THE PEOPLE OF THE STATE OF CALIFORNIA,	**Case No. S094890**
Plaintiff and Respondent,	Monterey County Superior Court No. SM 980798
vs.	
JOSEPH KEKOA MANIBUSAN,	**CAPITAL CASE**
Defendant and Appellant.	

Appeal from the Judgment of the Superior Court
of the State of California, County of Monterey

The Honorable Jonathan R. Price, Judge Presiding

APPELLANT'S OPENING BRIEF

Volume 2 of 2

DAVID S. ADAMS, SBN 078707
Attorney at Law
P.O. Box 1670
Hood River, Oregon 97031
(541) 386-5716

Attorney for Appellant
Joseph Kekoa Manibusan

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IX

THE TRIAL COURT'S DECISION TO REQUIRE THAT APPELLANT BE HARNESSED WITH AN ELECTRIC SHOCK BELT THROUGHOUT THE GUILT AND PENALTY PHASES OF HIS TRIAL WAS UNSUPPORTED BY ANY SHOWING OF NEED AND UNMITIGATED BY ANY CURATIVE INSTRUCTION, AND WAS REVERSIBLE ERROR

Introduction

The Sheriff's Department requested that the trial court order that Kekoa wear an electronic shock belt during courtroom sessions[48]. (8 RT 1408.) Although aware that the defense objected to any sort of restraint, the trial court failed to fulfill its duty to forbid any restraint devices unless there was a showing that some kind of restraint was manifestly necessary. (*People v. Duran* (1976) 16 Cal.3d 282 (*Duran*); *People v. Hill* (1998) 17 Cal.4th 800, 841 (*Hill*); *People v Mar, supra*, 28 Cal.4th at p. 1219 (*Mar*).)

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[48] The device in question was the REACT belt (Remote Electronically Activated Control Technology), described as a device that could be activated by a single deputy which would deliver an 8 second stunning shock. (8 RT 1408-1409.) This Court addressed the use of this device in *Mar* noting that the device would deliver a 50,000 volt debilitating shock with the potential to cause "immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. (*People v Mar* (2002) 28 Cal.4th 1201, 1204, 1206, 1214-1215.) The activation of the belt could also cause irregular heartbeat or seizure and would pose "serious medical risks for persons who have heart problems or a variety of other medical conditions." (*Ibid.*)

Instead, utilizing the rationale of *People v. Garcia* (1997) 56 Cal.App.4th 1349 (*Garcia*), the trial court found that no showing of manifest need was required before ordering the use of the shock belt. (40 RT 7929-7932; see 4 CT 1015-1026.)

By failing to adhere to the requirement of protecting a criminal defendant against the use of any restraint device absent a showing of manifest need, the trial court violated Kekoa's Constitutional rights to due process, a fair trial and a fair and reliable death penalty trial. (U.S. Constit., 5th, 6th and 8th amends.; Cal. Constit., art. I, §§ 7, 15 and 17.) Further, the trial court's errors in forcing Kekoa to wear the shock belt throughout his trial without finding that the restraint was needed and in failing to instruct the jury not to draw any inferences from the use of the device were not harmless, and require that the conviction and death sentence be reversed.

A. Background

At a pretrial proceeding in December, 1988, the trial court told the parties that the Sheriff's Department had requested that Kekoa be required to wear an electronic shock belt while he was in the courtroom. (8 RT 1408.) Although no hearing was held at this point, the prosecutor took pains to note that despite incidents occurring at jail, neither Kekoa nor Norman W. (whose case had not yet been severed) had given any reason to cause concern that they would be security risks, and wondered whether the request was

premature. (8 RT 1410.) The trial court agreed that neither man had given him any reason to be concerned. (8 RT 1411.)

After Kekoa's original counsel was relieved, new counsel filed a motion to forbid the use of restraints. (4 CT 1001-1004.) As shown in the following excerpt from the reporter's transcript, the motion to prohibit the use of restraint devices was discussed during discussion of several pretrial motions on July 17, 2000. This discussion is noteworthy for two reasons. First, notwithstanding his previous comments that no restraints appeared necessary, the prosecutor not only opposed the motion but also mistakenly thought that the issue had been previously litigated. Second, the trial judge expressed his understanding of the factual foundation necessary for an order to use an electronic shock belt.

> THE COURT: . . . Last motion I have is the motion to prohibit shackling of the defendant. Now, did I -- I did -- didn't I previously rule on that?
>
> MR. ALKIRE: Actually, we had a full scale hearing and there was a submission by the sheriff's deputy to the court by memorandum dated July 6, 1999 from Deputy Michael Breaux with twenty pages of attachments reflecting the defendant's disciplinary actions in the jail and description of the react belt.[49]

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[49] No such hearing was held in this case, but may have been held in the trial of the co-defendant. Documents matching the prosecutor's description were discovered in the District Attorney's files during the record correction proceedings in this case. As part of those proceedings, the memorandum and supporting papers described by the prosecutor in the quoted exchange were lodged with the trial

And my recollection is that we did have a hearing because the defense filed a written motion previously to prohibit it, and the sheriff's department came in with this evidence and bottom line was we were going to do in this case what we did in the Willover case.

THE COURT: Well, I thought I went back and checked with the court reporter and was it something --

THE REPORTER: I didn't respond.

THE COURT: But I can't find that I have already ruled on this.

MR. ALKIRE: I'm going by memory, so that puts me at a big disadvantage.

THE COURT: And me, too.

MR. ALKIRE: In any event, as to this motion, it speaks of shackling and ignores entirely the information before the court on this subject and asks the court to get involved in a security

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court on October 12, 2007. (4th Supplemental CT 31-51; .) In addition, other documents relating to the REACT belt or to Kekoa's conduct (some of which duplicate documents in pp. 31-51) were clipped together with the memorandum and its supporting documents. (4th Supplemental CT 06-30.) None of these documents were located in the trial court's files of this case and do not appear to have been filed under this case number. One of the documents, located in the center of the packet provided at the October 7, 2007 hearing, does contain a court file stamp (the cover page of the memorandum), but there is no clear indication that it was filed in conjunction with this case. That date does, however confirm that the shock belt used at the time of this trial in Monterey County was the device discussed in *Mar.*

Although these documents were lodged with the trial court during record correction proceedings, they were not determined to have been reviewed by the trial court regarding the motion to prohibit the use of restraints during the trial of this case. (See 10/12/2007 RT 10-13.)

issue that based on the submissions of the sheriff seems pretty simple to me.

THE COURT: ***It's real clear, it seems to me it's real clear that the decisions coming out now are saying this isn't shackling, the use of a react belt is not shackling at all and allows the defendant freedom to move around the courtroom as long as the court makes certain findings before ordering that to be done. But it is -- it's different than having him manacled.***

It would give Mr. Manibusan the freedom not to shuffle around in front of a jury either in and out of the courtroom. And so, I'm not willing to rule on this one yet. And I want to hold off on that until I can determine if I have previously ruled on this and whether or not in the interim I need to even -- that was in '99, revisit anything new either legally or because new counsel is involved or other evidence of -- I believe there's issues that have to be talked about in terms of whether or not he's presented himself as any risk in court.

And there's other standards. And I don't want to articulate them right now because I'm not confident that I can remember them off the top of my head.

But I do know that it seems to me that the react belt is a better way to not diminish courtroom decorum with shackles. And as I said, him shuffling around gives him more ability to scratch and move and do and appear natural in front of the jury. Taking out the onerous effect of even having something or always remaining seated in the courtroom because he's shackled to the chair from behind where they can't see.

I don't think, to be candid with you, any juror knows that Mr. or thinks that Mr. Manibusan is free and walking around out on the streets. That's not the issue.

MR. MARTINEZ: That's not the issue.

THE COURT: The issue is not that. Does it diminish courtroom decorum in terms of what we do and is it likely to discourage him from either testifying or causing confusion, embarrassment, that kind of thing.

MR. MARTINEZ: My concern on these issues is always the

effect of shackling or other means of control on the part of the jury, giving them the impression this man that is presumed innocent is dangerous. And --

THE COURT: Absolutely.

MR. MARTINEZ: And that's my main concern. And so I object strenuously to the shackling unless there is some showing in the last year or something, you know, we've had some problems that would rise to the level of requiring that.

And I object also to the belt because if there is -- because I don't have confidence in that belt and I have the same objections.

THE COURT: ***It's clear the belt is not shackling***. There is no doubt about that. And your objection to the belt is one that we need to address. But the issue isn't going to be shackles if there is going to be a belt. And if not, I think I'm just going to need more information on this as to whether or not we're going to use a react belt or not. So, let's set that for -- do we have another appearance on this case, short of pretrial?
(40 RT 7929-7932, emphasis added.)

No further hearings were held on the issue, the trial court received no evidence and made no findings of any kind concerning the need for restraints during trial. Instead, on September 6, 2000, after learning that Kekoa would prefer to the use of the shock belt "in lieu of shackles or any other form of restraint", the trial court ordered that the belt be used. (46 RT 9003.) Kekoa wore the belt throughout the trial. (See 81 RT 16013.)

B. Kekoa Was Required To Wear An Electric Shock Belt Without A Judicial Determination of Manifest Need for Restraints of Any Kind And In Spite of Findings That He Did Not Present A Security Risk

No criminal defendant, and particularly one on trial for his life, should

be tried while subject to physical restraint "except as a last resort" of courtroom security. (See *Illinois v. Allen* (1970) 397 U.S. 337, 344.) Limitations on the use of restraints are grounded United States and California Constitutions, particularly invoking the presumption of innocence, the "inherent disadvantages" of detracting from the decorum and dignity of the proceedings, and the impact it may have on a defendant's ability to communicate with his counsel. (*Ibid*; U.S. Const., Amends. VI, XIV.; Cal. Const., Art. I, §7,) In addition, restraints may confuse and embarrass the defendant, thereby impairing his mental faculties, and they may cause pain. (*People v. Mar, supra*, 28 Cal.4th 1201, 1219; *People v. Hill, supra*, 17 Cal.4th at p. 846; *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 747-748, quoting *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 720-721.) Finally, they may inhibit a defendant's willingness to approach the witness stand and testify on his own behalf. (*People v. Hill, supra*, 17 Cal.4th at p. 846.)

While not as likely to be visible as more traditional shackles, an electronic shock belt of the sort used here raises the risk of far more serious disadvantages. The belt is remotely controlled and there is a nearly even chance that the device could be accidentally activated. While designed to be debilitating but not lethal, shock belts have nonetheless been found to pose life threatening risks. A sudden, lengthy exposure to a 50,000 volt shock

can cause the wearer's heartbeat to become irregular, or cause the onset of seizures. Some individuals could suffer ventricular fibrillation, or even a heart attack. (See: 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, 242-243, 246-247; Brienza, *Stun Belts Zapped by Civil Liberties Groups* (1999) 35-APR Trial 99, 99; *People v Mar*, *supra*, 28 Cal.4th at pp. 1214-1215 and 1215 fn. 1.)

