specific to the defendant on trial." (*Deck v. Missouri, supra*, 544 U.S. at p. 624.)

The state and federal rules limiting the use of restraints safeguard a number of important rights: the presumption of innocence, the right to the effective assistance of counsel, and the right to fair and impartial jury adjudication of guilt and punishment in a death penalty trial.

> First, the criminal process presumes that the defendant is innocent until proven guilty. [Citations.] Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.... [¶] Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. [Citations.] The

> use of physical restraints diminishes that right. Shackles can interfere with the accused's "ability to communicate" with his lawyer. [Citations.]

(*Deck, supra*, at p. 630.) A defendant's appearance in shackles or restraints "almost inevitably implies to a jury as a matter of common sense, that court authorities consider the offender a danger to the community," and "inevitably undermines the jury's ability to weigh accurately all relevant considerations...when determining whether a defendant deserves death." (*Deck v. Missouri, supra,* at p. 633.)

Under *Duran* rule, as well as the federal rule, a trial court is obligated to make its own determination of the "manifest need" for the use of restraints as a security measure in a particular case, and may not rely solely on the judgment of jail or court security personnel. (*People v. Hill, supra,* 17 Cal.4th at p. 841, *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825; *Holbrook v. Flynn* (1986) 475 U.S. 560, 570 [89 L.Ed.2d 525, 106 S.Ct. 1340].) A trial court may not delegate to law enforcement personnel the decision regarding what types of restraints, if any, to use. (*People v. Ervine* (2009) 47 Cal.4th 745, 774.)

In *People v. Mar* (2002) 28 Cal.4th 1201, this Court considered under what circumstances a defendant in a criminal trial could be required, as a security measure, to wear a remote-controlled electronic "stun belt." As described in the *Mar* decision, a stun belt consists of a four-inch-wide elastic band, which is worn underneath the prisoner's clothing. The band wraps around the prisoner's waist and is secured by a Velcro fastener. Two 9-volt batteries connected to prongs, which are attached to the wearer over the left kidney region, power the belt. The stun belt delivers an eight-second, 50,000-volt electric shock if activated by a remote-control transmitter operated by an attending officer. The shock from a stun belt will

immobilize the defendant temporarily and/or cause muscular weakness for approximately 30 – 45 minutes. (*Mar* at p. 1215.)

This Court held the "manifest need" rule of *Duran* applied equally to stun belts, even though such belts may not necessarily be seen by the jury and do not restrain the wearer's physical movement. (*People v. Mar, supra*, 28 Cal.4th at pp. 1218-1219.) Furthermore, this Court ruled that features of the stun belt were sufficiently distinct from other types of restraints that trial courts must consider *additional factors* before compelling a defendant to wear one during a criminal proceeding. This Court observed:

> [W]earing a stun belt during trial may impair a defendant's capacity to concentrate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury. In addition, past cases both in California and in other jurisdictions disclose that in a troubling number of instances the stun belt has activated accidentally, inflicting a potentially injurious high-voltage electric shock on a defendant without any justification.... Further, because the stun belt poses serious medical risks to those who have heart problems or a variety of other medical conditions, we conclude that a trial court, before approving the use of such a device, should require assurance that a defendant's medical status and history has been adequately reviewed and that the defendant has been found free of any medical condition that would render the use of the device unduly dangerous. [¶] Finally, inasmuch as the governing precedent establishes that even when special court security measures are warranted, a court should impose the least restrictive measure that will satisfy the court's legitimate security concerns, we conclude that a court, before approving of the use of a stun belt, should consider whether there is adequate justification for the current design of the belt – which automatically delivers a 50,000 volt shock lasting 8 – 10 seconds, a shock that cannot be lowered in voltage or shortened in duration – as opposed to an alternative design that would deliver a lower initial shock and incorporate a means for terminating the earlier. Particularly in view of the number of accidental activations, we conclude that a trial court should not approve the use of this type of

> stun belt as an alternative to more traditional physical restraints if the court finds that these features render the device more onerous than necessary to satisfy the court's security needs.

(*People v. Mar, supra*, 28 Cal.4th at p.1205-1206.)[39]

> When a court commits shacking error,
>
> the defendant need not demonstrate actual prejudice to make out a due process violation. The state must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained."

(*Deck v. Missouri, supra*, at p. 635; quoting *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Howard* (2010) 51 Cal.4th 15, 30.)

This contrasts with the defendant's burden on appeal of showing prejudice caused by increases in the deployment of courtroom security personnel that do *not* involve the use of physical restraints. (*Holbrook v. Flynn, supra*, 475 U.S. 560, 569; *People v. Stevens, supra,* 47 Cal.4th at p. 635.) A showing of "manifest need" is not required to justify a security practice; courtroom security measures are subject to review for abuse of discretion. (*Id.*, at p. 637.) Therefore, errors involving the use of "benign security measures" are subject to the *Watson* standard of appellate review. (*People v. Hernandez* (2011) 51 Cal.4th 733, 744-745; *People v. Watson, supra*, 46 Cal.2d at p. 837.)

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[39] The record in this case does not contain any facts regarding the physical attributes or function of the stun belt that Bell was required to wear. But the record also did not contain any such facts in *People v. Mar, supra*. In *Mar*, this Court nonetheless held that the use of the stun belt was prejudicial error, relying on attributes discussed in "numerous legal and nonlegal articles provide a detailed discussion of such stun belts...." (*Id.*, at p. 1214.) In *Mar* and the present case, a REACT stun belt was utilized.

**B. The Trial Court Committed Prejudicial Error By Improperly Deferring To Security Personnel The Determination Of What Restraints To Employ, And By Failing To Make A Finding Of "Manifest Need" For The Use Of Both Visible Handcuffs And A Visible REACT Belt To Restrain Bell.**

The record clearly shows that courtroom deputies, not the judge, were making security decisions in Bell's case. The judge was unaware until the scuffle in the courtroom that deputies had previously "beefed up" security to include four deputies in the courtroom for the penalty phase trial. (XV RT 3084.)

After the proceedings were disrupted, the judge made a finding of "ample grounds" to impose restraints of some kind on Bell; but he did *not* exercise discretion to determine the severity of restraints necessary to satisfy the court's legitimate security concerns. Rather, the judge indicated that he would "follow the advice of...the people in charge of security" regarding what security measures to employ. (XV RT 3079.) The sergeant in charge of courtroom security offered the trial court a number of alternatives: to chain Bell, to arm a deputy with a Taser, to put Bell in a REACT belt, and/or to use some combination of these methods. (XVI RT 3079, 3083.) The trial court demurred to courtroom security personnel, and said he would do "whatever the bailiffs feel is appropriate." (XV RT 3081, 3083.)

Ultimately, the bailiffs expressed a preference for the stun belt. (XV RT 3085.) The court declined to make a specific order regarding the type of restraint. (XV 3097.) When Bell returned to court, he was chained to his wheelchair *and* wearing a stun belt "at the recommendation of the sheriff's department and the bailiffs." (XVI RT 3104, 3290-3291.) Bell's handcuffs

and the stun belt were visible to trial counsel and the court, as well as to the jury.[40] (XVI RT 3294.)

The requirement for a showing on the record of "manifest need" for restraints – a requirement that pre-dated Bell's trial

> presupposes that it is the trial court, *not law enforcement personnel*, that must make the decision an accused be physically restrained in the courtroom. A trial court abuses its discretion if it abdicates this decisionmaking responsibility to security personnel or law enforcement.

(*People v. Hill, supra,* 17 Cal.4th at p. 841; emphasis added; citing with approval, *People v. Jackson, supra,* 14 Cal.App.4th at p. 1825, and *People v. Jacla, supra*, 77 Cal.App.3d at p. 885.) "[A] Formal hearing is not required, so long as the court makes its own determination about the need for restraints based on facts shown to it, *and does not simply defer to the recommendations of law enforcement.*" (*People v. Lomax* (2010) 49 Cal.4th 530, 561; emphasis added.) "If the alternatives are less onerous yet no less beneficial, due process demands that the trial judge opt for one of the alternatives. (*Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 728; accord: *People v. Duran, supra*, 16 Cal.3d at p. 291, fn. 9.)

Here, the court violated the cardinal rule against deferring to law enforcement decisions regarding the decision to use multiple visible physical restraints. (*People v. Hill, supra,* 17 Cal.4th at p. 842.) The trial court likewise erred because it made no finding of "manifest need" to use both a stun belt and visible chains, rather than using less onerous, or less visible, restraints. (*Spain v. Rushen, supra.*)

A stun belt is among the most Draconian methods used to restrain criminal defendants in court. In contrast to more traditional devices, a stun belt may cause harmful psychological effects.

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[40] Otherwise, trial counsel would not have remarked that he "didn't see how" they could keep the jurors from seeing the devices. (XVI RT 3294.)

> The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a serious shock that promises to be both injurious and humiliating, may...impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury.

(*People v. Mar, supra*, 28 Cal.4th at p. 1226.) In an article written in 1996, several years before Bell's trial, an agent for a manufacturer of stun belts observed that defendants wearing stun belts during trial spend their time watching the person who controls activation of the device. (*People v. Mar, supra*, at pp. 1226-1227, citing, Cusac, *Life in Prison: Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry* (July 1996) The Progressive, p. 20.) A magazine article written in 1997 quotes from a stun belt manufacturer's promotional materials, bragging about the humiliating aspects of its product:

> After all, if you were wearing a contraption around your waist that by the mere push of a button in someone else's hand could make you defecate and urinate yourself...what would that do to you from the psychological standpoint?

(Schulz, *Cruel and Unusual Punishment*, New York Times Review of Books, 24 April 1997, p. 51; http://www.nybooks.com/articles/archives/1997/apr/24/cruel-unusual-punishment/; quoted in *People v. Mar, supra*, at p. 1227, fn. 8.)

The bailiffs in the courtroom decided to use a combination of stun belt and chains, restraints that were visible to the jury. They did so without a finding of "manifest need" by the judge. The error directly impinged upon Bell's constitutional rights to the effective assistance of counsel, and a fair and impartial jury adjudication of punishment in a death penalty trial. (*Deck v. Missouri, supra*, 544 U.S. at p. 630.) Respondent, accordingly,

bears the burden of proving beyond a reasonable doubt that the error did not contribute in any way to the death judgment. (*Ibid.*) This is a burden respondent cannot meet.

By no stretch of the imagination is it a foregone conclusion that the trial judge would have found a "manifest need" to chain Bell to his chair, while wearing a partially visible stun belt, had the judge not simply deferred to deputies. This is not a case in which the defendant either attempted to escape, or tried to help another inmate escape, prior to, or during the trial. (Cf. *People v. Virgil* (2011) 51 Cal.4th 1210, 1271 [defendant housed in a special unit for dangerous inmates was caught using a makeshift key to unlock another inmate's handcuffs]; *People v. Foster* (2010) 50 Cal.4th 1301, 1321-1322 [defendant escaped from an Idaho penitentiary]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 155-156 [Letner had escaped from custody while being transported to California to face charges, and had tried to assault another inmate while wearing normal restraints]; *People v. Gamache, supra,* 48 Cal.4th at pp. 368-369 [a homemade silencer and written five-step escape plan were found in the defendant's cell, and deputies intercepted letters from defendant, asking his mothers to obtain a device to trigger the stun belt he expected to wear at trial].) Bell was not threatening to disrupt future proceedings. (Cf. *People v. Combs* (2004) 34 Cal.4th 821, 837-838 [mentally unstable defendant threatened to commit "suicide" by inciting officers to get into a scuffle and shoot him].) Bell promised he would not be intentionally disruptive again. (XVI RT 3107.) Nor did Bell deliberately attack persons in the courthouse *without* any provocation. (Cf. *People v. Lomax* (2010) 49 Cal.4th 530, 559-560 [defendant struck the bailiff five times in the head, without apparent provocation]; *People v. Lewis and Oliver, supra,* 39 Cal.4th at pp. 1031-1032 [defendant, wearing a leg brace, attacked his counsel in court].)

The judge characterized Bell's demeanor as "stoic," except when his mother began crying, and the judge and trial counsel expressed agreement that Bell's outburst was precipitated by the uniquely emotionally provocative circumstance of watching his mother break down on the stand. (XVI RT 3080.)

Counsel did not object to using "some kind of restraint," but he objected restraints that he knew would be visible to the jury. (XV RT 3080-3081.) The recommendation by security personnel to use a stun belt, rather than a less onerous device, was accompanied by representations to the court and counsel that the stun belt would provide the most courtroom security, yet *not* be seen. (XV RT 3085.) But the stun belt was visible to jurors, as were Bell's handcuffs. (XVI RT 3294.) Sergeant Sweatman had offered the court a choice of other security options that did not involve the use of both the stun belt *and* chains. (XV RT 3080-3082.) For example, Bell could have been inconspicuously handcuffed, and one of the bailiffs could have been armed with a Taser, a much smaller handgun-shaped device with a similar ability to incapacitate a defendant who engages in nonconforming or dangerous conduct in the courtroom. (XV RT 3082-3083; See, http://www.taser.com/ for product information.) The trial court simply left the decision up to the deputies, making no effort to determine whether there was a "manifest need" for multiple, visible restraint devices. (XV RT 3081-3082; *People v. Hill, supra,* 17 Cal.4th 800 at p. 842.)

### C. The Issue Should Not Be Deemed Waived By Counsel's Failure To Object To The Stun Belt.

Respondent will almost certainly argue that the issue of restraints should be forfeited because counsel objected to visible chains, but did not specifically object to the use of a stun belt. This argument, if advanced, should be rejected.

Given Bell's emotional outburst and the melee it caused, defense counsel most likely perceived it would be futile to object to the use of any restraints at all. (See, *People v. Medina* (1990) 51 Cal.3d 870, 897-898.) Under the circumstances, it is abundantly clear from the record that counsel's main objective was to insure that *whatever* physical restraints were used would be *invisible* to the jury. Counsel *objected* to the use of chains, because they could not be made invisible. Counsel *did not object* when deputies proposed using a stun belt, or alternatively, a Taser, *because deputies had offered assurances neither device would be visible to the jury.* If counsel had anticipated that the stun belt *would* be visible to the jury, counsel would almost certainly have objected, just as he objected when the deputies proposed using visible chains. (XV RT 3081-3083.)

An objection is sufficient if it fairly appraises the trial court of the issue it is being called upon to decide. (*People v. Scott*, *supra*, 21 Cal.3d at p. 290.) Here, the trial court would have known that the defense had an objection to using *visible* restraints. Defense counsel's objection to visible restraints should be deemed adequate to preserve the issue.

Furthermore, it would have been futile to object once it became apparent that the handcuffs and stun belt were visible. (*People v. Hill, supra*, 17 Cal.4$^{th}$ at p. 820.) The judge had made it perfectly clear that he would order whatever restraints deputies wanted, including chains, even though deputies made it clear that chains could *not* be concealed. Deputies made the decision to use chains and a stun belt.

Likewise, trial counsel's failure to articulate specific objections to the use of a stun belt, based on concerns about the adverse effects of the stun belt on Bell's ability to consult with counsel, adverse effects on Bell's demeanor during trial, and/or possible medical risks associated with these devices, should not be relied upon as a reason not to address the merits. Bell's trial was held in 1999. Trial counsel could not have anticipated this

Court's decision in *People v. Mar, supra*, 28 Cal.4th 1201, which discussed problems unique to the use of stun belts, and imposed greater burdens on the trial courts to justify their use. (*People v. Black* (2007) 41 Cal.4th 799, 810-812.)

There is yet another reason to address the argument on the merits, despite counsel's failure to specifically object to the visibility of the stun belt. Once jurors had the opportunity to see the stun belt and handcuffs, the harm was irreparable. Jurors would have taken the court's decision to employ multiple physical restraints as evidence the court believed Bell was very dangerous. (*Deck v. Missouri, supra*, 544 U.S. 622; *People v. Duran, supra*, 16 Cal.3d 282.)

In any event, this Court retains inherent discretion to overlook a an attorney's failure to object, and will often do so where the error implicates fundamental constitutional rights (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6), or where addressing the merits will avoid a charge of ineffective assistance of counsel based on counsel's failure to object. (*People v. Cox* (1991) 53 Cal.3d 618, 682.) The issue should therefore be addressed on the merits in this case.

### D. The Trial Court Prejudicially Erred By Instructing Jurors To Disregard A Guilt Phase Instruction Not To Consider Courtroom Security Measures, And By Failing To Instruct Jurors That Increases In Courtroom Security, Including The Use Of Physical Restraints, Should Have No Bearing On The Penalty Decision.

When *visible* restraints of any kind are imposed on a criminal defendant, the trial court has a *sua sponte* duty to instruct the jury that the restraints should have no bearing on the determination of the defendant's guilt. (*People v. Duran, supra,* 16 Cal.3d at pp. 291-291; *People v. Jacla, supra,* 77 Cal.App.3d at p. 889.) Admonishing the jury is particularly

important when restraints are visible to the jury at the *penalty* phase of a capital trial. (See, *Deck v. Missouri*, *supra*, 544 U.S. at p. 633; see, e.g., *Elledge v. Dugger, supra,* 823 F.2d at p. 1452 [error that the trial court gave no cautionary instruction to disregard shackling at sentencing hearing]; *People v. Virgil* (2011) 51 Cal.4th 1210, 1271.) Conversely, when restraints are *concealed* from the jury's view, a cautionary instruction "should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided." (*People v. Duran, supra*, 16 Cal.4th at p. 292.)

Here, deputies' efforts at concealment failed, and the restraints were visible to the jury. Yet no cautionary jury instruction was given. To the contrary, the jury was effectively told that increased courtroom security measures, including the court's use of a stun belt and chains, *could* be discussed and considered in their determination of penalty. To wit, for the guilt phase of the trial, jurors were instructed:

> In your deliberations, the fact that there was increased courtroom security during the trial is not to be discussed or considered by you. There is no connotation of guilt of any kind because the courtroom was subjected to these security measures. Such security procedures are normal and should have no bearing on your determination of the defendant's guilt or innocence.

(IV CT 976.)

This instruction was not repeated for the penalty phase deliberations. The jury was directed to ignore the instructions not repeated during the guilt phase of the trial. (4 CT 1120; XVIII RT 3679, 3689.) It must be presumed that the jury obeyed this instruction. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1219.) The failure to give a cautionary admonition is constitutional error, subject to review according to the *Chapman* standard.

(*Deck v. Missouri, supra*, at p. 635; quoting *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Howard, supra,* 51 Cal.4th at p. 30.)

**E. The Instructional Error Was Not Invited.**

Respondent will no doubt argue that defense counsel waived the issue because, upon noticing the restraints were visible, the trial court inquired of counsel whether he should tell the jurors not to consider the restraints placed on Bell. Defense counsel responded, no; he did not want jurors attention "drawn to it right now." (XVI RT 3294.) This occurred just prior to the commencement of the testimony of a defense expert witness, Dr. Gretchen White. (XVI RT 3296.)

If counsel made any tactical choice, it was to *not* remind jurors of their fears about personal safety, and the presence of Bell's physical restraints, "right now" – meaning just before the testimony of a key defense witness on the issue of penalty. The record does not support a finding that trial counsel expressed a tactical reason for *omitting from the penalty phase instructions*, an instruction directing the jury not to consider increased courtroom security, or Bell's physical restraints, in deciding penalty. When the court and counsel discussed the instruction that would tell jurors to disregard instructions given in the guilt phase of the trial, the subject of Bell's restraints and the courtroom security instruction never came up. (XIV RT 2871; XVIII RT 3641.) Hence, the error was not invited. (*People v. McKinnon* (2011) 52 Cal.4th 610, 675-679; *People v. Graham* (1969) 71 Cal.2d 303, 321.)

The error was not just the omission of a required instruction. The trial court affirmatively misinstructed the jury. For the penalty phase, the trial court had an affirmative duty to tell jurors which of the instructions given during the *guilt* phase would continue to apply. (*People v. Romero*

(2008) 44 Cal.4th 386, 424; *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26.) The court discharged this duty in the following manner. The court advised jurors:

> You must accept and follow the law that I state to you; disregard all other instructions given to you in other phases of the trial.
>
> Now, some of those instructions that I have given to you I am going to repeat because they do continue to apply under these circumstances, so we want to repeat those to you.

(XVIII RT 3678-3679.)

The court then read the instructions that jurors were to apply to determine penalty. Twice more during the penalty phase instructions, the court reminded jurors to "disregard the instructions that I have previously given to you in the first phase of the trial..." unless repeated. (XVIII RT 3689, 3691.) There was no re-instruction given regarding court security, and no instruction advising the jury *not* to consider for any reason the fact that Bell was physically restrained. (See, former CALCRIM No. 204 [Defendant Physically Restrained]; see also CALJIC No. 1.04 [Defendant Physically Restrained].)

Even if a trial court has no *sua sponte* duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) In the case at bench, the trial court not only failed to discharge its *sua sponte* duty to instruct the jury not to consider Bell's physical restraints; the court affirmatively misled jurors into believing that increased courtroom security – which would obviously have included the fact that Bell was chained and wearing a stun belt – was a factor that could be weighed in the determination of penalty. (*People v. Stewart* (1976) 16 Cal.3d 133, 140-142.) Counsel did not "invite" this error.

### F. The Unnecessary Use Of Visible Restraints, Combined With The Lack Of An Instruction Advising Jurors Not To Consider Courtroom Security, Including The Use Of Physical Restraints For Any Purpose, Was Prejudicial.

The visible stun belt and handcuffs would inevitably have implied to the jury that the judge considered Bell extremely dangerous to the community, a factor always relevant when a jury decides between life and death. (*Deck v. Missouri, supra*, 544 U.S. at p. 633.) This would have magnified the prejudice already caused when, upon hearing the screaming and yelling coming from the courtroom, jurors pushed and shoved their way into the jury room, believing Bell might cause them harm. The circumstances undermined "the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determine[d]..." whether Bell should die. (*Deck, supra.*)

The prejudicial effect of using of multiple, visible physical restraints, was compounded by the instructional error. The instruction to disregard guilt phase instructions would have misled jurors to believe that, during the penalty phase, in contrast to the guilt phase, jurors *could* consider increased courtroom security measures, including the use of a stun belt and chains, as factors to be weighed in the determination of penalty. Absent a contrary instruction, telling jurors they must *not* consider the fact that physical restraints had been placed on Bell for any purpose, jurors almost certainly viewed the use of restraints as evidence of Bell's dangerousness, weighing in favor of death. (*Deck, supra.*)

Additionally, being chained and forced to submit to a stun gun interfered with Bell's ability to assist his counsel in at least one readily identifiable respect. Bell missed several days of penalty phase testimony because he could not endure the pain and discomfort of being chained to a wheelchair, immediately after sustaining injuries in the scuffle. (*Riggins v.*

*Nevada, supra,* 504 U.S. 127; *Daniels v. Woodford, supra*, 428 F.3d at p. 1197.) Of course, it is impossible to know with any degree of precision what other effects the use of a stun belt and chains had on Bell's demeanor, and ability to consult with counsel, while he was present in court. (See, *People v. Mar, supra*, 28 Cal.4th at p.. 1224.)

Because the errors substantially interfered with Bell's fundamental constitutional rights – the presumption of innocence as to allegations of aggravating prior criminal conduct, the right to a fair factfinding process, the right to counsel, and the right to a reliable adjudication of penalty, the burden is on respondent to prove that the shackling errors were harmless beyond a reasonable doubt. (*Deck v. Missouri, supra*, 544 U.S. at p. 635; *People v. Howard, supra*, 51 Cal.4th at p. 30.) This is a burden that cannot be discharged.

As Bell has previously pointed out, defense evidence in mitigation was substantial. Experts testified that Bell suffered from low birth weight, and that he was separated from his mother with little human contact as a newborn – events beyond his control which predisposed him to suffer from low intellectual functioning, developmental and learning disabilities, dyslexia, attention deficit disorder, impaired executive and social functioning, hyperactivity, and a host of other cognitive, emotional and behavior problems. (XVI RT 3124-3145, 3157- 3169.) Experts opined that Bell's uncontrollable outburst in the courtroom, which precipitated the need for restraints, was symptomatic of his impaired brain function. (XVI RT 3168-3169.) The court's use of visible restraints, and the absence of instructions telling jurors *not* to consider the use of restraints for any purpose, was almost certainly a "'thumb [on] death's side of the scale.'" (*Deck v. Missouri, supra*, 544 U.S. at p. 633; internal citation omitted.) Accordingly, the death judgment should be reversed.