Because an affront to human dignity, prejudice in the minds of the jurors, and disrespect for the entire judicial system are all incident to the unjustifiable use of physical restraints, a criminal "defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there's a showing of *a manifest need for such restraints*." (*People v. Hill, supra*, 17 Cal.4th at p. 841 [emphasis in original], quoting *People v. Duran* (1976) 16 Cal.3d 282, 290-291.) "'Manifest need' arises only upon a showing of unruliness, an announced intention to escape, or 'evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .'" (*People v. Cox, supra*, 53 Cal.3d at p. 651, quoting *People v. Duran, supra*, 16 Cal.3d at p. 292, fn. 11.) The showing of nonconforming conduct must appear as a matter of record, with the

imposition of restraints in the absence of such a showing amounting to an abuse of discretion. (*People v. Duran, supra*, 16 Cal.3d at p. 291.)[50]

The strict requirement of a showing on the record of "manifest need" for restraints "presupposes that it is the trial court, not law enforcement personnel, that must make the decision an accused be physically restrained in the courtroom." (*People v. Hill, supra*, 17 Cal.4th at p. 841.) Thus a trial court abuses its discretion if it abdicates the decision to impose restraints to courtroom security personnel or law enforcement, or simply relies on a policy or custom regarding the use of such devices. (*People v. Mar, supra*, 28 Cal.4th at p. 1218; *People v. Hill, supra*, 17 Cal.4th at p. 841; *People v. Duran, supra,* 16 Cal.3d at p. 293 *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825; *Woods v. Thieret* (7th Cir. 1993) 5 F.3d 244, 248.)

Apparently relying on *Garcia*, the trial court expressed a belief that the use of a stun belt was not a restraint within the meaning of *Duran* and that a lesser showing of need could be used. The trial court never articulated what this lesser standard was, nor was any standard requiring a showing of need ever applied. (40 RT 7930-7931.)

In *Garcia*, the Court of Appeal for the Second Appellate District

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[50] The standard of review on appeal is whether the trial court's decision to impose restraints amounts to a "manifest abuse of discretion." (*Duran, supra*, 16 Cal.3d at p. 293, fn. 12.)

addressed the then upcoming technology of electric shock belts. (*People v. Garcia*, supra., 56 Cal.App.4th 1349.) There, in the face of an objection to the use of the shock belt, the sheriff's department urged the use of the belt because the defendant was charged with murder, had two "strikes" charged, and had two prior robbery convictions. No indication that the defendant was feared to be disruptive in court appeared in the record. (*Id.* at 1354.) The Court of Appeal upheld the trial court's determination that because the shock belt could not be easily seen and did not directly confine the defendant's movements it was not a "restraint" within the meaning of this Court's decision in *Duran*. (*Garcia* at 1355-1356.) Consequently, the Court of Appeal determined that the shock belt could be used at the trial court's discretion upon a showing of facts sufficient to constitute "good cause." (*Id.* at 1357.)

Two years after *Garcia*, the Fifth Appellate District addressed the use of REACT belts in *People v. Mar*. (*People v. Mar* [formerly located at] (2000) 77 Cal.App.4th 1284, overruled by this Court in *People v. Mar*, *supra,* see discussion *post*.) In the original opinion, the 5th District Court of Appeal reviewed *Garcia* and found it's analysis of the restraint issue "less than persuasive." (*People v. Mar*, *supra*, at 1292.) Noting that there were several reliable references to unintentional activation of REACT shock belts

and the possibility of permanent injury[51], the Court of Appeal found that the "manifest need" standard of *Duran* applied to electric shock belts as well as to more traditional types of restraints. (*Id.* at 1293.) This Court granted review of the decision in *Mar* on June 2, 2000.

On review, the Court agreed that *Garcia* was wrong in its holding that the REACT shock belt was not a restraint within the meaning of *Duran* and reaffirmed both *Duran's* requirement of a showing of "manifest need" before restraints of any type can be used when a defendant appears before a jury, and that the showing be made explicitly on the record.

> In addition to emphasizing that such restraints should not be imposed in the absence of "a showing of *a manifest need* for such restraints" (*Duran, supra*, 16 Cal.3d 282, 291, italics added), in *Duran* we went on to specify how such need should be determined. "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record, and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. ***The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.*** In those instances when visible restraints must be imposed the court shall instruct the jury sua

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[51] The Court of Appeal cited: 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, 242-243, 246-247; Brienza, *Stun Belts Zapped by Civil Liberties Groups* (1999) 35-APR Trial 99, 99 and *State v. Filiaggi* (Ohio 1999) 86 Ohio St. 3d 230, 714 N.E.2d 867

> sponte that such restraints should have no bearing on the determination of the defendant's guilt. However, when the restraints are concealed from the jury's view, this 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." (*Duran*, *supra*, 16 Cal. 3d at pp. 291-292, fn. omitted.)
> (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, emphasis added.)

Thus the use of the electronic shock belt is, and was at the time, a restraint that could not be imposed without a showing of manifest need. As demonstrated below, no such showing was made in this case, nor was a showing of need even considered.

C. By Ordering the Use of an Electronic Shock Belt Without First Conducting a Hearing To Determining Manifest Need For Protective Measures, The Trial Court Violated Kekoa's Constitutional Rights, Particularly When The Trial Court Had Recently Commented on His Good Behavior

In this case, the Sheriff's Department initiated the request for the use of restraints, and specifically the REACT belt. (8 RT 1409-1411.) Once the trial court became aware that the shock belt would be used, it was under a duty to determine that the restraint was a manifest necessity. As this Court reemphasized in *People v. Mar*, *supra*:

> In *Duran* we further explained that "[t]he imposition of restraints in a proper case is normally a judicial function in which the prosecutor plays no necessary part. Although the prosecutor may bring to the court's attention matters which bear on the issue, *it is the function of the court,* not the prosecutor, *to initiate whatever procedures the court deems sufficient in order that it might make a due process determination of record that restraints are necessary.* The

> court's determination, however, when made in accordance with our views herein, cannot be successfully challenged on review except on a showing of a manifest abuse of discretion." (*Duran, supra,* 16 Cal.3d 282, 293, fn. 12, 127 Cal.Rptr. 618, 545 P.2d 1322, italics added.)(*People v. Mar*, *supra*, 28 Cal.4th at p. 1217.)

The simple fact that this was a capital case cannot support the use of restraints, since capital cases are the very cases in which the court must avoid giving the impression that the defendants are particularly dangerous and violent. (See *Duckett v. Godinez, supra*, 67 F.3d at p. 748; *People v. Hill, supra*, 17 Cal.4th at pp. 844, 846 [capital case where use of shackles, even where record did not disclose whether jury saw restraints, raised possibility of prejudice and contributed to finding of cumulative error]; *Spain v. Rushen* ((9th Cir. 1989) 883 F.2d 712, 713-716 [highly publicized capital case involving members of Black Panther party and death of prison guard and trial judge].) Yet short of the obvious fact of the nature of the case, no justification for the use of shackles was discussed or made a matter of the record, notwithstanding the trial court's recognition that Kekoa had given him no reason to be concerned that he would become a risk. (8 RT 1411.) Significantly, the court failed to determine any need for restraints whatsoever, believing that the REACT belt was not a restraint of any kind. The lack of any real hearing and the trial court's determination that the use of a shock belt was not a restraint under *Duran* indicates that rather than a "last

resort" in response to demonstrated need, the trial court improperly considered the use of the shock belt to be a matter of prerogative. (See *People v. Jackson, supra,* 14 Cal.App. 4th at pp. 1286-1287.)

The failure to consider the need for restraints before authorizing their use was a denial of due process and an abuse of discretion. (*People v. Jackson, supra,* 14 Cal.App. 4th at pp. 1286-1287, *People v. Mar*, *supra*, 28 Cal.4th 1201, *People v. Duran, supra*, 16 Cal.3d at p. 293; *Castillo v. Stainer* (9th Cir. 1992) 983 F.2d 145, 148, as amended, (1993) 997 F.2d 669.)

D. The Trial Court Erred by Failing To Instruct the Jury To Disregard Appellant's Physical Restraints

In addition to abusing its discretion by failing to determine whether the physical restraints applied to appellant were justified, the trial court committed further error by failing to take the necessary step of instructing the jury to disregard the presence of physical restraints. An instruction of this nature is required to be given sua sponte when the jury was aware that restraints were being used. (*People v. Duran, supra,* 16 Cal.3d at pp. 291-292; *People v. Jackson*, *supra*, 14 Cal.App.4th at p. 1825.)

This Court has recognized that an electronic shock belt may have a more profound effect on the defendant than traditional shackles, and may produce a noticeable change in demeanor.

> Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may

> preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury--especially while on the witness stand. In view of this potential adverse effect, we conclude that before the compelled use of such a belt can be justified for security purposes, the general standard and procedural requirements set forth in *Duran* must be met. (*People v. Mar, supra*, 28 Cal.4th at pp. 1219-1220.)

As a result, the need for a curative instruction in case where an electronic shock belt is in use is clear. As with the case of visible shackles, the jury should be instructed that they should disregard the defendant's demeanor that may be attributed to the presence of a device capable of causing permanent injury or death upon accidental activation.

E. The Use of an Electronic Shock Belt and the Failure to Give a Curative Instruction Was Inherently Prejudicial

In a capital case, where dangerousness is an issue during the penalty phase, "physical restraints may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person." (*Duckett, v. Godinez, supra*, 67 F.3d at p. 748.) Restraining devices are an "unmistakable indication[] of the need to separate a defendant from the community at large. . . ." (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) Accordingly the use of shackles during penalty proceedings has been deemed a denial of the right to a fair trial. (*Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1450-1451.)

Here, the use of an electronic shock belt creates an insidious and deleterious form of prejudice. Physical shackles restrain movement and provide an obvious visual cue reflecting dangerousness. As recognized by this Court in *Mar*, the use of a shock belt has other effects, particularly on the defendant's ability to maintain focus on the proceedings and causing him/her to appear preoccupied. This not only impairs a defendant's ability to participate in the defense, it can subtly alter the jury's perception of the defendant by presenting him/her as distracted, nervous, disinterested or aloof from the proceedings. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1219-1220.)

The use of the shock belt, far more than traditional restraints which cannot be unintentionally activated, also creates additional pressure for a defendant to remain seated, even to the point of wishing not to testify. Here, since Kekoa did not testify, the psychological impact of the shock belt cannot be understated. In this sense, the facts here differ from those presented in *People v. Howard*, a case finding *Mar* error not to be prejudicial. (*People v. Howard* (2010) 51 Cal.4th 15, 27-30.) In *Howard*, the defendant testified, then later explained his discomfort on the witness stand as the result of antipsychotic medication. Here, no such alternative explanation was offered to explain any oddities of his behavior. While Kekoa's failure to testify was supported by his Constitutional right to remain silent, that failure

was discussed by the jury[52] and if motivated in any part by the threat of unwarranted electrocution, is prejudicial under any standard.

The prejudice inherent in restraining the accused in this manner requires that appellant's convictions and sentence be reversed. Further, the improper restraint denied appellant his rights to due process, the presumption of innocence, a fair trial, and a reliable determination of guilt and the appropriate penalty, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the federal constitution and their state equivalents as guaranteed by article I, section 13 of the California Constitution. For all of these reasons, appellant's convictions and judgment of death must be reversed.

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[52] See argument II, *ante*.

SECTION 2

ISSUES AFFECTING PRIMARILY THE GUILT PHASE

X

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT FINDING APPELLANT GUILTY OF AGGRAVATED MAYHEM

Count 3 of the information charged Kekoa with the crime of aggravated mayhem (§205) against Jennifer Aninger. (3 CT 671.) Although the jury found him guilty of that charge on October 2, 2000 (6 CT 1629), the evidence showed that Norman W. fired the maiming shots suddenly during the course of an attempted robbery. No evidence implicated Kekoa as a gunman in that shooting, and no evidence suggested that any of the participants intended to inflict a permanent or disfiguring injury, or that aggravated mayhem was a natural or probable consequence of the attempted robbery.

A. Facts

The only evidence available to the jury bearing on the circumstances surrounding the maiming of Jennifer Aninger came from three witnesses who described their perceptions of the shooting. Two of these were accomplices[53] of the gunman and the third was Ms. Aninger herself.

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[53] See argument XI, *post*.