## XVIII

## BELL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S HANDLING OF ISSUES ARISING CONSEQUENT TO THE OUTBURST IN THE COURTROOM.[41]

### A. The Law Governing Ineffective Assistance Of Counsel Claims On Appeal.

The right to the assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*Strickland v. Washington, supra,* 466 U.S. at p. 685; *People v. Pope* (1979) 23 Cal.3d 412, 422.) The right to counsel "is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." (*Strickland* at p. 685.) The right to effective counsel applies at all critical stages of a criminal proceeding, including those portions of a criminal proceeding that may affect the severity of a defendant's sentence. (*Lafler v. Cooper* (2012) 132 S.Ct. 1376, 1386; *Missouri v. Frye* (2012) 132 S.Ct. 1399, 1405 [182 L.Ed.2d 379].) Nowhere is this right to effective counsel more important than in the context of a capital case. (*Spain v. Podrebarac* (U.S. Dist. Kan. 1995) 903 F. Supp. 38, 39.)

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[41] Bell has different counsel for appeal and habeas corpus. It is presumed that habeas corpus counsel will at some point file a petition for a writ of habeas corpus raising claims of effective assistance of counsel on an expanded factual record that may include evidence outside the record on appeal. Appellate counsel presumes that the rules generally prohibiting raising an issue on habeas corpus that was, or could have been raised on appeal, will not bar raising Bell's ineffective assistance of counsel claims on habeas corpus, based on a more fully developed factual record. (*People v. Tello* (1997) 15 Cal.4th 264, 267.)

To establish the denial of effective assistance of counsel at trial, a defendant must prove (1) that trial counsel's conduct of the case fell below objective standards of reasonableness under prevailing professional norms, and (2) that it is reasonably probable that a determination more favorable to the defendant would have resulted in the absence of counsel's failings. (*Strickland v. Washington, supra, at p. 694*; *People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

> Ineffective- assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim.

(*Martinez v. Ryan* (2012) 132 S.Ct. 1309, 1318 [182 L.Ed.2d 272].) For this reason, in California, if the record on appeal fails to shed light on why a defendant's attorney failed to act in the manner alleged, an appellate claim of ineffective assistance of counsel will generally be rejected "unless counsel was asked for an explanation and failed to provide one, or *unless there simply could be no satisfactory explanation.*" (*People v. Pope, supra,* at p. 426; emphasis added; *People v. Ledesma, supra*, at p. 746.)

In rare cases, reviewing courts "will reverse convictions on the ground of inadequate counsel…if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581; see also, *People v. Plager* (1987) 196 Cal.App.3d 1537, 1543-1544 [defense attorney, due to his ignorance of the law, advised his client to admit several prior "serious felony" conviction enhancements that did not qualify as "serious felonies"]; *People v. Borba* (1980) 110 Cal.App.3d 989, 994-998 [counsel challenged the client's illegally obtained confession for the first time in a post-trial motion]; *People v. Rosales* (1984) 153 Cal.App.3d 353, 361 [counsel was ignorant of the case law that would have supported a

motion to suppress].) This is such a case. (*People v. Diggs* (1986) 177 Cal.App.3d 958, 968-971.)

### B. Bell Was Denied The Effective Assistance Of Counsel By Counsel's Failure To Object To The Use of Physical Restraints, Including A Stun Belt, That Were Visible To The Jury.

Since 1976, the law has been well settled; a defendant may not be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of "manifest need" for such restraints. (*People v. Duran, supra,* 16 Cal.3d at pp. 290-291.) The federal courts have disapproved of the routine shackling of defendants without justification since the 19th century. (*Deck v. Missouri, supra,* 544 U.S. at p. 629.) This is because the use of visible shackles or restraints "almost inevitably implies to a jury... that court authorities consider the offender a danger to the community," and "inevitably undermines the jury's ability to weigh accurately all relevant considerations...when determining whether a defendant deserves death." (*Deck v. Missouri, supra,* at p. 633.)

Prior to 1999, the year of Bell's penalty trial, the uniquely debilitating and detrimental effects of stun belts, compared with other kinds of restraints, were well documented. (See authorities cited in *People v. Mar, supra,* 28 Cal.4th at p. 1227, including Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions* (1998) 30 St. Mary's L.J. 239; Cusac, *supra,* The Progressive, p. 20; Schulz, *supra,* N.Y. Review of Books, p. 51.) As was recognized by this Court in *People v. Mar, supra,* 28 Cal.4th 1201, a stun belt may impair a defendant's ability to concentrate on the events of the trial, thus interfering with his or her ability to assist counsel, and may cause serious

medical risks for people suffering from heart problems or other medical conditions. (*Mar* at p. 1204.)

After Bell's outburst, counsel expressed resignation about the use of "some kind of restraint." When courtroom security personnel suggested as possible options, a Taser, a stun belt and and/or chains, counsel objected to chains on the basis that the chains could not be made completely invisible. (XV RT 3080-3081.) During the ensuing discussion about security measures, deputies assured counsel that, if used, a stun belt would not be visible. (XV RT 3085.) When Bell appeared in court, he was chained to his wheelchair and wearing a stun belt. (XVI RT 3104.) The restraints were visible enough that the trial court inquired of counsel whether something should be said to the jury. (XVI RT 3290-3295.) At this point, counsel did not object, but rather merely commented he could not see any way to keep the jury from seeing the restraints. (XVI RT 3294.)

Counsel's handling of the situation bespeaks an ignorance of the case law governing a trial court's decision to employ visible physical restraints on a defendant in a criminal trial. (See, *In re Edward S.* (2009) 173 Cal.App.4$^{th}$ 387, 407 [counsel sought an inadequate continuance based on a mistake of law].) The trial judge was obligated to use the least restrictive restraint mechanisms available under the circumstances; if restraints less onerous yet no less beneficial were available, the judge was obligated to opt for them. (*Spain v. Rushen, supra*, 883 F.2d at p. 728.) Courtroom security personnel had suggested that Bell could be secured to his chair and a deputy could be posted behind him with an inconspicuous Taser, with equally beneficial effects. From the conversation in the courtroom, deputies were obviously prepared to employ alternatives to a stun belt if personnel trained in the use of the stun belt were not available. The choice of a stun belt over a Taser was not due to any "manifest need" to use both a stun belt and chains.

When Bell appeared in court in visible chains and a visible stun belt, there was no conceivable tactical reason for trial counsel *not* to object to the use of multiple visible restraints, including the stun belt *and* chains, when deputies themselves had suggested that less onerous, and less visible, and equally effective options were available. (*Walker v. Martel* (N. D. Ca. 2011) 803 F.Supp.2d 1032, 1046 ["it cannot be argued that it was reasonable for petitioner's counsel not to object to petitioner's shackling"].) Instead of arguing on Bell's behalf that the least onerous combination of restraints would suffice, counsel deferred to the judge, and the judge improperly deferred to his courtroom security staff.

Counsel's inaction was plainly prejudicial. Counsel had been misled about the visibility of stun belt. When it became apparent the stun belt was visible, counsel should have objected, and moved the court to order less onerous, less visible, options described by courtroom deputies, such as the use of a Taser. It is not a foregone conclusion that the court would have denied the request, if made. Indeed, *the court* expressed concern to counsel about the visibility of the restraints to the jury. Although the court had expressed worry about safety in the courtroom, given the provocative circumstances leading to Bell's emotional outburst – i.e., watching his distraught mother break down and cry – neither counsel nor the court appeared to believe that a similar outburst would necessarily occur again. The judge even referred to Bell as "stoic," except when his mother testified. (XV RT 3080.) In the face of a proper legal objection, the restraints could have been modified.

The use of a less onerous alternative would have benefited Bell in several ways. The use of visible restraints in the courtroom communicates to observers the court's perception of a defendant's dangerousness, and/or lack of willingness to refrain from disrupting the proceedings. Removal of visible restraints would have signaled the opposite – that Bell was willing

to refrain from disrupting proceedings and no longer a danger to the public. Additionally, the absence of a stun belt would surely have removed well-recognized impediments to Bell's ability to concentrate on the trial and assist his counsel.

### C. Bell Was Denied The Effective Assistance Of Counsel By Counsel's Failure To Request An Admonition To The Jury That Bell Was Excused From Penalty Trial Proceedings For Good Cause.

Although, the trial court admonished the jury to disregard Bell's absence in deciding the case (see, *People v. Jackson, supra,* 13 Cal.4th at p. 1212), it is unlikely jurors could have abided by such an instruction. Jurors would have assumed, to the detriment of the penalty phase defense that Bell was missing from the courtroom because he remained a danger, or was threatening to further disrupt the proceedings if forced to appear. (See, *Blackwell v. Brewer, supra,* 562 F.2d at p. 600.) *Commonwealth v. Kane, supra,* 472 N.E.2d at p. 1348; *State v. Garcia-Contreras, supra,,* 953 P.2d at p. 541.) This impression would have been reinforced when Bell finally returned to court restrained by a stun belt and chains.

Counsel's failure to request remedial instructions fell below objective standards of reasonableness. Under the circumstances, there could be no conceivable reason for Bell's attorney not to ask the court to explain to the jury that Bell was voluntarily absent from the courtroom *for good cause*. (*People v. Jackson, supra,* 13 Cal.4th at p. 1212.)

Counsel's failing cannot be dismissed as nonprejudicial, particularly in light of the cumulative effect of the other circumstances and instructions given. When Bell finally returned to court, he was wearing *visible* physical restraints. Even worse, the jury was told to *ignore* the instruction given in the guilt phase, *not* to consider the increased courtroom security in

determining penalty. From this, jurors would have concluded that security measures, such as the use of chains and a stun belt, could be considered as aggravating evidence of Bell's dangerous. The lack of an explanation for Bell's absence would have increased jurors' perception of Bell's dangerousness, and weighed heavily on death's side of the scales. (*Deck v. Missouri, supra*, 544 U.S. at p. 633.)

### D. Bell Was Denied The Effective Assistance Of Counsel By Counsel's Failure To Object To The Use Of Bell's Outburst In The Courtroom As Aggravating Evidence At The Penalty Phase Trial.

Bell's courtroom conduct was utilized by the prosecution as aggravating evidence of "criminal activity...which involved the use or attempted use of force or violence." (§ 190.3, subd. (b); IV CT 1146; XVIII RT 3741, 3745-3746.) To wit, the jury was asked to find that Bell's outburst constituted the crime or crimes of assault with force likely to cause great bodily injury, assault, battery, or battery on a peace officer. (IV CT 1159, 1161, 1183, 1190-1192.) The record reflects no objection by trial counsel to the prosecutor's use of Bell's outburst in the courtroom as aggravating evidence. At most, the record suggests that counsel would have "pitch[ed] a fit" – would have objected – had the People called more than two courtroom deputies as witnesses at the penalty phase trial. (XVII RT 3448.) Under the circumstances, defense counsel's failure to object was incomprehensible and incompetent by *Strickland* standards.

Prior to the testimony of Deputies Bentley and Ridenhour, the trial court denied Bell's motion for a mistrial based the jury's frightening exposure to, and later discussion of, Bell's outburst. The court denied the motion, knowing that prosecutors would introduce testimony about the

incident if the penalty trial went forward with the same jury. (XV RT 3087.)

Counsel knew or should have known that the denial of a mistrial meant that the *same* jurors who felt personally victimized by Bell's outburst would be allowed to sit in judgment on whether Bell's outburst should be weighed as aggravating evidence in favor of a death judgment. Counsel must have realized that the jury would be incapable of deciding the case solely on the evidence before it, because any assessment of the eyewitness accounts of Deputies Bentley and Ridenour would be colored by each individual juror's personal, frightening experience of incident. (*Smith v. Phillips, supra,* 455 U.S. at p. 217.)

Under such circumstances, it was objectively unreasonable for trial counsel *not* to object to the use of the incident as aggravating evidence at Bell's penalty phase trial. There could be no conceivable tactical reason not to object. All twelve jurors were, after all, percipient witnesses to an alleged aggravating act of criminal conduct. Thus, as to the incident in the courtroom, the entire jury lacked "the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror." (*Dyer v. Calderon, supra,* 151 F.3d at p. 982.)

### E. Counsel's Omissions Were Individually And Cumulatively Prejudicial.

After the incident in the courtroom, when Bell was absent for testimonial proceedings, counsel did not take reasonable steps to inform the jury that Bell's absence was voluntary, and for essentially medical reasons, not because he was threatening to be disruptive. When Bell appeared for his trial, he was visibly restrained, and counsel failed to lodge any objection, or request remedial action. As a result of counsel's inaction in these first two

instances, the jury would certainly have formed the indelible impression that the court perceived Bell to be very dangerous.

After this, the jury heard evidence about the incident, which included testimony by uniformed deputies asserting that Bell nearly reached the spectator section of the courtroom, and that deputies sustained injuries in their efforts to restrain him. The prosecutor argued that this evidence of Bell's so-called "escalating violence" was a reason to kill him. (XVIII RT 3746.) The jury instructions tacitly permitted jurors' to weigh their own traumatic experience of the incident in determining penalty. Jurors' own visceral fear of Bell – particularly when combined with the perception that court deemed Bell too dangerous to attend proceedings without chains and a stun belt – would have given the prosecution's argument for death much greater traction. (*People v. Hill, supra*, 17 Cal.4th at p. 847 [discussing cumulative error, including use of visible restraints without manifest need].)

Because Bell's punishment was selected by jurors whose judgment depended more on the jurors' own emotional sensitivities than actual evidence regarding the aggravating features of Bell's conduct in the courtroom, the reliability of the death sentence was irremediably compromised in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. (*Saffle v. Parks, supra,* 494 U.S. at p. 493; *People v. Page, supra,* 44 Cal.4th at p. 42.) Furthermore, counsel's omissions were cumulatively so prejudicial as to undermine confidence in the outcome of the penalty phase trial. (*In re Edward S.* (2009) 173 Cal.App.4th 387, 418; *Strickland v. Washington, supra*, at pp. 693-694.) This caused prejudice within the meaning of *Strickland.*

## ARGUMENT SECTION 7

## ERRORS RELATING TO THE ADMISSION OF EVIDENCE DURING THE PENALTY PHASE

## XIX

## THE TRIAL COURT ABUSED ITS DISCRETION AND EVISCERATED BELL'S RIGHT TO A FAIR PENALTY TRIAL AND A RELIABLE DEATH DETERMINATION BY ALLOWING THE PROSECUTOR TO PLAY A VIDEOTAPE OF THE VICTIM'S WEDDING CEREMONY AND CELEBRATION.

### A. The Facts:

Bell filed several motions to exclude and/or limit victim impact evidence, or alternatively, to conduct hearings outside the presence of the jury to determine whether any victim impact evidence proffered by the prosecution should be admitted. (II CT 569-586; III CT 711-721, 765-769, 788-789.)

At hearings prior to trial, the prosecuting attorneys indicated that they wanted to present victim impact testimony by up to a half-dozen of the victim's family members (2 RT 219) and five minutes of excerpts from a videotape of the day of the victim's wedding, celebrated a month prior to his death. (2 RT 81, 227.) Initially, the trial court questioned whether any of the videotape, or more than a few minutes of the videotape, should be admitted, given that it was "designed to play on the emotions of people...." (2 RT 82-83.)

The trial court requested a list of the witnesses the People intended to call as victim impact evidence with a brief summary of the substance of each witness's testimony, and deferred ruling on the issue to a later date. (2 RT 221-222.) At an Evidence Code section 402 hearing, the court watched portions of the wedding videotape that the prosecutors proposed to play for the jury. (2 RT 227-237.) The court tentatively ruled that the videotape

would be admitted, except for a segment in which the bride and groom were shown receiving communion in a Catholic church. (2 RT 227-237.) The court found that the law required the court to give the prosecution some leeway to introduce victim impact evidence. (2 RT 285.) Further arguments and rulings on the testimony of victim impact witnesses were reserved. (2 RT 289-290.)

Before commencement of jury selection, defense counsel filed supplemental points and authorities regarding victim impact evidence (III CT 836-840), and, on February 25, 1999, reminded the court that there had been no final rulings. (II RT 258.) The trial court indicated it was disinclined to make specific rulings excluding particular argument in advance of the penalty trial, because the prosecution had a right "to put on evidence both as to the character of the victim and the impact on his friends and family and even from an emotional standpoint." (II RT 285.) The court further indicated it would not make orders telling the prosecutor what she could argue in advance. (II RT 290-291.)

During the penalty phase trial, the prosecution presented testimony by three victim impact witnesses: Isaac Francis Dawod, the father of the victim; Margaret Francis, the sister of the victim; and Laura Belham, a cousin of the victim's wife. (XIV RT 2755-2761.) A four-minute excerpt of the victim's wedding videotape was played for the jury. (XIV 2764; People's Exhibit 40.)

The jury was instructed in relevant part:

> Evidence in the form of testimony of the victim's family and friends and the playing of the wedding videotape has been introduced for the purpose of showing the specific harm caused by the defendant's crime.
>
> Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether or not the 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.

(XVIII RT 3694.)

Thereafter, in closing argument, the prosecutor talked at some length about the "incomprehensible loss" caused by Bell to the victim's family members, and the fact that the victim had never even seen a single minute of the wedding videotape that was played for the jury. (XVIII RT 3740-3741.)

**B. The Trial Court Erred And Abused Its Discretion By Admitting As Victim Impact Evidence The Videotape Of The Victim's Wedding; Admission Of The Evidence Violated Due Process, Denied Bell A Fundamentally Fair Trial, And Deprived The Death Judgment Of Reliability In Violation Of The Eighth Amendment.**

In *Payne v. Tennessee* (1991) 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597], the United States Supreme Court famously reconsidered its holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d440, 107 S.Ct. 2529] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [104 L. Ed.2d 876, 109 S.Ct. 2207], that the Eighth Amendment prohibited the admission of victim impact evidence during the penalty phase of a capital trial. In *Payne, supra*, the defendant was convicted of killing his girlfriend, and her two-year old daughter, and brutally stabbing the girlfriend's surviving three-year-old son. (*Payne*, at p. 811.) The prosecutor offered the testimony of the surviving son's grandmother regarding how the lone survivor of the attacks had been affected the murders of his mother and sister. (*Payne*, at pp. 814-815.) In this context, the high court concluded that the Eighth Amendment "erects no per se bar" to the use of victim impact evidence, and prosecutorial argument on that subject. (*Payne*, at p. 827.) In the wake of *Payne v. Tennessee, supra*, this Court has often rejected constitutional challenges to the use of victim impact evidence.

California law, as it has evolved via this Court's decisions, can be summarized in the following manner.

Factor (a) of section 190.2 provides for consideration of "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding." The circumstances of the crime under this factor "extend to that which surrounds the crime materially, morally, or logically." (*People v. Hamilton* (2009) 45 Cal.4th 863, 926.) "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is...admissible...under section 190.3, factor (a)." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056.) Victim impact evidence is relevant and admissible as a circumstance of the crime" so long as it is not 'so unduly prejudicial' that it renders the trial 'fundamentally unfair.' [Citations]" (*People v. Russell* (2010) 50 Cal.4th 1228, 1264.)

Using multimedia as a vehicle for victim impact evidence is not without controversy, however. This Court has held that courts "must exercise great caution" in permitting the prosecution to present victim impact evidence in the form of videotapes, noting that "if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim, or listening to the victim's bereaved parents." (*People v. Prince* (2007) 40 Cal.4th 1179, 1289; see also, *People v. Vines* (2011) 51 Cal.4th 830, 887.) In the past, this Court has generally cautiously condoned the use of videotapes depicting living victims, and rejected claims that videotape evidence was so unduly prejudicial as to render the defendant's trial fundamentally unfair. Bell respectfully submits that the Court should revisit and reconsider the issue in the case at bench.

In Bell's case, the videotape at issue depicted the victim and his widowed wife getting married. It is difficult to conceive of evidence more emotionally evocative than a home movie of a deceased victim's marriage ceremony and celebration, filmed shortly before the victim's death. Additionally, however, videotape of the victim's marriage ceremony and celebration was juxtaposed with another videotape with an audio track featuring sounds of the victim's agonizing death. The latter videotape was played repeatedly during the guilt phase and again during penalty phase closing argument. In the presence of the victim's family members who were seated in the courtroom,[42] jurors first witnessed the victim's wedding and then victim's death. The combination of both videotapes invited a purely irrational response from the jury that would have made it impossible for jurors to follow the instructions of the court to "rationally and soberly" determine the issue of penalty. (XVIII RT 3694; see, *People v. Jones* (2012) 54 Cal.4th 1, 71.)

In *People v. Kelly* (2007) 42 Cal.4th 763 [hereafter, *Kelly*], this Court rejected another defendant's challenge to the use of a videotaped presentation portraying the victim's life. The videotape, in this Court's words, "helped the jury to see that the defendant took away the victim's ability to enjoy her favorite activities, to contribute to the unique framework of her family – she was of Native American descent and adopted into a Caucasian home – and to fulfill the promise to society that

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[42] The victim's family members, excepting those few who testified, decided to watch the trial, and not testify as victim impact witnesses, after the trial court granted a defense motion to exclude from the courtroom family members who were going to be called as victim impact witnesses at the penalty phase trial. (III CT 860-872; VIII RT 1747-1748; IX 1761-1768, 1830, 1892 [defense counsel approaches bench to ask the court to suggest that family members should leave the courtroom during the playing of the robbery videotape]; XV RT 2679-2681 [court refuses to reconsider order excluding testifying family members].)

someone with such a stable and loving background can bring." (*Id.*, at p. 797.)

The United States Supreme Court denied certiorari in the *Kelly* case, as well as in a companion case, *People v. Zamudio* (2008) 43 Cal.4th 327, but not without dissension. (See, *Kelly v. California and Zamudio v. California* (2008) 555 U.S. 1020 [172 L.Ed.2d 445, 129 S.Ct. 564].) Justices Stevens and Souter wrote separate opinions discussing the reasons why they would have granted the certiorari petitions.

Justice Souter wrote:

> In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, "unduly prejudicial" forms. Following *Payne's* model, lower courts throughout the country have largely failed to place clear limits on the scope, quantity, or kind of victim impact evidence capital juries are permitted to consider. See generally Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 Ariz. L. Rev. 143 (1999). Not only have courts allowed capital sentencing juries to hear brief oral or written testimony from close family members regarding victims and the direct impact of their deaths; they have also allowed testimony from friends, neighbors, and co-workers in the form of poems, photographs, hand-crafted items, and -- as occurred in these cases -- multimedia video presentations. See Blume, Ten Years of Payne: Victim Impact Evidence in Capital Cases, 88 Cornell L. Rev. 257, 271-272 (2003) (collecting cases).
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> As one Federal District Judge put it, "I cannot help but wonder if *Payne*...would have been decided in the same way if the Supreme Court Justices in the majority had ever sat as trial judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony [in a codefendant's case] and the juror's sobbing

> during the victim impact testimony still rings in my ears. This is true even though the federal prosecutors in [the case] used admirable restraint in terms of the scope, amount, and length of victim impact testimony." *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (ND Iowa 2005).
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> *** These videos are a far cry from the written victim impact evidence at issue in *Booth* and the brief oral testimony condoned in *Payne*. In their form, length, and scope, they vastly exceed the "quick glimpse" the Court's majority contemplated when it overruled *Booth* in 1991. At the very least, the petitions now before us invite the Court to apply the standard announced in *Payne*, and to provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence. Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use.

(*United States v. Kelly, supra*, at pp. 1024-1026.)

Justice Breyer, dissenting, agreed with Justice Souter. Justice Breyer pointed out that the

> film's personal, and artistic attributes themselves create the legal problem. They render the film's purely emotional impact strong, perhaps unusually so. The impact is driven in part by the music, the mother's voiceover, and the use of scenes without victim or family (for example, the film concludes with a clip of wild horses running free). Those aspects of the film tell the jury little or nothing about the crime's "circumstances."

(*United States v. Kelly, supra*, at pp. 1026-1027.) Justice Breyer opined that certiorari should be granted to "elucidate constitutional guidelines" governing the scope of permissible victim impact evidence.
(*Id.*, at p. 1027.)