Melissa Contreras said that when the car stopped near the women at the wharf, Norman W. was closest to them. He demanded money from the women and, when they did not reply became angry, calling them "assholes." He turned back to the women and fired "a lot" of shots. (60 RT 11877-11882.) Contreras was surprised by the shooting and had no idea Norman would use the gun, nor had he discussed doing so with anyone in the car. (61 RT 12070-12075.)

Adam Tegerdal told a somewhat similar story. In his version the car stopped near the women by the wharf, Norman put his head out of the passenger window and said "Give me the money." When there was no response from the women he began shooting, firing "quite a few" shots. (66 RT13031-13033.) As they drove away, Norman said that he couldn't leave any witnesses. (66 RT 13033.) Tegerdal, too, was surprised by the shooting and also said that no one had encouraged Norman to shoot. (68 RT 13407-13408.)

Jennifer Aninger testified that she had been at the wharf with her friend Ms. Mathews when she heard yelling. At first she didn't think that the yelling was directed to them, but then realized that it was. She turned to the voice and said "excuse me." She saw a flash from the window of a car and heard the sound of gunfire. She saw bullets hitting Ms. Mathews, but felt nothing herself. She then lost consciousness. (69 RT 13678-13679.)

Thus the only evidence available to allow the jury to determine the circumstances of the shooting consistently described the shots as being fired suddenly and indiscriminately.

B. Standard of Review

To make a determination regarding the sufficiency of evidence to sustain a conviction, a reviewing court must examine the entire record in the light most favorable to the judgment rendered in the trial court to determine whether the evidence is reasonable, credible and of such solid value that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Pensinger*, (1991) 52 Cal.3d 1210, 1237; *People v. Staten* (2000) 24 Cal.4th 434, 460.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The prosecution bears the burden in every criminal case to prove every element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) Due process requires reversal when the record fails to disclose substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Hill, supra*, 17 Cal.4th at p. 849; *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

In reviewing such due process claims, federal courts apply a substantially identical test. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In *Jackson*, the Supreme Court defined "the relevant question" as "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at p. 319; see also *Wright v. West* (1992) 505 U.S. 277, 284.) "Put another way, the dispositive question under *Jackson* is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.' " (*Chein v. Shumsky* (9th Cir. 2004) (en banc) 373 F.3d 978, 982-983 (quoting *Jackson*, 443 U.S. at 318).)

When the factual record supports conflicting inferences, the reviewing court must presume, even if it does not affirmatively appear on the record, that the trier of fact resolved any such conflicts in favor of the prosecution, and the court must defer to that resolution. *Jackson*, 443 U.S. at 326. "Jackson cautions reviewing courts to consider the evidence 'in the light most favorable to the prosecution.'" *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) (quoting *Jackson*, 443 U.S. at 319). Additionally, "[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1358 (citation omitted.) The federal court must refer to the substantive

elements of the criminal offense as defined by state law and look to state law to determine what evidence is necessary to convict on the crime charged. (*Jackson, supra,* 443 U.S. at 324 fn.16; *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 12.)

C. Aggravated Mayhem Requires the Specific Intent to Cause Debilitating or Disfiguring Injuries

Aggravated Mayhem is defined in Penal Code section 205 which provides in relevant part: "[a] person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." Aggravated mayhem is a specific intent crime which requires proof the defendant specifically intended to cause the maiming injury, i.e., the permanent disability or disfigurement. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 833.) It must be distinguished from simple mayhem (§ 203), which is a general intent crime and can be proved simply by the nature of the injuries sustained by the victim of a criminal act. (Compare *People v. Ferrell, supra*, 218 Cal.App.3d at p. 833 with *People v. McKelvy* (1987) 194 Cal. App. 3d 694, 702 [regarding simple mayhem "No specific intent to maim or disfigure is required, the necessary intent being inferable from the

types of injuries resulting from certain intentional acts"].)

Although the charge of aggravated mayhem in this case arises from the injuries suffered by Jennifer Aninger, those injuries are not sufficient evidence to support a charge of aggravated mayhem. Absent some evidence that the act causing the injuries was accompanied by the intent to cause a particular kind of injury, a permanent disability or disfigurement, aggravated mayhem cannot be found to exist. (*People v. Ferrell*, *supra*, 218 Cal.App.3d at p. 835; *People v. Lee* (1990) 220 Cal. App. 3d 320, 325; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831.)

The intent to maim is ordinarily proved by circumstantial evidence. "[S]pecific intent may be inferred from the circumstances attending an act, the manner in which it is done, and the means used, among other factors." (*People v. Lee*, *supra*, 220 Cal.App.3d at p. 325.) A showing of a "controlled and directed" attack, an attack directed at a specific body part or an attack of "focused or limited scope" may provide substantial evidence of such specific intent. (*Id.* at p. 326.) However, where the evidence shows no more than an "indiscriminate" or "random" attack, or an "explosion of violence" upon the victim, it is insufficient to prove the needed specific intent to maim. (*Ibid*; see also *People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 831.)

In *People v. Lee*, the Court of Appeal considered the facts of several

cases to illustrate this distinction, including cases discussing ordinary mayhem (a general intent crime) in the context of felony murder which required a specific intent to commit the particular crime. (*People v. Lee*, *supra*, 220 Cal.App.3d at p. 325.) One of these, *People v. Sears* (1965) 62 Cal.2d 737, illustrates that severe and maiming injuries alone cannot support a verdict of mayhem. In *Sears*, the defendant killed his young stepdaughter during a violent attack on his estranged wife. The attack on the girl produced injuries well within the definition of mayhem: her nose and lip were lacerated by beating with a steel pipe, and she had a scalp wound and a knife wound which punctured her jugular vein. (*People v. Sears*, *supra*, 62 Cal.2d at pp. 741, 745.) Nonetheless, the *Sears* court found insufficient evidence of intent to support the mayhem charge, noting that "such evidence does no more than indicate an indiscriminate attack; it does not support the premise that defendant specifically intended to maim his victim." (*Ibid.*) The *Lee* court also considered *People v. Anderson* (1965) 63 Cal.2d 351, in which the reviewing court found that an "explosion of violence" resulting in over 60 wounds all over the victim's body showed only an "indiscriminate attack" rather than an intent to maim. (*Id.* at pp. 356, 360.)

Applying this principle to the facts, the *Lee* court also found insufficient evidence for a conviction of mayhem, despite the infliction of maiming injures. In that case, the defendant had been seen to enter a

neighbor's room, push a four year old child out of the room and shut the door. Shortly afterwards, the sounds of a fight came from the room. An observer saw the defendant in the hallway kicking the victim twice, asking if he was dead. The victim said that the defendant had come into his room uninvited, said "you know what to do" and started hitting him in the face with his fists. The victim recalled three blows, and said that he crawled to the door, called for help and then lost consciousness. The defendant was arrested a little later at a restaurant where he had drunkenly damaged property. As a result of the attack, the victim suffered permanent paralysis and brain damage. (*People v. Lee*, *supra*, 220 Cal.App.3d at pp. 323-324.)

In reviewing the sufficiency of the evidence to support the conviction, the Court of Appeal "considered the circumstances attending defendant's act, the manner in which it was done, and the means used" to conclude that the attack was sudden, indiscriminate and unfocused; although violent and without regard to the victim's well being there was no evidence of a "controlled, directed, limited attack" that could support the jury's verdict of aggravated mayhem. (*People v. Lee*, *supra*, 220 Cal.App.3d at p. 326.)

The *Lee* court also contrasted cases in which there was sufficient evidence to support an inference of maiming intent, reviewing *People v Ferrell*, *supra*, 218 Cal.App.3d 828 and *People v. Campbell* (1987) 193 Cal.App.3d 1653. In *Ferrell*, the defendant was a stranger to her victim, but

came looking for her by name, stating that she had been sent by a friend from jail. The defendant pointed her gun at her victim's mother and threatened to kill her. When the victim's father moved toward defendant, she calmly and deliberately lowered her aim and shot him in the knee. The defendant then turned and shot her victim once in the neck. Once her victim was down, defendant did not fire additional shots. As a result of her injury, the victim was permanently partially paralyzed. The court found that the evidence did not show an indiscriminate random attack on the victim or an explosion of violence such as those in *Sears* or *Anderson*; instead, there was a convincing showing that the attack was directed, controlled, and of focused or limited scope. (*People v. Ferrell*, *supra*, 218 Cal.App.3d at pp. 835-836.)

Similarly, in *Campbell* a jealous boyfriend inflicted about 25 non-life-threatening punctures to the left side of his girlfriend's face with a screwdriver. He also battered the right side of her head and face with a cinder block, extensively tearing her right ear. Analyzing these facts, the court concluded "The facts indicate [defendant] limited the amount of force he used with the screwdriver rather than stabbing with his full force, and limited the scope of the attack with the brick to the head and face, rather than randomly attacking [the victim's] body. The controlled and directed nature of the attack supports an inference [defendant] intended to disfigure [the victim's] face, including her right ear." (*People v. Campbell*, *supra*, 193

Cal.App.3d at pp. 1668-1669, fn. omitted.)

Thus *Lee*'s analysis provides a useful tool to assist reviewing courts with precisely the question posed here, whether the evidence can support a jury's decision that a defendant has committed intentional mayhem. In each of the cases considered there was evidence of an attack sufficient to produce a maiming injury. Only in cases presenting evidence of a focused attack designed to produce such an injury was the jury's verdict sustained. When the evidence was merely that the attack was violent enough to produce maiming injuries as part of an indiscriminate attack, the verdict was overturned.

E. Evidence Showing Only A Sudden, Indiscriminate Fusillade of Gunshots Cannot Support A Conviction For Aggravated Mayhem

The evidence available to the jury presented a sudden and indiscriminate attack following closely upon the heels of an ineffectual attempt at robbery. The testimony of all witnesses claiming to have observed the shooting of Ms. Aninger describes the shots as coming from inside a vehicle, and shows that the shooter took no particular time to aim or otherwise direct fire toward a specific body part, or even toward a specific person.

There was thus no evidence that could reasonably be interpreted to say the shots were directed to cause permanent disability or disfigurement.

The most likely interpretation is that Norman W., having been awake for many hours and having taken methamphetamine during that time, simply lost his temper when his demands for money were ignored and fired out of frustration. (See 60 RT 11877-11882; 66 RT13031-13033; 67 RT 13244-13249.) It is also possible that Norman's purported justification for the shooting relayed by Tegerdal was true - that he shot at the women to avoid leaving witnesses to the attempted robbery. (See 66 RT 13033.)

Neither of these theories would support the jury's verdict here, and no rational analysis of the evidence can do so. There was simply no evidence to support a conclusion that Norman's spasmodic gunfire was the sort of "controlled, directed, limited attack" that could support a finding of aggravated mayhem. (*People v. Lee*, *supra*, 220 Cal.App.3d at p. 326.) The opposite is true. The shooting described by the witnesses was an impersonal, emotional and sudden response arising in an already tense situation, earmarks of the type of "indiscriminate" attacks evaluated in *Lee*, *Sears* and *Anderson, supra.* Although this type of shooting displays thorough disregard for the welfare of those near the spray of bullets and could adequately support a charge of simple mayhem, it does not have the earmarks of the specific intent to permanently disable or disfigure needed to support the aggravated mayhem conviction. Absent any such evidence, the jury's verdict is without a rational basis and must be overturned.

F. Aggravated Mayhem is not a Natural or Probable Consequence of Attempted Robbery

Kekoa's criminal liability for the attack on Ms. Aninger was based on a theory of aiding and abetting rather than on his direct action; accordingly the jury was instructed that they could find him guilty of aggravated mayhem if they determined that he aided and abetted an attempted robbery or attempted murder during which a co-principal committed aggravated mayhem and that aggravated mayhem was a natural and probable consequence of armed robbery or attempted murder. (7 CT 1866; 75 RT 14840-14841.)