This Court should heed the advice of Justices Souter and Breyer, and revisit the need for constitutional limitations on victim impact evidence in California's courts. This Court should place clear limits on the use of

victim impact evidence that vastly exceeds the "'quick glimpse'" of the victim's life contemplated by the United States Supreme Court when in decided *Payne v. Tennessee*. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822.)

In this case, the videotape was cumulative of other, less emotionally provocative, penalty phase evidence. The fact that the victim had married only a week prior to his death was established through the testimony of a weeping bridesmaid, Laura Belham. (XIV RT 2761.) The jury knew *before* the videotape was played that the taking of the victim's life had widowed his young bride. The playing of a wedding videotape montage added nothing new to the prosecutor's proof of the "circumstances of the crime." (§ 190.2, subd. (a).) Even the trial judge recognized that the playing of a videotape of the victim's wedding had no real purpose but to "play on the emotions of people...." (2 RT 82-83.)

More importantly, as Bell has previously pointed out, this poignant home movie of the victim's wedding *was not the only film viewed by the jury*. Jurors also repeatedly viewed, and heard, the surveillance videotape of the robbery featuring the gruesome sounds of the newly wed victim dying. Notwithstanding the court's instructions to the contrary, the evidence would have diverted the jury's attention from its proper role and invited an irrational, purely subjective response. (*People v. Edwards, supra,* 54 Cal.3d at p. 836; see also, *Salazar v. State* (Tex. Crim. App. 2002) 90 S.w.3d 330, 335-337 ["the punishment phase of a criminal trial is not a memorial service for the victim"].)

It is the responsibility of a trial court to

> secure the defendant's right to due process by viewing the proffered evidence in the context of all the other evidence in the case and deciding if its admission would contribute to or detract from a trial that is fundamentally fair and allows

> jurors to base their decisions on reason and reliable evidence rather than passion.

(*United States v. Sampson* (D.C. Mass. 2004) 335 F. Supp.2d 166, 187.) This is because the more a jury is exposed to the emotional aspects of a victim's death, the less likely it is that the verdict will be a "reasoned moral response" to the question whether a defendant deserves to die, and the greater the risk a defendant will be deprived of due process. (*Conover v. State* (Okla. Crim. App. 1997) 933 P.2d 904, 921; internal citations omitted.) By refusing to exclude the videotape of the victim's marriage, trial court failed to protect Bell's right to a fundamentally fair penalty trial, and to jurors whose decisions would be based on reason rather than passion.

A multiplicity of errors "though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error...." (*People v. Hill, supra*, 17 Cal.4th at p. 844) The synergistic effect of playing videotapes of the victim both marrying *and* dying, moreover, put "a heavy thumb on the prosecutor's side of the scale" in the jury's determination of penalty. (*United States v. Kelly, supra*, at pp. 1024-1026; *Conover, supra*, at pp. 919-921.) This violated due process.

As appellant has oft pointed out, death is "profoundly different from all other penalties." (U.S. Const., 5th, 6th, 8th & 14th Amends; *Eddings v. Oklahoma, supra*, 455 U.S. at p. 110; *Hollywood v. Superior Court, supra*, 43 Cal.4th at p. 728.) The Eighth Amendment imposes a heighted need for reliability in the determination that death is the appropriate punishment. (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 340; *Depew v. Anderson, supra,* 311 F.3d at p. 751; internal citation omitted.) Here, the trial court failed to give due weight to Bell's interest in a fair trial and reliable penalty determination.

The defense offered lay and expert testimony that Bell suffered from debilitating mental impairments, almost from the moment of birth. Exposing the jury to a home movie of a happy bride and groom, followed by video and audio of the groom dying would have made it nearly impossible for the jury to give any weight to Bell's social and mental health history in determining penalty. The evidence invited "a purely irrational response from the jury," (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1056), and thus compromised the accuracy of the jury's factfinding and the reliability of the verdict of death in violation of the Eighth Amendment and Fourteenth Amendments.

## XX

## THE TRIAL COURT ABUSED ITS DISCRETION PURSUANT TO EVIDENCE CODE SECTION 352, AND VIOLATED BELL'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND RELIABLE DEATH DETERMINATION BY ADMITTING EVIDENCE THAT BELL REQUESTED THE PLAYING OF "GANGSTA RAP" MUSIC DURING THE BEATING OF PATRICK CARVER.

### A. The Facts:

An Evidence Code section 402 hearing was held prior to the penalty phase testimony of prosecution witness Lawrence Smith. (XV RT 2910.) During the hearing, Smith testified that, prior to the alleged beating of Patrick Carver, Bell told Joey Black to put on a Dr. Dre tape, which Smith referred to as "gangsta rap" music.[43] (XV RT 2917.) Defense counsel objected to the reference to "gangsta rap" under Evidence Code section 352, and on general relevance grounds. (XV RT 2917.) The court commented that "gangsta rap" was just a phrase describing rap music. The court opined: "Doesn't say they were in a gang, just music." (XV RT 2918.) Defense counsel argued that the witness was not qualified to say whether Dr. Dre qualified as "gangsta rap" music. (XV RT 2918.)

Under questioning by the court, Smith testified that he listened to a lot of rap music, and was familiar with the different types of rap music. Smith stated that "gangsta rap" was "rap singing about gang violence, gang drugs." (XV RT 2918.) The court thereupon opined that, in the penalty phase of a capital trial, it was relevant if "[w]hat they are doing is putting

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[43] Dr. Dre is one of several extremely notorious "gangsta rap" stars who were associated with the independent record label Death Row records in the 1990's. (*Estate of Tucker v. Interscope Records* (9th Cir. 2008) 515 F.3d 1019, 1025.)

on music and then they beat this guy up like they do it in the song." (XV RT 2919.)

Defense counsel argued that the content of the song was hearsay, that there was a "foundational issue," and reiterated his objection under Evidence Code section 352. (XV RT 2919-2920.)

The Evidence Code section 402 hearing continued.

> THE COURT: Wait a minute.
> First of all, who said to put on music?
> THE WITNESS: Mr. Bell. Mr. Bell asked my friend Joey to put on a specific tape by Dr. Dre.
> MS. FLADAGER: Did he do that?
> A. Yes, he did.
> Q. Are you familiar with that music?
> A. Yes, I am.
> Q. Are you familiar with that music being known as gangster rap?
> A. Yes, I am.
> Q. When this music was put on, did the defendant react in any way?
> A. Yes. He also said – after the music was put on, Mr. Bell told Joey, he said, "you know how I get," he says, "when I hear my Dre."

(XV RT 2921.)

Mr. Faulkner objected again that this last statement was not an element of the crime. (XV RT 2921.) The court disagreed, and questioning continued.

The prosecutor asked, "What kind of music is Dr. Dre?" (XV RT 2921.) The witness answered, "Dr. Dre is a gangster rap band. It's a band that sings about violence, riding and low riders, smoking weed." To this, defense counsel objected on hearsay grounds. (XV RT 2921-2922.) The objection was overruled. (XV RT 2922.)

During the penalty phase testimony of Lawrence Smith, the prosecutor asked several questions regarding the music that was playing during the alleged beating of Patrick Carver.

> Q. Okay. Once he got to the house what's the first thing that happened?
> A. The first thing that happened was we confronted him [Carver] about the situation. And Mr. Bell told him to pull out his – his knife that he had in a sheath.
> Q. Okay. Now, had there been any discussion before that happened about music?
> A. Yes.
> Q. Can you tell us what happened?
> A. Mr. Bell had told Mr. Black to put on a tape.

At this point, Mr. Faulkner objected on relevance grounds, but the objection was overruled. (XV RT 2971.) Smith answered: "Mr. Bell had told Mr. Black, my friend Joey Black, to put on a gangsta rap tape named Dr. Dre." (XV RT 2971.) Questioning continued.

> Q. And did he say something specific about Dr. Dre?
> A. Yes.

Mr. Faulkner objected again: "Objection, 352, and relevance. Same objections as before, your Honor. Would this Court consider those as continuing objections?" The Court responded, "All right. Objection overruled." (XV RT 2971.)

The prosecuting attorney asked: "Did he say something in particular about the Dr. Dre? Smith answered, "Yes. He told Mr. Black, he said, 'you know how I get when I hear my Dre.'"
(XV RT 2972.)

### B. On Appeal, Bell May Argue A Violation Of The Eighth and Fourteenth Amendments As Well As Abuse Of Discretion Under Evidence Code Section 352.

Counsel's objections, couched in terms of Evidence Code section 352, were clearly directed at protecting Bell against undue prejudice, and preserving the fundamental fairness of the penalty phase of a capital trial. This Court's own clear precedent provides that, on appeal, a defendant who objects to evidence under Evidence Code section 352 may argue that the trial court's abuse of discretion has the additional consequence of violating due process. (*People v. Partida, supra,* 37 Cal.4th at p. 435.) Furthermore, in order to obviate the necessity to make time-consuming state and federal constitutional objections to protect Bell's rights, before trial, counsel took the step of filing an unopposed motion asking that state law objections be deemed to include both objections under article I, sections 7, 13, 15 and 16, of the California Constitution, and Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution. (III CT 858-859.)

### C. The Trial Court Abused Its Discretion And Violated Due Process By Admitting Evidence Regarding The Playing Of "Gangsta Rap" Music During The Carver Assault.

California courts have long recognized the potentially prejudicial effect of gang membership. As one California Court of Appeal observed:

> It is fair to say that when the word 'gang' is used..., one does not have visions of the characters from the 'Our Little Gang' series. The word gang...connotes opprobrious implications.... [T]he word 'gang' takes on a sinister meaning when it is associated with activities.

(*People v. Perez* (1981) 114 Cal. App. 3d 470, 479.)

Given its highly inflammatory impact, this Court has condemned the introduction of such evidence if it is only tangentially relevant to the

charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) In fact, *in cases not involving gang enhancements* – and there were no gang enhancements in this case -- this Court has held evidence of gang membership should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.)

Generally, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) For example, "[e]vidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) Even if, however, gang-related evidence has some arguable relevance, the trial court must carefully scrutinize it before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams, supra,* 16 Cal.4th at p. 193; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

At issue in Bell's case is not the admission of evidence of Bell's gang *membership*, but rather, evidence that Bell requested the playing of Dr. Dre's "gangsta rap" music as a backdrop to a violent assault. The term "gangster" has many commonly understood meanings, none of them positive. Roget's Thesaurus lists as synonyms for the term "gangster," "gunman, mobster, hoodlum, bandit, racketeer, syndicate member, Mafioso; criminal, crook, felon, thug, ruffian; ...hooligan, tough, hood, ... goon." (Random House Roget's Thesaurus (Fourth Ballantine Books ed. 2001) p. 254.) So-called "gangsta rap" music is commonly associated with gangs, drugs and violence. As one court explained:

> "Gansta rap" has been described as "a form of hip hop music that became the genre's dominant style in the 1990s, a reflection and product of the often violent lifestyle of American inner cities afflicted with poverty and the dangers of drug use and drug dealing.... Prominent gangsta rap groups are described as "presenting tales of gangs and violence," "offering hard-hitting depictions of crack-cocaine related crime," and featuring "a marriage of languid beats and murderous gang mentality."

(*Tucker v. Fischbein* (3rd Cir. 2001) 237 F.3d 275, 280 fn. 1 [internal citation omitted].)

The trial court initially characterized the relevance of the "gangsta rap" music with reference to the possibility that Bell, while beating Carver, was acting out the lyrics to Dr. Dre's music. (XV RT 2919.) But no evidence was offered at the *in limine* hearing concerning the lyrics of Dr. Dre's music, or even which titles were playing. The court suggested that the prosecutor retrieve the Dr. Dre tape, which was in Lawrence Smith's possession, and play it at the *in limine* hearing; Ms. Fladager declined precisely because she did not know what songs were playing during the incident. (XV RT 2921-2922.) The relevance of references to "gangsta rap" music was, at most, extremely attenuated.