These instructions, set forth in CALJIC 3.02, present the general rules of accomplice liability. Under California's "natural and probable consequences doctrine," a person who aids and abets a "target crime" is also liable for any other crime that was a natural and probable consequence of the target crime. (See *People v. Prettyman* (1996) 14 Cal. 4th 248, 260-62.) Whether one criminal act is a natural and probable consequence of another criminal act is generally a question for the trier of fact; and the test is objective, depending upon whether the resulting crime "is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened." (CALJIC 3,02; See *People v. Nguyen* (1993) 21 Cal. App. 4th 518, 531.) Although variations in phrasing

are found in decisions addressing the doctrine, such as "probable and natural," "natural and reasonable," or "reasonably foreseeable," the ultimate factual question is one of foreseeability. (See *People v. Coffman* (2004) 34 Cal. 4th 1, 107.) Furthermore, to be reasonably foreseeable, the consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. (*People v. Medina* (2009) 46 Cal. 4th 913, 920.)

Thus simple mayhem is a natural and probable consequence of assaultive or other violent target crimes. (See, e.g. *People v. Reed* (1984) 157 Cal.App.3d 489, 492 (bar fight); *Lee v. United States* (D.C. 1997) 699 A.2d 373, 386, fn. 29 (home invasion); *Bowers v. State* (Tex. Crim. App. 1888) 24 Tex. Ct. App. 542, 550 [7 S.W. 247] (conspiracy to whip); *Lopez v. Scribner* (C.D. Cal. 2010) No. EDCV 06-623-VBF [2010 U.S. Dist. Lexis 39815, pp. 24-26] (gang assault).)

The same is not true of aggravated mayhem. For aggravated mayhem to be a foreseeable consequence of attempted robbery particularly unique circumstances must be present ; counsel has been unable to locate any cases containing such circumstances. Mindful of the sort of circumstantial evidence needed to support direct liability for the two crimes, it would appear that the evidence would have to include facts supporting a finding that the perpetrator had a dual intent, both to rob and to disfigure, and that the

aider/abettor had some reason to anticipate that dual purpose, not just the intent to rob. Hollywood screenplays or detective fiction may provide such a scenario, but the evidence from this case does not.

The best support would, of course, be a statement of intent by Norman sometime before he fired the shots to which Kekoa assented or showed support. But there was no evidence whatsoever of any discussion of an intent to disfigure anyone for any reason between the occupants of the car. In fact, the use of the gun at the wharf was a complete surprise according to both Tegerdal and Contreras. The only discussion in evidence concerned an attempt to obtain money by robbery, and the necessary element of foreseeability of intentional mayhem is not present in the sort of robbery contemplated. In fact, aggravated mayhem would be at cross-purposes and a detour from that crime. Aggravated mayhem is designed to create a horrifying and memorable experience for the victim, not to avoid leaving witnesses, allow a quick get away, or to otherwise advance the purpose of a street-side, grab and go type of robbery.

The facts presented to the jury show simply a sudden burst of gunfire and the tragic consequences that followed. Despite the susceptibility of those facts to support various criminal charges, they do not provide constitutionally adequate support for the jury's verdict of aggravated mayhem. As a result, the jury's verdict for Count 3 must be reversed.

XI

ALTHOUGH MELISSA CONTRERAS AND ADAM TEGERDAL WERE ACTIVE PARTICIPANTS IN ALL OF THE EVENTS THAT GAVE RISE TO THE CHARGES FILED AGAINST KEKOA, THE TRIAL COURT IMPROPERLY DENIED COUNSEL'S REQUEST TO DESIGNATE THEM AS ACCOMPLICES

Introduction

Throughout all of the events that occurred on January 31 and February 1, 1998, four people were present, Kekoa, Norman W., Melissa Contreras and Adam Tegerdal. All participated in the plans to rob people, both before and after the shooting of Priya Mathews and Jennifer Aninger. All four remained together after that shooting, although they stopped and changed cars. Tegerdal owned both of the cars that were used that night and three of the people drove one or both of the vehicles during the night, Kekoa, Contreras and Tegerdal. After the events, however, paths diverged. Kekoa and Norman W. were each charged with two counts of murder (with special circumstances), one count of attempted murder and one count of aggravated mayhem. Contreras and Tegerdal became prosecution witnesses, obtained benefits, and testified at both trials.

In this trial, defense counsel moved for an order that Contreras and Tegerdal be designated accomplices to these charges as a matter of law, based on their ongoing participation in the events forming the basis for the

charges. The trial court refused to do so, although Tegerdal was designated an accomplice as a matter of law for an added count of attempted robbery that occurred at a different day and under different circumstances.

Because both Contreras and Tegerdal participated in planning robberies, provided aid to the enterprise during its course, and did not abandon the project despite opportunities to do so, both were accomplices. The trial court's refusal to designate them as such was error and under the circumstances of this trial, was prejudicial. The jury was not told that as accomplices their testimony could not corroborate each other, and there was little other evidence tying Kekoa to the killings. As a result of the error, Kekoa's convictions must be reversed.

A. Contreras and Tegerdal Each Participated in a Meaningful Way in the Plans to Commit Robbery, and Neither Sought to Abandon the Enterprise Even after the Shootings at the Wharf

Melissa Contreras and Adam Tegerdal were the major prosecution witnesses at Kekoa's trial and were the only witnesses who alleged that they had seen Kekoa participate in the crimes. (60 RT 11859-63 RT 12440 [Contreras]; 66 RT 13012-68 RT 13411.) Before the shootings of Ms. Aninger and Ms. Mathews, Kekoa, Adam Tegerdal, Melissa Contreras and Willover went out together, with Kekoa driving Tegerdal's car. (60 RT 11867; 63 RT 12403-12405.) During the drive, members of the group openly discussed committing robberies to get money to pay for

methamphetamine, and Tegerdal voiced the opinion that both he and Contreras would share in the proceeds. (66 RT 13020-13022, 13083-13088, 67 RT 13291.) Also during this time, all of the people in the car became aware that Willover had a gun and planned to use it in any robbery. (60 RT 11869-11872; 63 RT 12403-12405.) Before the shooting at the wharf, Contreras parked the car while Kekoa and Willover left on foot to look for someone to rob. Both Contreras and Tegerdal remained in the car and Contreras was prepared to be a getaway driver if the other two were successful. (62 RT 12209; 66 RT 13022-13028.)

After leaving the area where they'd parked, Tegerdal admitted that he continued to help look for robbery victims. (66 RT 13106-13107.) When they drove to the wharf and saw Ms. Mathews and Ms. Aninger, Tegerdal and Contreras joined the conversation about robbing the two. (66 RT 13106-13119.) Tegerdal asked if they had purses, trying to ascertain if they would be suitable victims.[54] (66 RT 13028-13031.)

After the shooting at the wharf, Tegerdal suggested using a different car to avoid detection. The group drove to Tegerdal's house where Tegerdal

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[54] Tegerdal admitted that he asked this because otherwise there would be no point to rob them. (66 RT 13031.) Further, Tegerdal was not new to this enterprise and had previously been involved in a purse snatch type attempted robbery with Kekoa, charged as Count 5. Tegerdal's plea agreement included a plea to this count. (66 RT 13016.)

provided his 1979 Monte Carlo, which he then drove until he got tired. (67 RT 13208-13211, 13212-13219.) Contreras also stayed with the group, and was present in the new car with the group as they continued to discuss robbing someone. (66 RT 13038.) After the shooting of Ms. Olivo, Tegerdal and Willover went through the car and removed spent bullet casings. (67 RT 13243-13244.)

Thus both Contreras and Tegerdal, despite opportunities to abandon the enterprise, continued to join in. They provided aid, assistance and encouragement, all the while knowing that one of the activities contemplated was armed robbery. At no point did either voice an objection or attempt to leave. Neither questioned why a gun might be necessary, nor did either suggest that the shooting at the wharf may have been more than they'd bargained for. As shown below, each was an accomplice in all of the crimes that occurred.

B. Both Contreras and Tegerdal Were Accomplices as a Matter of Law Based on Their Joint Participation in the Ongoing Plan to Commit Robbery

Penal Code Section 1111 provides as follows:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution *for the identical offense* charged against

> the defendant on trial in the cause in which the testimony of the accomplice is given. (Italics added.)

To be chargeable with the "identical offense", the witness must be a principal in the crime. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114; *People v. Fauber* (1992) 2 Cal.4th 792, 833.) Penal Code Section 31 defines principals and includes "[a]ll persons concerned in the commission of a crime ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ... ." (§ 31.) Thus, an accomplice need not share in the actual perpetration of a crime to be chargeable as a principal. Accomplice liability may be based on having aided and abetted the commission of the crimes so long as the aider/abettor knows and shares the perpetrator's specific criminal intent, and actively promotes, encourages, or assists the perpetrator with the intent and purpose of advancing the perpetrator's commission of the target offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

However, not all people who are involved in a crime are principals. "A mere accessory ... is not liable to prosecution for the identical offense, and therefore is not an accomplice." (*People v. Horton, supra,* 11 Cal.4th at p. 1114, citing *People v. Fauber, supra,* 2 Cal.4th at pp. 833-834, and *People v. Hoover* (1974) 12 Cal.3d 875, 879.)

The application of these rules most often requires the jury to resolve disputed evidence to decide whether a witness is or is not an accomplice. The import of that determination is that if a witness is an accomplice, the jury must apply a series of instructions explaining how to evaluate accomplice testimony. Among those instructions are those explaining that an accomplice's testimony should be viewed with caution, and that an accomplice's testimony must be corroborated before being accepted as proof of any fact. (CALJIC No.s 3.11, 3.13, 3.18.[55])

In most cases, the determination of whether a person is an accomplice is a question of fact for the jury to determine. However, if the facts are uncontroverted, the question becomes legal rather than factual. Thus:

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[55] CALJIC No. 3.11 provided: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence that tends to connect [the] [that] defendant with the commission of the offense. ¶ [Testimony of an accomplice incloudes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true.]"

CALJIC No. 3.13 provided: "The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of [his] [her] accomplices but must come from other evidence."

CALJIC No. 3.18 provided: "To the extent that an accomplice gives testimony that tends to incriminate [the] [a] defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case."

> Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury "unless the evidence permits only a single inference." (Citation.) Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are "clear and undisputed." (Citations.) (*People v. Williams* (1997) 16 Cal. 4th 635, 679

Stated in another way, a person is an accomplice as a matter of law when " 'there is no dispute as to either the facts or the inferences to be drawn therefrom.' [Citation.]" (*People v. Richardson* (2008) 43 Cal. 4th 959, 1023 quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) If the evidence adduced at trial establishes as a matter of law that a witness was an accomplice to the charged offense, the trial court had a *sua sponte* duty to so instruct, and the jury is not free to evaluate the witness without utilizing the cautionary instructions. (*People v. Zapien* (1993) 4 Cal.4th 929, 982; *People v. Robinson* (1964) 61 Cal.2d 373, 394.)

Counsel first asked that both Contreras and Tegerdal be designated as accomplices in a pretrial motion. (4 CT 899-900[56].) After a brief hearing, the trial court correctly noted that this was a question of fact and that he

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[56] The motion also asked that Norman Willover be designated as an accomplice. In light of Willover's convictions for the same offenses, the prosecutor had no objection, but also did not intend to call Willover as a witness. The prosecutor also agreed that Tegerdal was an accomplice to Count 5, the attempted robbery that did not involve either Contreras or Willover. As to that charge, the trial court agreed to designate Tegerdal an accomplice as a matter of law. (40 RT 7870-7872.)

should not determine the facts before the evidence is presented. (40 RT 7870-7873.) The question arose again as the parties discussed jury instructions. Counsel moved again that Contreras and Tegerdal be designated accomplices as a matter of law. This motion was accompanied by transcript excerpts showing that both were active participants in the criminal events regarding the shooting at the wharf. (7 CT 1932-1951.) The trial court denied the motion, reasoning "In this case there are two reasonable interpretations of the evidence to say they either are or are not an accomplice. That's the instance where it goes to the jury and that's what I'm going to do." (72 RT14221.)

In order to prove that Contreras and Tegerdal were accomplices whose testimony required corroboration, Kekoa was required to show by a preponderance of the evidence that they were chargeable as a principals with having committed the identical offenses with which he was charged. (§§ 31-33; *People v. Horton*, *supra*, 11 Cal.4th at p. 1114; *People v. Fauber*, *supra*, 2 Cal.4th at pp. 833-834; *People v. Sully* (1991) 53 Cal.3d 1195, 1227.)

The facts showing that Contreras and Tegerdal are accomplices as a matter of law are clear and undisputed. All of the facts in this regard came from their own testimony at trial and was, for the most part, adduced in the prosecution's direct examination. Although the defense disputed aspects of

their testimony portraying Kekoa's participation, their own roles in the events were not disputed. While each subjectively distanced themself from the actual shootings, they each admit the actions that, when viewed objectively, showed them to be principals in the crimes.

Where the facts with respect to the participation of witnesses in the crime for which the accused is on trial are clear and not disputed, it is for the Court to determine whether the witnesses are accomplices, not the jury. (*People v. Allison* (1927) 200 Cal. 404, 408; *People v. Lamb* (1955) 134 Cal.App.2d 582, 586.) If the undisputed evidence establishes that a witness is an accomplice, the jury should be so instructed. (*People v. Robinson* (1964) 61 Cal.2d 373, 395; *People v. Mangipane* (1957) 152 Cal.App.2d 245, 248.) Where the undisputed evidence establishes complicity, the court must instruct the jury that the witness is an accomplice as a matter of law. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 982; *People v. Allison*, *supra*, 200 Cal. at 408; *People v. Duncan* (1960) 53 Cal. 2d 813, 816.)

In the crimes charged regarding the shootings of Priya Mathews and Jennifer Aninger, Contreras and Tegerdal stand in the same position as Kekoa. Although Kekoa was driving at that moment, Contreras and Tegerdal were more than mere passengers. Tegerdal had provided the car, knowing that robbery was an activity that they would engage in. Contreras, with the same knowledge, had driven the car during the unsuccessful search

for earlier robbery subjects and it was only a matter of chance that she was not driving when Willover shot Priya Mathews and Jennifer Aninger. Had that robbery been successful, both Contreras and Tegerdal expected to share in the proceeds. They both knew of and shared the intent to rob, and both actively assisted and encouraged in the events.

The same is true for the shooting of Frances Olivo. There, according to their own testimony, Contreras and Tegerdal stand in the same shoes as Norman W. Despite a clear opportunity to depart after the first shootings, they remained both elected to stay with Kekoa and Willover when they reached Tegerdal's house. Tegerdal provided a different automobile in case the first had been seen at the first shooting and initially drove that car. Although not their sole activity, they continued to be on the lookout for potential robbery targets, and were not in the car by happenstance or with ignorance of the fact that the events at the wharf could recur. Neither expressed disapproval of the earlier events, and by their willingness to continue both tacitly approved of that course of action.

Because it was undisputed that Contreras and Tegerdal were both principals in the crimes charged in Counts 1-4, the trial court was required to instruct the jury that they were accomplices as a matter of law. (*People v. Gordon* (1973) 10 Cal.3d 460, 469-470; *People v. Bevins* (1960) 54 Cal.2d 71, 76; *People v. Sullivan* (1976) 65 Cal.App.3d 365, 372; *People v. Dailey*

(1960) 179 Cal.App.2d 482, 486.)

By concluding that the facts gave room to two reasonable interpretations, the trial court was simply wrong. The facts showing that both Contreras and Tegerdal were accomplices were not in dispute. Their credibility as a whole was challenged throughout the trial, but at no time was any evidence provided that suggested an alternative explanation for their testimony. Either what they were saying was true, and they were accomplices, or it was false and Kekoa was innocent. This sort of all or nothing credibility question does not rise to the level of alternate reasonable interpretations because the question exists for ***every*** fact subject to proof in court - believe it or don't. Here, both Contreras and Tegerdal admitted their participation and merely stressed their surprise that the attempted robbery escalated into shooting. Because there was no innocent alternative explanation of any kind suggested by their testimony or other evidence, the trial court's ruling to the contrary is error.

C. The Trial Court's Failure to Instruct the Jury That Contreras and Tegerdal Were Accomplices as a Matter of Law Whose Testimony Required Independent Corroboration Was Prejudicial Error

The trial court's error in not instructing the jury to find that Contreras and Tegerdal were accomplices as a matter of law denied appellant due process by improperly instructing the jury (see *United States v. Gaudin*

(1995) 515 U.S. 506, 510-514; *People v. St. Martin* (1970) 1 Cal.3d 524, 531; *People v. Ford* (1964) 60 Cal.2d 772, 792-793), and also denied him the protection intended by Penal Code section 1111.

While this Court has found such error to be harmless when the record supplies sufficient corroboration, the trial court's error was prejudicial here because of the primary place Contreras and Tegerdal played in the prosecution's case. Both were unquestionably accomplices, as shown above. By giving the jury the option of finding them not to be accomplices, the trial court both subtly enhanced their status, and interjected a confusing and unnecessary choice into the deliberations.

The principles involved in this distinction should have been well known to the trial court. Over fifty years ago, this Court addressed the issue precisely.

> By telling the jury that corroboration of his testimony was required only if they found [the witness] to be an accomplice, the court impliedly and erroneously authorized the jury to find him not an accomplice, thereby making corroboration unnecessary. The fact that the court may have, thereafter, given either a proper or an improper definition of accomplice does not cure the error. It only emphasizes it, for such definition serves to strengthen the thought that the jury was the sole judge of whether or not Hickman was an accomplice. . . But the important fact is that Hickman, Robinson and Guliex were all accomplices as a matter of law (each by reason of his own confession, as well as by reason of other testimony). The court should not have invited the jury to speculate on who was and who was not an accomplice.
> (*People v. Robinson, supra*, 61 Cal.2d at pp. 394-395.)

Here, however, the trial court did "invite the jury to speculate" and by doing so committed prejudicial error.

Contreras and Tegerdal ***were*** the prosecution's case. The prosecution could not otherwise put Kekoa or Willover at the scene of either shooting, much less show that either was an active participant in the events. By not designating both witnesses to be accomplices, the trial court implied that the jury was free to determine either one (or both) was not an accomplice. This, in turn, allows one to corroborate the other, entirely diluting the protection that the accomplice testimony rules provide.

This was not a case that invited the jury to choose whether the witnesses were accomplices. They were accomplices and the trial court should have told the jury exactly that. The failure to do so was prejudicial and requires that the convictions and death sentence be reversed.

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XII

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY MUST AGREE UNANIMOUSLY WHETHER KEKOA HAD COMMITTED MALICE MURDER OR FELONY-MURDER

Kekoa was charged in Count 1 of the information with premeditated and deliberate murder in violation of section 187, subdivision (a), and in Count 2 with attempted premeditated and deliberate murder. (3 CT 669-670.) To determine whether these charges had been proved, the jury received instructions on three theories of first degree murder: a theory of deliberate and premeditated murder (7 CT 1882-1883; CALJIC 8.20) a theory of felony murder (CT 935, CALJIC 8.21) and a theory of drive-by murder. (7 CT 1884.) The jury was not instructed that they were required to reach a unanimous verdict, beyond a reasonable doubt, as to which of these theories it accepted.

Kekoa was thus found guilty of first-degree murder by a jury that failed to unanimously find each and every element of the charges against him to be true beyond a reasonable doubt. The instructions erroneously denied appellant his rights to have the state establish proof of the crimes beyond a reasonable doubt, to due process and to a reliable determination on allegations that he committed a capital offense under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the correlate

provisions of the state constitution.

A. This Court Should Reconsider Its Case Law Regarding the Relationship Between Premeditated Malice Murder and Felony-Murder

Appellant recognizes that this Court has rejected several arguments pertaining to the relationship between malice murder and felony-murder (see e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. McPeters* (1992) 2 Cal.4th 1148, 1185.) In light of *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304 appellant presents an abbreviated argument in order to preserve this issue for further review.

Murder is explicitly defined only in section 187, which states that "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Malice aforethought is defined in section 188, and, contrary to the common law, does not include within its definition the commission of a felony.[57] Section 189 lists various factors which will elevate a murder to

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[57] provides in pertinent part that:

> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

murder of the first degree.[58]

The plain language of these statutes leads to the conclusion, as this Court has stated that "To prove first degree murder *of any kind*, the prosecution must first establish a murder within section 187 -- that is, an unlawful killing with malice aforethought. [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 794, emphasis added.) Section 189 then provides guidance for fixing the degree of murder once murder with malice has been proven.

In accordance with this understanding, this Court has held that all types of murder, including felony-murder, were defined by section 187 and therefore included the element of malice aforethought (*People v. Milton*

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[58] Section 189 provided, in pertinent part at the relevant time, that:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree; and all other kinds of murders are of the second degree.

(1904) 145 Cal. 169, 170-172), though in the case of first-degree felony-murder the necessary malice was presumed from commission of a felony listed in section 189 (*People v. Ketchel* (1969) 71 Cal.2d 635, 641-642; *People v. Milton*, *supra*, at p. 172).

However, in *People v. Dillon* (1983) 34 Cal.3d 441, the Court re-examined its earlier cases and concluded that first-degree felony-murder was not merely an aggravated form of the malice murder defined by section 187, but was instead a separate and distinct crime, with different actus reus and mens rea elements, and defined exclusively by section 189. (*Id.* at pp. 465, 471-472.) Under this construction, malice aforethought is *not* an element of first-degree felony-murder. (*Id.* at pp. 465, 475, 477, fn. 24.)

Notwithstanding *Dillon*, however, this Court has continued to occasionally assert that "There is still only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter, supra*, 15 Cal.4th at p. 394, quoting *People v. Pride*, *supra*, 3 Cal.4th at p. 249.) In light of these seeming contradictions, and the continuing uncertainty regarding the elements of certain kinds of first degree murder, counsel respectfully requests that this Court reconsider whether the jury may convict a defendant of first degree murder without being unanimous as to whether the killing was a felony-murder or premeditated and deliberate murder.

B. The Trial Court Should have Instructed the Jurors That to Convict Appellant of First Degree Murder, They Had to Be Unanimous as to Whether the Murder Was Premeditated and Deliberate Murder or Felony-Murder

Due process requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship, supra,* 397 U.S. at p. 364.) Although states have great latitude in defining what constitutes a crime, once the elements of a crime have been established, the state may not relieve the prosecution's burden of proving every element of that offense. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

Appellant submits that in California, under *People v. Dillon*, *supra*, 34 Cal.3d 441, malice murder and felony-murder have different elements which need to be proved beyond a reasonable doubt in order to convict. (See *id.* at pp. 465, 471-472, 475, 477 fn. 24.)

The United States Supreme Court addressed the due process implications of convicting a defendant of both premeditated murder and felony-murder in *Schad v. Arizona* (1991) 501 U.S. 624. The defendant in *Schad* challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony-murder or premeditated and deliberate murder. The Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual

issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit a state's capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due process the court gave deference to Arizona's determination that, under its statutory scheme, "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Id.* at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (*Id.* at p. 636, emphasis added.) Thus, while Arizona determined not to treat premeditation and the commission of a felony as independent elements of the crime, *Shad*'s language implies that when a state ***has*** determined that the statutory alternatives are independent elements of the crime, it is a due process violation if jury unanimity does not apply to all the elements.