It makes no difference that the "gangsta rap" evidence was introduced in the *penalty* phase rather than the guilt phase of a capital trial. Inflammatory evidence of a defendant's association with a gang is equally inadmissible at the sentencing phase of a capital trial unless relevant prove some material fact in issue. (*Dawson v. Delaware* (1992) 503 U.S. 159 [117 L.Ed2d 309, 112 S.Ct. 1093] [hereafter, *Dawson.*) In *Dawson*, the United States Supreme Court held that it was a violation of the First Amendment and the Fourteenth Amendment's Due Process Clause to admit evidence at the penalty phase of a capital case that the defendant belonged to the notorious white supremacist prison gang, the Aryan Brotherhood. The court

opined that, inasmuch as the defendant's gang membership was not related to the capital murder, not relevant to prove any of the aggravating circumstances, and not relevant to rebut evidence of mitigating circumstances, the Aryan Brotherhood evidence had no purpose but to convince the jury that the defendant deserved to die because he harbored "morally reprehensible" beliefs. (*Id.*, at p. 167.)

Similarly, the references in testimony to "gangsta rap" music, and Bell's remark about how he "gets" when he listens to Dr. Dre had no relevance to prove any contested issue at the penalty phase of Bell's trial. According to Smith, Bell and his cohorts beat Patrick Carver because they believed he was a "child molester," or owed rent money, not because of gang enmity. (XV RT 2969.) The incident had absolutely nothing to do with Bell's gang allegiances, fondness for gang culture, or affinity for "gangsta rap" music. In context, the references to "gangsta rap" amounted to nothing more than evidence of bad character, offered to convince the jury that, because Bell listened to "gangsta rap" music, he had a proclivity to engage in the kind of gratuitous violence that is romanticized in it. (See, e.g., *People v. Memory* (2010) 182 Cal.App.4th 835, 848-864 [reversible error to admit evidence of defendant's membership in an outlaw motorcycle club]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 191-195 [reversible error to admit evidence of gang graffiti in the defendant's bedroom].) The evidence additionally created a danger that the jury would improperly weigh Bell's perceived "morally reprehensible" gang values in its life-or-death determination. (*Dawson, supra*, at p. 167.)

The circumstances at bench are a far cry from the facts of other cases in which this Court has condoned the receipt of gang-related evidence where relevant to a contested issue at the penalty phase of a capital trial. For example, in *People v. Champion* (1995) 9 Cal.4th 879, there was evidence suggesting that the charged murders in the case "were committed

by defendants' gang." (*Id.*, at p. 943.) This Court held that the defendant's gang membership was a "circumstance of the crime" that the jury could properly consider. (*Ibid.*) Here, the robbery-murder was not alleged to be gang-related.

In *People v. Gurule* (2002) 28 Cal.4th 557, the prosecution introduced penalty phase evidence of the defendant's prior acts of gang-related violence. (§ 190.3, subd. (b).) This Court held that gang-related evidence was relevant to show the prior violent crimes were "not the product of a personal grievance but of a larger social evil." (*Id.*, at p. 654.) In contrast, the assault on Patrick Carver was not motivated by gang allegiances.

In *People v. Jones* (2003) 30 Cal.4th 1084, the defendant presented evidence of his good character at the penalty phase of his trial. During cross-examination, the prosecutor asked the defendant's character witnesses if they were aware of the defendant's gang membership. (*Id.*, at p. 1121.) This Court held that the prosecutor was entitled to show that the witnesses who had vouched for the defendant's good character were unaware of the "discreditable aspects of defendant's life." (*Ibid.*)

Similarly, in *People v. Williams, supra,* 16 Cal.4th 153, the defendant opened the door to gang-related evidence by testifying that he had terminated his gang membership on a particular date. The prosecutor's evidence that the defendant possessed gang paraphernalia after that date was relevant to prove that the defendant's gang membership had continued. (*Id.*, at p. 249.)

In this case, Bell did not offer evidence of good character, nor did he offer any evidence at the penalty phase to put his affinity for "gangsta rap" at issue. The injection into the penalty trial of the playing of "gangsta rap" was an abuse of discretion and violated Bell's right to a fundamentally fair trial.

### D. The Error Was Prejudicial, And Violated The Eighth And Fourteenth Amendments.

If Bell's only argument were abuse of discretion in violation of Evidence Code section 352, this Court would examine the evidentiary error under the "reasonably probable" standard of *People v. Watson, supra*, 46 Cal.2d 818. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 228-229.) But Bell asserts that the erroneous admission of "gangsta rap" music rendered his penalty trial fundamentally unfair in violation of the Fourteenth Amendment, and its outcome unreliable under the Eighth Amendment. Assuming federal constitutional error occurred, the beyond-a-reasonable-doubt *Chapman* standard applies. (*Albarran, supra*, at p. 229; *Chapman v. California, supra*, 386 U.S. at p. 24.)

In *People v. Albarran, supra*, the Court of Appeal analyzed a defendant's federal constitutional claim that the introduction of gang-related evidence deprived him of a fundamentally fair trial in violation of the Fourteenth Amendment. In *Albarran*, the defendant was convicted of attempted murder, shooting at an inhabited dwelling, and attempted kidnapping for carjacking with gang enhancements. The shooting occurred at a birthday party in Palmdale, in territory claimed by the defendant's gang. At the trial, a gang expert testified that the shooting was gang-related, and intended to benefit the defendant's gang. The defendant presented an alibi defense. There was little evidence but the defendant's gang affiliation, and the gang expert's opinion that the shooting would gain respect for the defendant's gang, to support the prosecutor's assertion that the shooting was gang related.

On the defendant's motion for new trial, the trial court reversed the gang enhancements, but not the convictions of the underlying crimes. On appeal, the defendant argued that the court should have granted the

defendant's motion for new trial as to the underlying charges, and granted his pretrial motion to exclude the gang evidence as irrelevant and unduly prejudicial in the first instance. The Court of Appeal agreed that the admission of gang-related evidence was error. The Court of Appeal opined: "Where, as here, the trial is infused with gang evidence, it is simply not possible to assess the fairness of the trial in its absence...." (*Id.*, at p. 231, fn. 15.) Analyzing prejudice, the court found that admitting gang evidence, including facts concerning threats to police officers and references to the Mexican Mafia, "was arbitrary and fundamentally unfair." (*People v. Albarran, supra*, 149 Cal.App.4th at p. 230.)

In this case, the error occurred in the context of penalty phase factor (b) evidence concerning prior criminal activity involving the use of force or violence. (§ 190.3, subd. (b).) The most damaging account of the assault on Patrick Carver was offered by a witness who was a willing co-participant, and whose credibility was severely impeached by virtue of a prior felony conviction stemming from the near-fatal, brutal beating of a two-year old baby. (XV RT 2968-3015; XVII RT 3407-3414, 3476-3486.) A second participant in the group assault, Joseph Black, testified and described the attack on Carver in significantly less brutal terms. (XVI RT 3370-3394.) The victim, Carver himself, was called as a rebuttal witness. He generally corroborated Smith's testimony regarding some of the details of the assault, but *denied* that the defendant in the courtroom, i.e., Bell, was the individual, Mike Brown, who inflicted the beating. (XVIII RT 3574-3608.) Given the evidence presented, the jurors had the choice to credit either Mr. Black's less egregious account of Bell's conduct, or the more aggravated account offered by Mr. Smith. Given the victim's testimony that Bell was not the perpetrator, some jurors may also have entertained a reasonable doubt concerning Bell's identity as Mike Brown.

Here, as in *People v. Avitia, supra*, 127 Cal.App.4th 185, and *People v. Memory, supra*, 182 Cal.App.4th 835, subjective assessments of witness credibility would have played in key role in the jury's assessment of the significance of the Carver attack as factor (b) evidence. Additionally, there was a wealth of mitigating evidence regarding Bell's impaired mental functioning, possibly consequent to his premature birth and deprivations in early infanthood. Under the circumstances, infusing the inflammatory "gangsta rap" evidence made it substantially more likely jurors would give greater aggravating weight to the Carver assault, and relatively less weight to Bell's mitigating evidence. Given 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,' [Citation]" (*People v. Tully* (2012) 54 Cal. 4th 952, 1068), the error may well have tipped the scales of justice in favor of a death verdict, thus rendering the penalty trial fundamentally unfair and violative of the Due Process Clauses of the Fourteenth Amendment, and article I, sections 7 and 15 of the California Constitution.

Additionally, the Eighth Amendment imposes a heighted need for reliability in the determination that death is the appropriate punishment in a specific case. (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 340.) Introducing irrelevant, inflammatory evidence of Bell's request for "gangsta rape" music during testimony about the Carver assault deprived Bell of his right to heightened reliability in a case in which the ultimate penalty of death is to be exacted. (U.S. Const., Amendment VIII: Cal. Const., Art. I, § 17.)

## ARGUMENT SECTION 8

## ARGUMENTS RELATING TO THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL.

### INTRODUCTION

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because most challenges California's sentencing scheme 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 United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6 [126 S.Ct. 2516, 165 L.Ed.2d 429];[44] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme

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[44] 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." (548 U.S. at p.178.)

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 § 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.

## XXI

## 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.") Voters approved this initiative measure, Proposition 7, on November 7, 1978. At the time of the offense charged against Bell, the statute contained 31 special circumstances[45] purporting to narrow the category of first-degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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[45] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now *thirty-three*. This includes 12 types of felony murder.

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.) Most recently, in *People v. Clark* (2011) 52 Cal.4th 856, this Court so broadly construed the witness-murder special circumstance that virtually any murder committed in the presence of a second victim will qualify for death under section 190.2, subdivision (a)(10). 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 United States 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.

Although this Court has repeatedly declined the invitation to do so in the past (see, e.g., *People v. Lightsey* (2012) 54 Cal.4th 668, 73; *People v. Scott* (2011) 52 Cal.4th 452, 496; *People v. Thomas* (2011) 52 Cal.4th 336, 365), this Court should reconsider 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 United States Constitution and prevailing international law.[46] (See Section E. of this Argument.).

[46] In a habeas petition to be filed after the completion of appellate briefing, it is presumed by appellate counsel that Bell's habeas counsel may 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, Bell may 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 [92 S.Ct. 2726, 33 L.Ed.2d 346], and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

## XXII

## BELL'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.[47] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[48] or having had a "hatred of religion,"[49] or threatened witnesses after his arrest,[50] or disposed of the victim's body in a manner

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[47] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see CALJIC No. 8.88, par. 3; see also, 1-500 CALCRIM 763 (2011). (V CT 1221.)

[48] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, cert. den., 494 U.S. 1038 (1990).

[49] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, cert. den., 112 S.Ct. 3040 (1992).

[50] *People v. Hardy* (1992) 2 Cal.4th 86, 204, cert. den., 113 S.Ct. 498.

that precluded its recovery.[51] 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.) Relevant "victims" include "the victim's friends, coworkers, and the community." (*People v. Ervine* (2009) 47 Cal.4th 745, 858.) The harm "victims" describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings. (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783.) In this case, for example, jurors heard testimony by family members and viewed video footage of the victim's wedding, juxtaposed with video and audio of the victim's death.

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 [114 S.Ct. 2630, 129 L.Ed.2d 750]), 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 that are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

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[51] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. 496 U.S. 931 (1990).

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 [108 S.Ct. 1853, 100 L.Ed.2d 372] [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759; 64 L.Ed.2d 398].) 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.

While this Court has consistently rejected challenges to section 190.3, factor (a) (see, e.g., *People v. Valdez* (2012) 55 Cal.4$^{th}$ 82, 179; *People v. McDowell* (2012) 54 Cal.4$^{th}$ 395, 443), given overbroad use of this factor in practice, the issue should be revisited.

## XXIII

## CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decisionmaking 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.

**A. Bell'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, Bell'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 United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] [hereinafter *Apprendi*]; *Ring v. Arizona, supra,* 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 851, 125 S.Ct. 21] [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856] [*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, supra,* 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 p. 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 p. 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 p. 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 [125 S.Ct. 738, 160 L.Ed.2d 621], 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 p. 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*, 549 U.S. at p. 274.) 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. (549 U.S. at p. 282.)

### 1. 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 factfinding 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.[52] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to Bell's jury (V CT 1221), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, a jury must find the existence of one or more aggravating factors. Before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[53] These factual determinations are essential prerequisites

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[52] 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 importantly – to render an individualized, normative determination about the penalty appropriate for the particular defendant...." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[53] 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

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.[54]

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." (See, e.g., *People v. Jones* (2012) 54 Cal.4th 1, 86; *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 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 United States Supreme Court explicitly rejected this reasoning in *Cunningham*.[55] In *Cunningham*, the principle that any fact that exposed a

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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)

[54] 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.)