California has followed a different course than Arizona. Under *Dillon*, premeditated malice murder and felony-murder have different elements. Even if it is assumed there is one crime of murder (*People v.*

Davis, *supra*,10 Cal.4th at p. 515, *cf Dillon*, *supra*, 34 Cal.3d at p. 476, fn. 23), and malice murder and felony-murder may be described as two theories of that one crime (*People v. Pride*, *supra*, 3 Cal.4th at p. 249), they are crimes and/or theories with different elements, and one of those elements cannot be removed by the state without violating due process under *Winship*.

In *Dillon*, the Court, *inter alia*, addressed the contention that the first-degree felony-murder rule operated as an unconstitutional presumption of malice because malice is an element of murder as defined by section 187. (*Id.* at p. 472.) The resolution of that issue depended on the Court's conclusion that there are two distinct crimes of "murder," each with different elements:

> We do not question defendant's major premise, i.e., that due process requires proof beyond a reasonable doubt of each element of the crime charged. [Citations.] Defendant's minor premise, however, is flawed by an incorrect view of the law of felony-murder in California. To be sure, numerous opinions of this Court recite that malice is 'presumed' (or a cognate phrase) by operation of the felony-murder rule. But none of those opinions speaks to the constitutional issues now raised, and their language is therefore not controlling. [Citation.]
> (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 473-474, fn. omitted.)

The Court conceded that, if the felony-murder rule did operate as a presumption of malice, the presumption was a conclusive one. (*People v. Dillon*, *supra*, at p. 474.) The Court also conceded that malice is an essential element of the crime of murder defined in section 187. "In every

case of murder other than felony-murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.] (*Id.* at p. 475.) However, the Court concluded that what appeared to be a conclusive presumption of malice in the felony-murder rule was not a true presumption but rather a rule of substantive law, and thus: "[A]s a matter of law malice is not an element of felony-murder." (*Ibid.*)

If there were any doubt that the Court was distinguishing between two crimes with distinctly different statutory elements, it was laid to rest by the Court's response to the equal protection claim raised in *Dillon*:

> There is likewise no merit in a narrow equal protection argument made by defendant. He reasons that the "presumption" of malice discriminates against him because persons charged with 'the same crime,' i.e., murder other than felony-murder, are allowed to reduce their degree of guilt by evidence negating the element of malice. *As shown above, in this state the two kinds of murder are not the "same" crimes* and malice is not an element of felony-murder. (*People v. Dillon*, *supra*, at p. 476, fn. 23, emphasis added; see also pp. 476-477, fn. 24.)

After *Dillon*, this Court appears to have retreated somewhat from the description of felony-murder and malice murder as "separate crimes." (See e.g., *People v. Pride*, *supra*, 3 Cal.4th at p. 249.) Nonetheless, the Court has continued to reaffirm that "the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, emphasis in original.) The Court's continuing treatment of felony murder as a separate

crime with separate elements brings the *Schad* analysis into play. In that case, appellant's right to due process was violated when the court failed to require jury unanimity on each element of the crimes charged.

The same result applies if the elements of malice murder and felony-murder are the same Malice would then be an element of felony-murder, and the California felony-murder rule violates *Sandstrom* and *Mullaney* in that the required element of malice is unconstitutionally presumed. Also, if that is the case, the trial court failed to instruct that the jurors must find malice in order to convict of felony-murder. This instructional failure amounts to an unconstitutional conclusive presumption. (*Carella v. California* (1989) 491 U.S. 263; *People v. Figueroa* (1986) 41 Cal.3d 714, 723-741.)

In the face of this conundrum, the instructions given violated the bedrock principle that all elements of an offense must be found beyond a reasonable doubt by the trier of fact, (*Sandstrom v. Montana*, (*supra*), 442 U.S. 510), by a unanimous jury. (See e.g., *Burch v. Louisiana* (1979) 441 U.S. 13, 139.) Moreover, in California, a criminal defendant has a constitutional right to trial by a unanimous twelve person jury that has found every element of the crime alleged to be true beyond a reasonable doubt. (See Cal. Const, art. I § 16; see also *People v. Wheeler*, *supra*, 22 Cal.3d at p. 265; *People v. Collins* (1976) 17 Cal.3d 687, 693.) This state created

right is protected under the due process and equal protection clauses of the Fourteenth Amendment. (See generally *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Bush v. Gore* (2000) 531 U.S. 98; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295.)

Thus, by failing to properly instruct the jury on the elements of murder, the trial court denied appellant his rights to due process and to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., art. I, §§ 7, 16.) Also, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the trial court violated appellant's right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal. Const., art.I, § 17.)

A unanimity instruction is required where " 'the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' "(*People v. Gonzales* (1983) 141 Cal.App.3d 786, 791; see *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300- 302.) Nonetheless, this Court has held that a unanimity instruction is not required where a single charged offense is submitted to the jury on alternative "legal theories" of culpability, i.e. first degree murder based on alternate theories of felony murder. (*People v. Milan* (1973) 9 Cal.3d 185, 195.) However, if

two theories have different elements, they are, by definition, different crimes. As the United States Supreme Court has observed, "[c]alling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.)

As shown above, this Court has determined that malice murder and felony-murder are different crimes and have different elements. Having instructed on both malice murder and on felony-murder, the State may not remove the burden of proving one of those elements from the prosecution without violating Kekoa's constitutional rights. Nonetheless, each juror in the instant case was allowed to find different factual elements to be true under the different theories presented by the State, yet vote guilty for the first degree murder charge. Because the jury was not instructed to set forth the theory under which they convicted,[59] the jury was never required to unanimously find beyond a reasonable doubt each element of the crime for which it found appellant guilty. The Constitution requires more. (*In re*

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[59] This Court has noted that, "in an appropriate case," the trial court may protect the record by requiring the jury to explain, in special findings, which of several alternate theories was accepted in support of a general verdict, but only where the defense requests such special findings. (*People v. Carter* (2003) 30 Cal.4th 1166, 1200-1201.) The federal Supreme Court's holdings in the *Apprendi,* and *Blakely* opinions dictate that where alternate theories of an offense are based on differing elements, the trial court must sua sponte instruct the jury to return special verdicts indicating it has found all elements of one theory to be true beyond a reasonable doubt.

Winship, supra, 397 U.S. at p. 364.)

Because this is a capital case, there are additional foundations for a requirement of a unanimous verdict on the murder count. The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict. (*Brown v. Louisiana* (1980) 447 U.S. 277 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352.) There is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama, supra,* 447 U.S. at p. 638.) As the U.S. Supreme Court has explained: "The Framers would not have thought it too much to demand that, before depriving a man [] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors.' " (*Blakely v. Washington* (2004) 542 U.S. 296 307, quoting 4 Blackstone, Commentaries, at 343; see also *United States v. Booker* (2005) 543 U.S. 220, 230.) Kekoa did not receive the required "unanimous suffrage" before he was deprived of his liberty.

The trial court, by failing to instruct the jury that it had to agree unanimously whether Kekoa committed malice murder or felony-murder, incurred constitutional error. Because the jurors were not required to reach unanimous agreement on each and every element of first degree murder, there is no valid jury verdict on which harmless error analysis can operate.

In this instance, the failure to instruct was a structural error and therefore reversal of the entire judgment is required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Even if a harmless error analysis were appropriate, this error was prejudicial. When a jury is given instruction on a legally proper theory of guilt in conjunction with instructions on a legally improper theory of guilt, any resulting conviction must be reversed unless it can be conclusively shown by reference to the jury verdicts that no juror relied upon the improper theory. (*People v. Green* (1980) 27 Cal.3d 1, 69; *People v. Guiton* (1993) 4 Cal.4th 1116; see also *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237-1238.) That determination cannot be made in this case, and the judgment and convictions must therefore be reversed.

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XIII

THE CUMULATIVE EFFECT OF A SERIES OF INSTRUCTIONAL ERRORS WAS PREJUDICIAL AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY JURY, AND RELIABLE VERDICTS, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

The trial court instructed the jury with CALJIC Nos. 2.06, 2.51 and 2.52. (7 CT 1844, 1854, 1855; 75 RT 14832, 14836.) As discussed below, these instructions violated appellant's constitutional rights to due process (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., Amends. VI & XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17). (*Sullivan v. Louisiana*, (*supra*) 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, supra, 447 U.S. at p. 638.)

Appellant recognizes that this Court has previously rejected these claims. (See, e.g., *People v. Cleveland, supra*, 32 Cal.4th at pp. 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden, supra*, 9 Cal.4th at p. 144.) Nevertheless, in accord with *People v. Schmeck, supra*, 37 Cal.4th at pp. 303-304, he raises them here in order for this Court to reconsider those decisions and in order to raise the claims in subsequent proceedings.

A. The Court Erred in Instructing the Jurors With CALJIC No. 2.06 and CALJIC No. 2.52 That They Could Consider Kekoa's "Efforts to Suppress Evidence" and his Flight as Evidence of his Consciousness of Guilt

During her testimony, Melissa Contreras testified that while at Tim Frymire's house she received a telephone call from Kekoa after he had been arrested. She claimed that during this call, Kekoa asked if she was being "true" which she interpreted to mean was she keeping quiet. (61 RT 12024-12025.) Tim Frymire was also asked about receiving a telephone call from Kekoa after his arrest, but Frymire did not recall that event. After reviewing his testimony from the preliminary hearing[60], Frymire still could not recall the incident, but said that he was being truthful when he testified at the hearing. (68 RT 13464, 13478.) During a discussion of potential jury instructions, defense counsel objected to the use of CALJIC 2.06[61]. The trial court overruled the objection, holding that the questions about "staying true" were sufficient to warrant the instruction. (71 RT 14065.)

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[60] At the Preliminary Hearing, Frymire testified that Kekoa had called a day or two after his arrest and asked if Frymire "was being true". (1 CT 133.)

[61] CALJIC 2.06 provided: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness by destroying evidence by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide. (7 CT 1844.)

The trial court also decided to give CALJIC 2.52 based on the speed with which the car left the wharf over defense counsel's question of whether the instruction was supported by the evidence.[62] (71 RT 14072.) CALJIC No. 2.52 referred to flight and read as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.
> (71 CT 855; 75 RT 14836.)

During closing argument at the guilt phase of the trial, the prosecutor highlighted the telephone calls to Frymire and Contreras, and placed a

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[62] Although appellant's trial counsel questioned the applicability of the instruction, he did not announce an objection to the flight instruction. Regardless of whether counsel's statement is construed as a formal objection, this issue is cognizable on appeal. With regard to CALJIC No. 2.52, Penal Code section 1127c and case law require that the trial court give an instruction on flight when the evidence warrants such an instruction, and this Court has held that under these circumstances error is preserved even in the absence of an objection. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Moreover, instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal. 4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error, nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

sinister connotation on them:

> Now, you will be instructed that if you find that a defendant attempted to suppress evidence against himself in any manner, such as by intimidation of a witness or concealing evidence, this attempt may be considered as a circumstance tending to prove his guilt. And what do we have here? We have the defendant telling Tim Frymire, don't talk to the police. Keep quiet about this. In his own words, of course, but communicating that message. The defendant telling Melissa Contreras after he's arrested, don't talk to the police. Don't tell, stay true is the way he likes to say it.
> (73 RT 14456-14457.).