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. (549 U.S. at pp. 276-279.) 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*, 549 U.S. at pp. 290-291.)

*Cunningham* then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 293.)

> 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").

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[55] *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*, 549 U.S. at p. 289.)

(*Cunningham, supra*, 549 U.S. at pp. 291.) 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)[56] 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

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[56] Section 190, subdivision (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."

offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.)

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*, 536 U.S. at 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 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 (§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. (§190.3) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a

reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer 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.*, 542 U.S. at p. 328; 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.

**2. 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 25); *Johnson v. State* (Nev. 2002) 59 P.3d 450.[57])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615] ["the death penalty is unique in its severity and its finality"].)[58] As the high court stated in *Ring, supra*, 536 U.S. at p. 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The 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

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[57] 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).

[58] In its *Monge* opinion, the United States Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755 [102 S.Ct. 1388, 71 L.Ed.2d 599]) 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.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [101 S.Ct. 1852, 68 L.Ed.2d 270], and *Addington v. Texas* (1979) 441 U.S. 418, 423-424 [99 S.Ct. 1804, 60 L.Ed.2d 323].)

make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy.

Recently, in *Southern Union Company v. United States* (2012) 132 S.Ct. 2344 [183 L.Ed.2d 318], the United States Supreme Court applied the principles of *Apprendi* in a case involving a trial court's adjudication of the amount of a criminal fine imposed for violation of the Resource Conservation and Recovery Act [RCRA] of 1976. The federal law authorized a maximum fine of $50,000 for each day of violation. A jury found Southern Union guilty of unlawfully storing liquid mercury "on or about September 19, 2002, through October 19, 2004." (*Id.*, at p. 2349.) The trial court imposed a fine of $38.1 million based on the assumption that the company had violated the RCRA for 762 days, including September 19, 2002, through October 19, 2004. (*Ibid.*) The Supreme Court agreed with the defendant that imposing a criminal fine greater than the single-day penalty of $50,000 would require the jury to determine unanimously, beyond a reasonable doubt, the number of days that the company unlawfully stored liquid mercury. The Supreme Court explained:

> The rule that juries must determine facts that set a fine's maximum amount is an application of the "two longstanding tenets of common-law criminal jurisprudence" on which *Apprendi* is based: First, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.' *Blakely*, 542 U.S., at 301, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (quoting 4 Blackstone 343). And second, "'an accusation which lacks any particular fact which the law makes essential to the punishment is...no accusation within the requirements of the common law, and it is no accusation in reason.'"542 U.S., at 301-302, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)).

(*Id.*, at p. 2354-2355.)

The Supreme Court in the *Southern Union* case further rejected the Government's argument that the trial court's determination of how long the violation lasted was qualitatively different than the task of defining a separate set of acts for punishment, and therefore not subject to the unanimous jury requirement of *Apprendi*. (*Southern Union Company, supra*, 132 S.Ct. at p. 2356.) The high court stated that the Government's argument was defective in two respects.

> First, it rests on an assumption that *Apprendi* and its progeny have uniformly rejected: that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an "element" of the offense and one that is a "sentencing factor." See, e.g., 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435; *Ring*, 536 U.S., at 605, 122 S. Ct. 2428, 153 L. Ed. 2d 556. Second, we doubt the coherence of this distinction. This case proves the point. Under 42 U.S.C. § 6928(d), the fact that will ultimately determine the maximum fine Southern Union faces is the number of days the company violated the statute. Such a finding is not fairly characterized as merely "quantifying the harm" Southern Union caused. Rather, it is a determination that for each given day, the Government has proved that Southern Union committed all of the acts constituting the offense.

(*Id.*, at p. 2356.)

In California, a juror may not vote for death based upon the finding of special circumstances alone. A vote for death must be predicated on a jury finding that "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (Former CALJIC No. 8.88; V CT 1221, 1225.)

Manifestly, a juror cannot begin to engage in the task of weighing aggravating against mitigating circumstances without first deciding whether aggravating and mitigating sentencing factors have been proven. As the United States Supreme Court has now made abundantly clear, the truth of

sentencing factors as well as the elements of the capital offense must be proven beyond a reasonable doubt "'by the unanimous suffrage of twelve'" jurors, or violate *Apprendi*. (*Southern Union Company v. United States, supra.*) 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.

### B. The Due Process And The Cruel And Unusual Punishment Clauses Of The State And Federal Constitutions 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.

#### 1. 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 [78 S.Ct. 1332, 2 L.Ed.2d 1460].)

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 Clauses of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) 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 [97 S.Ct. 1197, 51 L.Ed.2d 393 ]; see also, *Presnell v. Georgia* (1978) 439 U.S. 14 [99 S.Ct. 235, 58 L.Ed.2d 207].) 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. Both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment require this.

**2. Imposition of Life or Death**

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. at pp. 363-364; see also, *Addington v. Texas, supra*, 441 U.S. at p. 423; *Santosky v. Kramer, supra*, 455 U.S. at p. 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 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Ca1.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator); *Southern Union Company v. United States, supra*, 132 S.Ct. 2344 (imposition of a fine).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra*, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life,... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 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 v. North Carolina* (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 96 S.Ct. 2978].) 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 United States 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.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri, supra*, 451 U.S. at p. 441, and *Addington v. Texas, supra*, 441 U.S. at pp. 423-424.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Bell of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543 [93 L.Ed.2d 934, 107 S.Ct. 837]; *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 [83 S.Ct. 745, 9 L.Ed.2d 770].)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1364; *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.)[59] 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. (§1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a

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[59] 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 defendant would violate the equal protection clause of the Fourteenth Amendment (see generally, *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*) the sentencer in a capital case is constitutionally required to identify for the record 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 [108 S.Ct. 1860, 100 L.Ed.2d 384].) 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 in fact 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 persons subjected to a capital penalty trial under section 190.3 are afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

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*, 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

### D. California's Death Penalty Statute As Interpreted by The California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions Of The Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] (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 and witness murder special circumstances have made first degree murders that cannot 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*. 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*, 548 U.S. at pp. 177-178), 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* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

### E. The Prosecution May Not Rely In The Penalty Phase On Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For The Prosecutor To Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As A Factor In Aggravation Unless Found To Be True Beyond A Reasonable Doubt By A Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments,

rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by Bell. Evidence was presented regarding unadjudicated criminal acts committed by Bell during a high speed chase while he was intoxicated (XIV RT 2795-2818); an unadjudicated violent group assault on Patrick Carver (XV RT 2967-2984); the unadjudicated assault on sheriffs deputies in the courtroom during trial (XVII RT 3449-3474); and two unadjudicated incidents involving possession of a shank in jail (XIV RT 2821-2827; XVII RT 3497- 3504).

The prosecution devoted a considerable portion of its closing argument to arguing the aggravating weight of these unadjudicated offenses. The district attorney discussed, incident-by-incident, Bell's prior convictions *and* the prior unadjudicated criminal acts attributed to Bell by the various penalty phase witnesses. (XVIII 3742-3747, 3752.) The prosecutor emphasized that Bell's criminal behavior demonstrated "escalating violence," (XVIII RT 3746) deserving of the death penalty. She further underscored that unanimous decision-making regarding Bell's unadjudicated criminal conduct was *not* required. (XVIII 3735.)

The United States Supreme Court's recent decisions in *United States v. Booker, supra, Blakely v. Washington, supra, Ring v. Arizona, supra, Apprendi v. New Jersey, supra,* and *Southern Union Company v. United States, 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. Bell's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

### F. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Impermissibly Acted As Barriers To Consideration Of Mitigation By Bell's Jury.

The inclusion in the list of potential mitigating factors of the adjective "extreme" (see factor (d) and former CALJIC No. 8.85) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973].) In this case, there was extensive expert testimony during the penalty phase from which the jury could have inferred that Bell was mentally disturbed at the time of his crimes, the result of a plethora of social, physical and mental history-related factors. (See XVI RT 3124-3207, 3296-3367.) Yet the jury was instructed that it could only take into account whether or not the Bell's crimes were committed while the defendant was under the influence of "extreme" mental or emotional disturbance. (IV CT 1146; XVIII RT 3690; emphasis added.) Use of the word "extreme" rendered the language of factor (d) unconstitutionally vague, arbitrary, capricious and/incapable of principled application. (*Maynard v. Cartwright, supra*, 486 U.S. 356; *Godfrey v. Georgia, supra*, 446 U.S. 420.)

By virtue of the rights implicitly and explicitly guaranteed by the Sixth, Eighth and Fourteenth Amendments, capital penalty jurors must be permitted to "consider and give effect to all relevant mitigating evidence offered by" a defendant. (*Boyde v. California* (1990) 494 U.S. 370, 377-378 [110 S.Ct. 1190, 108 L.Ed.2d 316]; accord: *Penry v. Lynaugh* (1989) 492

U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256] ["full consideration of evidence that mitigates against the death penalty is essential." (Emphasis in original)].) Limiting the jury to consideration of "extreme mental or emotional disturbance" violated this constitutional mandate. (Accord: *Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1165-1166 [Montana scheme unconstitutional because it permitted sentencer to "refuse to consider ... mitigating evidence simply because it fell below a certain weight"]; *Kenley v. Armontrout* (8th Cir. 1991) 937 F.2d 1298, 1309 [defendant need not be insane for mental problems to "be...considered mitigating evidence"]; *People v. Robertson* (1982) 33 Cal.3d 21, 59-60 [violates Eighth Amendment to permit jury to consider "mental disease" as mitigating but not "mental defect"].)

It is true that the jury was also instructed on factor (k), i.e., "[a]ny factor which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (§ 190.2, subd. (k); XVIII RT 3694.) This Court has previously held that use of the standard factor (d) instruction is not error if the jury is also instructed in the language of factor (k). (*People v. Wright* (1990) 52 Cal.3d 367, 443-444; *People v. Ghent* (1987) 43 Cal.3d 739, 776.) In *People v. Wright, supra*, however, this Court left open the possibility that a defendant could show that the circumstances, arguments and instructions were conducive to the jury believing that "extreme" mental or emotional disturbance was required for mitigation. (*Id.* at pp. 444-445.) In this case, there was neither instruction nor argument by counsel that would have disabused the jury of the notion that only "extreme" mental disturbance qualified as a mitigating factor. Accordingly, this Court should find it reasonably likely that the jury interpreted the factor (d) instruction in an unconstitutionally restrictive manner. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385].)

### G. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (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, supra,* 428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [77 L.Ed.2d 235, 103 S.Ct. 2733].)

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 978, 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11

> Cal.4th 786, 886-887.) 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* (1996) 13 Cal.4th 92, 188.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself is 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 the language at issue could mislead a seasoned judge, 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.)[60]

The very real possibility that Bell's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived Bell 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 Bell's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 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

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[60] See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State-as represented by the trial court [through the giving of CALJIC No. 8.85]-had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

The likelihood that the jury in Bell's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's penalty phase closing arguments. For example, the prosecutor argued:

> Factor (e) is whether or not the victim was a participant in the defendant's homicidal conduct or consented. Simon Francis did not consent to being murdered.

(XVIII RT 3748.)

Regarding mental state evidence potentially relevant to prove "whether or not the offense was committed while defendant was under the influence of extreme mental or emotional disturbance," or "whether or not at the time of the offense the capacity of the defendant to...conform his conduct to the requirements of the law was impaired as a result of mental disease or defect," the prosecutor argued:

> What is the sum total of what we have heard? [¶] The defendant was premature. He had health problems as a child. He had a learning disability. He had a lower than average IQ. His father was in the military so they had to move. He had two siblings and he had to change high schools once. [¶] Ladies and gentleman, these are common lifetime experiences, good things, bad things, happy things, and sad things, easy things, hard things, overcoming difficulties. That's what makes us unique and human. [¶] Do you feel sorry for the infant, the child Michael Bell? Go ahead. Feel sorry for him but punish the adult, the grown man.

(XVIII RT 3749-3750.)

It is likely that Bell's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors – such as the lack

of consent on the part of the murder victim, or lack of incapacity to conform his conduct to the law – 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 Bell "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 [112 S.Ct. 1130, 117 L.Ed.2d 367].)