CALJIC No. 2.06 permitted the jury to use these witness's versions of appellant's statements as evidence "to show his consciousness of guilt" while CALJIC No. 2.52 permitted the jury to use his "flight" for a similar purpose. (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1841.) Although this Court has upheld these instructions in other cases (see, e.g., *People v. Jackson, supra,* 13 Cal.4th at pp. 1223-1224), it should reconsider its previous opinions.

1. CALJIC Nos. 2.06 and 2.52 Should not Have Been Given Here Because They Were Impermissibly Argumentative

A trial court must refuse to deliver any instructions which are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) Such an instruction presents the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See generally *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring

into prominence before the jury isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those which "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437.) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels*, *supra*, 52 Cal.3d at pp. 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and should be refused. (*Ibid*).

Judged by this standard, the consciousness of guilt instructions given in this case were impermissibly argumentative. Structurally, they are almost identical to instructions found to be impermissibly argumentative in other cases. (See *People v. Mincey, supra,* 2 Cal.4th 408, 437, fn. 5 [instruction advising the jury that if it found certain facts, it could consider that evidence for a particular purpose deemed argumentative and properly denied].)

To ensure fairness and equal treatment, appellant requests this Court to reconsider its decisions finding California's consciousness-of-guilt instructions to not be argumentative. Except for the party benefitted by the

instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713), and a defense instruction held to be argumentative because it "improperly implie[d] certain conclusions from specified evidence." (*People v. Wright, supra*, 45 Cal.3d at p. 1137.)

Another rationale offered by this Court to uphold the consciousness-of-guilt instructions in *People v. Kelly* (1992) 1 Cal.4th. 495, 531-532, and in several subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In the *Kelly* decision, the Court focused on the allegedly protective nature of the consciousness-of-guilt instructions, noting that they tell the jury that consciousness-of-guilt evidence is not sufficient by itself to prove guilt. Based on that fact, this Court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly, supra*, 1 Cal.4th at p. 532.)

In a more recent decision, this Court has appeared to abandon the rationale set forth in *Kelly, supra,* that consciousness-of-guilt instructions are protective or neutral. In *People v. Seaton* (2001) 26 Cal.4th, 598, 673, the Court held that failing to give such instructions was harmless error because those instructions "would have benefitted the prosecution, not the defense.

However, the *Seaton* decision does not go far enough in considering the full impact of the instruction. Not only does the instruction benefit the prosecution, it lessens the prosecution's burden of proof and thus violates the due process clause of the United States Constitution. (*In re Winship* (1970) 397 U.S. 358, 364.) The constitutional violation lies in the fact that while the instruction says that consciousness-of-guilt evidence is not sufficient by itself to prove guilt, it does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. It thus permits the jury to seize on one isolated piece of evidence and use that in combination with the consciousness-of-guilt evidence to conclude that the defendant is guilty. This constitutes an unconstitutional lessening of the burden of proof.

Finding that a consciousness-of-guilt instruction based on flight unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction will always be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, the Wyoming court joined a number of other state courts that have found similar flaws in similar flight instructions. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939,

949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson (Colo. 1978) 572 P.2d 815, 817-818* [same].)

The argumentative consciousness-of-guilt instructions given in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, implicitly placing the trial court's stamp of approval on the prosecution theory of the case and lessening the prosecutor's burden of proof.[63] The instructions therefore violated Kekoa's due process right to a fair trial and his right to equal protection (U.S. Const., Amends V & XIV; Cal. Const., art. I, §§ 7 & 15), his right to be acquitted unless found guilty beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., Amends. VI & XIV; Cal. Const., art. I,

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[63] This is particularly true of CALJIC 2.03 in this context. Even if the prosecution interpretation of the question about being "true" was correct, a request for information about whether someone has given a statement to the police, without more, is not threatening. If counsel, or counsel's investigator had asked whether a witness talked to the police, the inquiry would be seen as natural and obvious. By allowing the instruction, the trial court tacitly endorsed the prosecution's theory that the call was a threat.

§ 16), and his right to a fair and reliable capital trial. (U.S. Const., Amends. VIII & XIV; Cal. Const., art. I, § 17.)

2. CALJIC Nos. 2.03 and 2.52 Also Allowed the Jury to Draw Irrational Permissive Inferences

The consciousness-of-guilt instructions given here were also constitutionally defective because they embodied an improper permissive inference. Those instructions permitted the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., that he allegedly attempted to prevent others from talking to the authorities, and he fled from the areas of the shootings. (See *People v. Ashmus* (1991) 54 Cal.3d. 932, 977.) An instruction which embodies a permissive inference can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren (9th Cir. 1994) 25 F.3d 890, 899.)* By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to the need to "consider all evidence will not cure this defect." (*United States v. Warren, supra,* 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid;* see also id. at p. 900 (conc. opn. of Rymer, J.) ["inference instructions in general are a bad

idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal, supra, 967 F.2d at p. 926.)* The Due Process Clause of the Fourteenth Amendment "demands that even inferences-not just presumptions-be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) The rational connection required is not merely a logical or reasonable one, but rather a connection that is "more likely than not." (*Ulster County Court v. Allen, supra*, 442 U.S. at pp. 165-167; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Constitution requires " 'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.' "].) This test is applied to judge the inference as it operates under the facts of a specific case. (*Ulster County Court v. Allen, supra*, at pp. 157, 162-163.)

Here, the consciousness-of-guilt evidence was relevant to whether

appellant committed the charged homicides. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) The irrational inference permitted by these instructions concerned Kekoa's mental state at the time the crimes occurred. Specifically the instructions permit the jury to use the evidence of after occurring events to determine whether he acted with the requisite mens rea. The improper instructions permitted the jury to use the consciousness of guilt evidence to infer not only that he was a major participant in the activities leading to the killings, but that he did so while harboring the mental state required for first degree murder under the theories advanced. Although consciousness-of-guilt evidence in a murder case may rationally bear on a defendant's state of mind after the killing, it is not probative of his state of mind immediately prior to or during the killing. (*People v. Anderson, supra*, 70 Cal.2d at p. 32.)

Kekoa's actions after the crimes, upon which the consciousness-of-guilt inference was based, were simply not probative of whether he harbored the necessary mental state for first degree murder at the time of the killings. There is no rational connection between his calls to Contreras or Frymire or of his leaving the scenes of the shootings and the mens rea required for first degree murder.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning

the defendant's mental state. (See, e.g., *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [CALJIC Nos. 2.03 & 2.06].) However, appellant respectfully asks this Court to reconsider and overrule these holdings, and to hold that delivering the consciousness-of-guilt instructions given in this case was reversible constitutional error.

Because the consciousness-of-guilt instructions permitted the jury to draw an irrational inference of guilt, those provisions undermined the reasonable doubt requirement and denied Kekoa a fair trial and due process of law. (U.S. Const., Amends. VI & XIV; Cal. Const., art. I, §§ 7 & 15.) The instruction also violated his right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., Amends. VI & XIV; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, violated appellant's right to a fair and reliable capital trial (U.S. Const., Amends. VIII & XIV; Cal. Const., art. I, § 17).

Because the error violated Kekoa's federal constitutional rights, the judgment should be reversed unless the prosecution can demonstrate beyond a reasonable doubt that there is no reasonable possibility the error could have

affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [Chapman standard applied to combined impact of state and federal constitutional errors]; and *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

Because of the likely substantial impact of the error, the prosecution cannot meet this burden and Kekoa's convictions and sentence must be reversed.

B. The Trial Court's Instructions Improperly Allowed the Jury to Find Guilt Based upon Either the Presence or Absence of Motive Alone

Another instruction allowing an irrational inference was the frequently used CALJIC instruction concerning motive, No. 2.51. This instruction provides as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of Motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

This instruction has been frequently attacked on appeal as allowing a conviction of murder upon a showing of motive alone, and has been as frequently upheld by this Court. In light of *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304, counsel presents only abbreviated argument on this issue to preserve further appeal.

1. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone

CALJIC No. 2.51 informed the jury that motive "may tend to establish the defendant is guilty." However, it is beyond question that motive alone is insufficient as a matter of law to prove guilt, and due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307.) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

The peculiar wording of the motive instruction stands out from the other standard evidentiary instructions given to the jury in this case. Other instructions that covered an individual evidentiary consideration of this nature also included an admonition that the specific evidence was insufficient, standing alone, to establish guilt. Examples from this case are CALJIC No. 2.06 (Efforts To Suppress Evidence): "However, this conduct is not sufficient by itself to prove guilt . . . ." (7 CT 1844; 75 RT 14832) and CALJIC No. 2.52 (Flight After Crime): ". . . is not sufficient in itself to establish his guilt . . . ." (7 CT 1855; 75 RT 14836.)[64]

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[64] Other CALJIC instructions similarly ensure that a single circumstance cannot be used to prove guilt:

CALJIC No. 2.51 is improperly different from these instructions because it does not contain the cautionary language that proof of motive

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CALJIC No. 2.03 (Consciousness Of Guilt--Falsehood): "However, that conduct is not sufficient by itself to prove guilt . . . ."

CALJIC No. 2.04 (Efforts By Defendant To Fabricate Evidence): "However, that conduct is not sufficient by itself to prove guilt . . . ."

CALJIC No. 2.05 (Efforts Other Than By Defendant To Fabricate Evidence): "[T]hat conduct is not sufficient by itself to prove guilt . . . ."

CALJIC No. 2.15 (Possession Of Stolen Property): "[T]he fact of that possession is not by itself sufficient to permit an inference that the defendant _____ is guilty of the crime of _____."

CALJIC No. 2.16 (Dog-Tracking Evidence): "This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crime of _____."

CALJIC No. 2.50.01 (1999 Revision) (Evidence Of Other Sexual Offenses): "However, ... that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crime[s]."

CALJIC No. 2.50.02 (1999 Revision) (Evidence Of Other Domestic Violence): "However, ... that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged offense[s]."

CALJIC No. 2.72 (Corpus Delicti): ". . . unless there is some proof of each element independent of any confession or admission"

alone is insufficient to prove guilt. The absence of the cautionary language is prejudicially highlighted because the instructions listed above which contain the cautionary language were read within moments of the motive instruction. The order and pacing of the instructions could make the omission of the caution appear intentional and thereby encourage the jury to determine guilt based upon motive alone. Indeed, the jury would conclude that if motive were insufficient by itself to establish guilt, the instruction obviously would say so since other instructions given at about the same time specifically included the caveat that additional evidence was required. The exclusion of any caution that motive alone was insufficient to prove guilt would thus be seen as intentional. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [the reasoning expressed by the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction](conc. opn. of Brown, J.).) In a different context, this Court too has recognized that differing standards in instructions create erroneous implication. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557 [failure to instruct on effect of reasonable doubt between lesser included offenses].)

Thus giving the instruction in this case was error.

2. CALIC No. 2.51 Shifted the Burden of Proof to Imply That The Defense Had to Prove Innocence

CALJIC No. 2.51 informed the jurors that the absence of motive

could be used to establish innocence. The instruction effectively placed the burden of proof on Kekoa to show that Willover's act was independent and deliberate, separate from and not a part of any robbery attempt, rather than placing the burden on the prosecutor to show that the shooting was part and parcel of the attempt to rob. The instruction confirmed that the jury could convict if Kekoa's motive was robbery, regardless of what Willover was doing.

Thus as used here, CALJIC No. 2.51 deprived Kekoa of his constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution submitting the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [in a capital case, reliability concerns extend to guilt phase].) Accordingly, the instruction was given in error.

3. Reversal is Required

The trial court's error in giving the flawed instruction implicated Kekoa's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. This Court must thus reverse the judgment unless the error can be shown to be harmless beyond a reasonable doubt. (*Chapman v.*

California , *supra,* 386 U.S. at p. 24.) Because the instruction substantially lowered the prosecutor's burden it made a conviction much more likely. This Court should find that the error in giving the instruction was not harmless beyond a reasonable doubt. Reversal is thus required.