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 instructions. 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 v. Oklahoma, supra,* 455 U.S. 104.) 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.

## XXIV

## 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 United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (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, supra,* 17 Cal.3d at p. 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 that 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 [62 S.Ct. 1110, 86 L. Ed. 1655].)

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*,[61] as in *Snow*,[62] 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., §§ 1158, 1158a.) Under rules in effect since 2008, when a California judge makes a sentencing choice in a non-capital case, the court's "reasons for selecting one of the three authorized prison terms…must be stated orally on the record." (Cal. Rules of Ct., rule 4.420(e).) The cited rule went into effect on Jan. 1, 2008, when a new discretionary Determinate Sentencing Law [DSL] scheme replaced the one at issue in *Cunningham*, *supra*.

The rule in effect at the time of Bell's trial, California Rules of Court, former rule 4.420(e), also required the court to give "a concise statement of the ultimate facts which the court deemed to constitute

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[61] "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.)

[62] "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." (*People v. Steele* (2000) 83 Cal.App.4th 212, fn. 10.) Furthermore, this Court has conceded that, from 2004 (when *Blakely* was decided) until Jan. 1, 2008, when the DSL scheme was made discretionary), the Sixth Amendment -- pursuant to *Cunningham* -- required that, in non-capital cases, findings of aggravating circumstances supporting imposition of the upper term be made beyond a reasonable doubt by a unanimous jury. (See, *In re Gomez* (2009) 45 Cal.4th 650, 655.) That buttresses the equal protection claim for capital cases tried within the same time frame. Moreover, both *Blakely* and *Ring* applied *Apprendi* to statutes in existence before *Apprendi* was decided (2000). At the very least, *Apprendi* is applicable to cases not yet final at the time it was decided. (*Ibid.*)

In a capital sentencing context, by contrast, 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 noncapital 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.[63] (*Bush v. Gore* (2000) 531 U.S. 98 [148 L.Ed.2d 388, 121 S.Ct. 525, 530].)

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[63] 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.)

To provide greater protection to noncapital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421; *Ring v. Arizona, supra,* 536 U.S. 584.)

## XXV

## 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 nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [108 S.Ct. 2687, 101 L.Ed.2d 702] [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa – with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at 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. 268, 315 [20 L.Ed. 135, 11 Wall. 268] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227 [40 L.Ed. 95, 16 S.Ct. 139]; *Martin v. Wadell* (1842) 41 U.S. 367, 409 [10 L.Ed. 997, 16 Pet. 367].)

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* (2002) 536 U.S. 304, 316 [153 L.Ed.2d 335, 122 S.Ct. 2242].) 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, supra,* 159 U.S. at p. 227; see also *Jecker v. Montgomery* (1855) 59 U.S. 110, 112 [15 L.Ed. 311, 18 How. 110]; see, *Medellin v. Texas* (2008) 552 U.S. 491 [170 L.Ed.2d 190, 128 S.Ct. 1346].)

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.")[64] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright, supra,* 477 U.S. 399; *Atkins v. Virginia, supra.*)

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[64] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

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 United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

In the past several years, the United States Supreme Court has continued to emphasize the importance of increasing national and international antipathy toward the death penalty in deciding whether its use in the United States violates the Eighth Amendment. For example, in *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125 S.Ct. 1183], which abolished capital punishment for juvenile offenders, the federal high court stated:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds conformation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty....[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

(*Id.* at p. 577; see also, *Kennedy v. Louisiana* (2008) 554 U.S. 407 [117 L.Ed.2d 525, 128 S.Ct. 2641]; cf. *Graham v. Florida* (2010) 130 S.Ct. 2011, 2033-2034 [176 L.Ed.2d 825.) The high court also placed heavy emphasis on the fact that a majority of our states had rejected the death penalty for juveniles. The court concluded that states' rejection of the juvenile death penalty bespoke evolving standards of decency, such that

abolition of the juvenile death penalty was now required by the Eighth Amendment. (*Roper v. Simmons, supra*, 543 U.S. at pp. 563-568.)

Public opinion is turning against the use of capital punishment. As Justice Moreno observed in his dissenting opinion in *People v. Martinez* (2009) 47 Cal.4th 399, 459, fn. 1.

> I note that the problem of how to deal with prospective jurors in capital cases who oppose the death penalty may well be a large and growing one. Polls show that about one-third of those surveyed in this state oppose the death penalty, up from only 14 percent in 1989. (See Field Research Corp., The Field Poll, Release # 2183 (Mar. 3, 2006) 1-2, 6 (The Field Poll) [poll conducted February 12–26, 2006, showed 63 percent favored and 32 percent opposed the death penalty in California].) The exclusion of one out of three potential jurors because the attitudes toward the death penalty might predispose them to vote for life imprisonment without parole would indeed result in a jury panel "uncommonly willing to condemn a man to die" in violation of the defendant's Sixth Amendment rights.

This Court has consistently rejected challenges to California's use of the death penalty founded in international law or norms. (*People v. Scott, supra*, 52 Cal.4th at p. 497; *People v. Thomas* (2011) 52 Cal.4th 336, 366-367.) Appellant respectfully suggests that it is time for this Court to reassess the constitutionality of California's application of the death penalty considering evolving international attitudes toward capital punishment.

An international trend toward abolition is evident. On August 3, 2009, the Associated Press reported what may be the largest mass commutation of death sentences in modern history. President Mwai Kibaki of Kenya commuted all death sentences imposed on convicted prisoners to life imprisonment. In a statement to the public, President Kibaki explained that no death sentence had been carried out in his country for the past 22 years, leading to an accumulation of over 4,000 prisoners on death row in

Kenyan prisons. Like California's prisons, Kenya's prisons are overcrowded, underfunded and understaffed. They were built for a population of about 15,000 but have an inmate population of more than 40,000. The decision to commute took into consideration that extended stays on death row may cause undue mental anguish and suffering, psychological trauma, and anxiety, and may constitute inhumane treatment. The Kenyan president has directed government officials to study whether the death penalty has any impact on fighting crime. (See, Associated Press, August 3, 2009, *Kenyan Leader Reduces All Death Sentences to Life*.)

Although this Court lacks the authority to commute all of the state's death sentences, it should reconsider its prior rulings and set aside Bell's death judgment because the continued broad application of capital punishment violates international law and norms as well as the Eighth and Fourteenth Amendments.

## XXVI

## THE CUMULATIVE PREJUDICIAL EFFECT OF THE ERRORS DEPRIVED THE GUILT AND PENALTY PHASE JUDGMENTS OF FAIRNESS OR RELIABILITY.

A state court's erroneous application of state law does not, standing alone, violate the federal constitution, state law errors that render a trial fundamentally unfair may violate federal due process. (*Estelle v. McGuire, supra,* 502 U.S. 62, 68; *Jammal v. VanDeKamp* (9th Cir. 1990) 926 F.2d 918, 919; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.) Moreover, 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 that is fundamentally unfair. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Hill, supra*, 17 Cal.4th at 844-845.

The trial court deliberately misapplied the *Witt* standard in a manner favoring the retention of pro-death penalty jurors, resulting in a jury predisposed to convict and sentence Bell to die. (Argument I, *ante*.) The trial court unreasonably and erroneously denied Bell's counsel the assistance of a jury consultant during voir dire. (Argument II, *ante*.)

Among other errors to numerous to list, the defense was wrongfully denied discovery of material information in the hands of the prosecutors that could have been used to substantially impeach the credibility of a codefendant who testified pursuant to a generous plea bargain. (Arguments III & IV, *ante*.) The inadmissible testimonial hearsay statement of a deceased codefendant was erroneously received in violation of Bell's constitutional right to confront and cross-examine the witnesses against him. (Argument V, *ante*.) Evidence of a nontestifying witness's testimonial hearsay identification of Bell from a surveillance videotape of the robbery was also erroneously received. (Argument VI, *ante*.) During the guilt phase,

the jury was exposed repeatedly and unnecessarily to bone-chilling audio of the victim's sounds while dying. (Argument VIII, *ante*.)

Errors too numerous to list were committed in the penalty phase after Bell became upset over his mother's weeping, and had to be violently subdued. Bell was thereafter improperly excluded from portions of the penalty phase trial, including testimony by an important penalty phase defense expert witness. His absence – due to pain, not disruptiveness – was never explained to the jury. When Bell reappeared before the jury, he was wearing visible shackles, including a stun belt, but no admonition to jurors to disregard the restraints was ever given. Subsequently, the *same* jurors who felt personally victimized by Bell's outburst in the courtroom were allowed to sit in judgment on the issue of penalty, and assess the credibility of the testimonial accounts of the courtroom incident offered by other eyewitnesses. (Arguments XIII – XVIII, *ante*.)

In the penalty phase, jurors viewed a videotape of the victim's wedding ceremony juxtaposed with a surveillance videotape of the robbery, featuring audible sounds of the victim dying. (Argument XIX, *ante*.) Irrelevant evidence of Bell's affinity for "gangsta rap" was injected during testimony describing the alleged assault of Patrick Carver. (Argument XX, *ante*.)

The United States Supreme Court recognizes that the greater the need for reliability in *capital* cases means that death penalty trials must be policed at *all stages* for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.) The federal high court has further "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (*Parker v. Dugger* (1991) 498 U.S. 308, 321 [112 L.Ed.2d 812, 111 S.Ct. 731].) Appellant was not entitled to a "perfect trial," but he was entitled to a trial in which guilt and penalty were "fairly

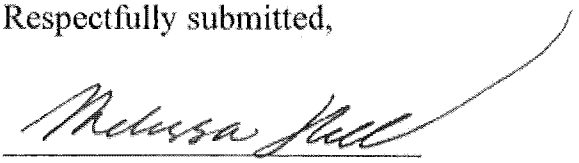
adjudicated." (*Hill*, at P. 844.) Neither was fairly adjudicated in this case. Even if no single error was sufficiently prejudicial to require reversal, the cumulative effect of so many errors deprived the guilt and penalty phase judgments of any semblance of reliability. Clearly, "if ever there were a case for application of cumulative error principles, this is it." (*Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Hill*, at pp. 844-848; *In re Jones* (1996) 13 Cal.4th 552, 587.)

## CONCLUSION

For the foregoing reasons, the entire judgment should be reversed. Additionally, appellant should be afforded any further relief supported by the law and evidence including, in the alternative, reversal of the death judgment, and/or remand the matter for an *in camera* review of Tory' confidential conversations with counsel to determine whether Bell was denied critical impeachment evidence stemming from what was said by the parties during plea bargaining discussions.

Dated: February 19, 2013

Respectfully submitted,



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**WORD COUNT CERTIFICATE**
**PEOPLE V. MICHAEL BELL, S080056**

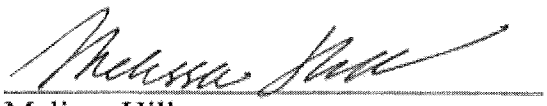
I certify, pursuant to California Rules of Court, rule 8.630, as follows:

Microsoft Word for Mac 14.2.5 (2011) was used to create this document.

The Microsoft Word for Mac properties program indicates that the attached Appellant's Opening Brief, exclusive of certificates, tables and indices, and proof of service, has a typeface of Times New Roman 13 points, and contains 125,167 words (in excess of the 102,000 allowed). A motion for permission to file a brief in excess of allowable word count limits accompanies this brief.

Dated: February 19, 2013

Respectfully submitted,



Melissa Hill
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Michael Leon Bell

## PROOF OF SERVICE

I reside in the State of New Mexico, Sandoval County. I am over the age of 18 years and a duly-licensed California attorney. I represent Michael Leon Bell, the appellant in this action. My business address is PO Box 2758, Corrales, New Mexico, 87048.

On February 19, 2013, I served the attached Appellant's Opening Brief on the following interested parties by placing true copies thereof, enclosed in a sealed envelope with postage prepaid, in the United States mail in Corrales, New Mexico, addressed as follows:

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I declare under penalty of perjury the laws of the State of California that this statement is true.

Executed this 19th day of February 2013, at Corrales, New Mexico.

Melissa Hill

* Personal delivery of the Appellant's Opening Brief will be made to Michael Leon Bell within 30 days of the brief's filing date.