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SECTION 3

ISSUES AFFECTING PRIMARILY THE PENALTY PHASE

XIV

THE JURY WAS PREVENTED FROM HEARING LEGITIMATE MITIGATING EVIDENCE AND THUS REACHED AN ARBITRARY AND UNFAIR SENTENCING DECISION

Despite defense counsel's request, the jury was prevented from learning that Kekoa's more culpable co-defendant, Norman Willover, had been previously tried, found guilty of substantially identical charges, and yet sentenced to life without the possibility of parole because he was a juvenile at the time of the shootings. Because seventeen year old Willover had provided the pistol used in all three shootings and had instigated the act of shooting in the first place by his unprovoked acts of killing one person and wounding another at the wharf, he was the most culpable person in the group. The fact that he could not even be subject to a jury's death penalty determination, while a less culpable person of similar age, nineteen year old Kekoa, did face such scrutiny rings a sour note that sounds of the unfairness and arbitrariness forbidden by the Eighth Amendment to the United States Constitution, the due process clause, and article I, sections 15 and 17 of the California Constitution. The death sentence reached in the absence of this evidence thus violates the state and federal constitutions and constitutes an

unreliable penalty determination.

A. Background

On August 15, 2000, the defense filed a motion "To Inform Jury of Sentence Given to Co-Defendant." (5 CT 1388-1411.) Accompanied by a copy of the Florida Supreme Court's decision in *Brookings v. State* (Fla, 1986) 495 So.2d 135, the motion sought the trial court's permission to introduce evidence that the co-defendant "was given a sentence of life without the possibility of parole, after being convicted of the same crimes of which the instant defendant was convicted, because he was statutorily ineligible for such penalty . . ." (5 CT 1389.) The defense argued that the evidence was necessary to "insure a guided, constitutionally adequate" sentencing choice, that the evidence was properly considered as a circumstance relating to the offense under section 190.3, and that it was required by basic concepts of fairness, particularly because of those present Kekoa alone faced the death penalty, while Norman faced a maximum of LWOP, Tegerdal faced only a possibility of a minor sentence and Contreras faced no penalty whatsoever. (5CT 1400.)[65]

The prosecutor opposed the introduction of the evidence, arguing that

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[65] By virtue of their testimony at trial, the jury was aware that Contreras was not prosecuted due to her willingness to testify, and that Tegerdal had been allowed to plead to a lesser charge. Willover did not testify and the jury did not learn of his sentence.

no California authority permitted the use of evidence of Willover's sentence as evidence in the penalty phase, and that ample authority existed to bar the use of the evidence, citing *People v. Dyer* (1988) 45 Cal.3d 26, 69-70 and *People v. Beardslee* (1991) 53 Cal.3d 68, 112. The prosecutor further argued that he sought the maximum possible sentence against both Kekoa and Willover and that death is further appropriate for Kekoa because of his "far more extensive and serious criminal history." (5 CT 1420-23.)

The motion was heard on August 24, 2000. (44 RT 8667-8673.) In argument, the defense suggested that there were two aspects covered by the motion, whether the jury should receive evidence of Willover's sentence and whether they should be instructed to consider the evidence in choosing between death and life without possibility of parole. The defense argued that the leading case on the issue, *People v. Dyer, supra,* reached its conclusion through what was essentially an Evidence Code, section 352 analysis, finding that in order to present an accurate picture of why the co-defendants did not receive a death penalty would require a full retrial of the co-defendants' penalty phases. Because the determination of the co-defendant's penalty here was legal rather than factual, the obstacles presented in *Dyer* and its progeny were not present. (44 RT 8668.)

The defense then pointed out that in two of the cases cited by the prosecution, *People v. Gallego* (1990) 52 Cal.3d 115 and *People v. Malone*

(1988) 47 Cal.3d 1, the evidence of the co-defendant's sentence was presented to the jury. (44 RT 8669-6-8670.) Relying upon the Florida case of *Brookings v. State, supra*, 495 So.2d 135, the defense argued that evidence of the co-defendant's sentence was a circumstance that could properly be considered by the jury as mitigating evidence in its penalty determination. (44 RT 8670-8671.)

The prosecutor replied that the California law on the subject is unequivocal; because Willover did not testify, the disposition of his case is irrelevant to any of the sentencing factors and thus inadmissible. (44 RT 8672.) Relying on *People v. Belmontes* (1988) 45 Cal.3d 744, the trial court agreed. Although he expressed amazement at the Court's conclusion there, the judge noted *Belmontes'* conclusion that the fact that "the accomplices had received a lesser sentence, it's not an extenuating circumstance and it doesn't reduce the moral culpability of the killing or make it less deserving of the death penalty than other first degree murders." (44 RT 8672-8673.) The motion was denied upon those grounds. (44 RT 8673.)

B. Notwithstanding This Court's Previous Holdings to the Contrary, Evidence of a Co-defendant's Lesser Sentence is Relevant to a Jury's Penalty Determination and Must Be Admitted Upon A Defendant's Request

Appellant acknowledges that this Court has repeatedly held that evidence of a co-defendant's sentence, or lack thereof, may neither be

presented nor argued as mitigation in the penalty phase of a capital trial. (See, e.g. *People v. Avila* (2006) 38 Cal.4th 491, 610-611; *People v. Brown* (2003) 31 Cal.4th 518, 562-563; *People v. McDermott* (2002) 28 Cal.4th 946, 1004-1005; *People v. Cain* (1995) 10 Cal.4th 1, 63; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1183, fn. 26.) Such evidence has been deemed irrelevant "because it does not shed light on the circumstances of the offense or the defendant's character background, history or mental condition." (*People v. Cain, supra*, 10 Cal.4th at p. 63.) In light of this line of cases and the holding of *People v. Schmeck* (2005) 37 Cal.4th 240, 303, appellant will present only abbreviated argument on this point.

Section 190.3 provides the framework for the penalty phase of capital trials and defines the evidence which may be presented as follows:

> In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to ***any matter relevant to aggravation, mitigation, and sentence including, but not limited*** to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition. (Section 190.3, emphasis added.)

California law thus codifies the rule of *Lockett v. Ohio*, requiring admission and consideration of all relevant mitigating evidence proffered by

a capital defendant.[66] The definition of such evidence is expansive, encompassing not only aggravating and mitigating evidence but also evidence as to the sentence. This Court's restriction on the presentation of evidence of a co-defendant's sentence violates section 190.3 and also the federal and state constitutions.

Evidence of a co-defendant's lesser sentence is relevant to the sentence to be imposed upon the defendant in the current trial, and both federal and state courts recognize that such evidence can be mitigating. (*Parker v. Dugger* (1991) 498 U.S. 308, 315; *Brookings v. State*, *supra.*, 495 So.2d 135.) Although it does not follow that such evidence is relevant mitigating evidence in all cases or that a state is prohibited from excluding as irrelevant "evidence not bearing on the defendant's character, prior record, or the circumstances of his offense" (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604 n.12), that is not the issue here. California's death penalty statute allows "any matter relevant to aggravation, mitigation, and sentence." (§190.3)

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[66] In *Lockett*, the United States Supreme Court held "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." A footnote observed "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

Although the examples of proper mitigating and aggravating evidence listed in the statute mirror the categories described in *Lockett*, the use of the phrase "but not limited to" prior to those examples in section 190.3 expressly sweeps more broadly, and nothing in the statute can be seen to limit the use of otherwise relevant evidence.

This Court, however, denies that evidence of a co-defendant's sentence is relevant because evidence of a co-defendant's sentence does not relate directly to the crime or to the defendant. (*People v. Cain*, *supra*, 10 Cal.4th at p. 63.) Although such evidence is not, directly, a circumstance of the offense nor a fact concerning the defendant personally, it ***is*** a fact directly impacting the choice of an appropriate sentence to be imposed. Since section 190.3 expressly refuses to limit the jury's consideration to only factors relating to the crime or the defendant, this Court's interpretation of the statute both violates the rules of statutory construction[67] places an unconstitutional limiting construction on the statute.

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[67] A well recognized principle of statutory construction requires that, whenever possible, significance must be given to every word in pursuing the legislative purpose, and directs a reviewing court to avoid a construction that makes some words surplusage. (*Woolsey v. State of California* (1992) 3 Cal. 4th 758, 775-776; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.) The Court's current refusal to consider a category of evidence that is not specifically listed in the statue but is otherwise relevant mitigating evidence would render the words "but not limited to" surplusage.

Further, this Court has expressly adopted an expansive interpretation of the phrase "circumstances of the crime" to encompass evidence of the consequences of the crime on persons who were not immediately present. "The "circumstances" of the crime under section 190.3, factor (a) are not merely the immediate temporal and spatial circumstances of the crime, but extend to that which surrounds the crime materially, morally, or logically." (*People v. Hamilton* (2009) 45 Cal. 4th 863, 926, citing *People v. Edwards*, *supra* 54 Cal.3d at p. 835; see also *People v. Brady* (2010) 50 Cal. 4th 547, 574; *People v. Brown* (2004) 33 Cal.4th 382, 394.)

Edwards and its progeny have extended the circumstances of the crime to include the consequences of the crime to the loved ones of the victim. The consequences of the crime to a co-defendant are no more attenuated, and consideration of those consequences also serves the interests of fundamental fairness. Here, an arguably more culpable defendant avoided facing the death penalty merely by an accident of age. Kekoa was less than two years older than 17 year old Willover, but his intervening 18th birthday allowed the prosecution to seek greater punishment. The jury determining that punishment had a right to know what happened to Willover when deciding what should happen to Kekoa.

For these reasons, the Court is invited to reexamine its holdings in regard to the admissibility this mitigation evidence.

XV

ALLOWING THE JURORS TO CONSIDER EVIDENCE THAT KEKOA WAS IN A CAR CONTAINING A KNIFE AND AT ANOTHER TIME A GUN AS A REASON TO IMPOSE THE DEATH PENALTY DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

In the penalty phase, the prosecutor introduced evidence supporting several instances of criminal activity involving the express or implied use of force or violence, or the threat of force or violence. While some of these acts, such as evidence of assaultive behavior or threats, fell within the usual pattern for such evidence, other acts did not. Thus the jury heard, among other things, that Kekoa was a passenger in a vehicle on two occasions when the vehicle was stopped and weapons were found. Not only were the connections between these incidents and Kekoa's involvement in forceful or violent conduct attenuated to the point of absurdity, the jury was not instructed on crucial legal concepts needed to determine whether these acts had been proved beyond a reasonable doubt. The trial court's errors in allowing evidence which did not meet the requirements of Section 190.3 (b), and in failing to adequately instruct the jury allowed the jury to consider improper evidence in aggravation and in this case is prejudicial.

A. Factual Background

The prosecutor selected several incidents to advance as so called

"factor (b)" evidence in support of his request that the jury return a death verdict. (§ 190.3 (b).) Ultimately, the trial court instructed the jury as follows:

> Evidence has been introduced for the purpose of showing that the defendant Joseph Kekoa Manibusan has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence:
>
> assault by means of force likely to produce great bodily injury on Yolina Manibusan, on January 29, 1995;
>
> possession of a sawed-off rifle, at Community Hospital, on January 30, 1995;
>
> witness intimidation, of Dennis Jarvis at Community Hospital, on January 30, 1995;
>
> possession of a firearm concealed on his person at Community Hospital (sawed-off rifle), on January 30, 1995;
>
> making threat to inflict great bodily injury or death on Dennis Jarvis, on January 30, 1995;
>
> Infliction of injury on Leslie Cline (Plieankul), the mother of his child, on August 26, 1995;
>
> possession of concealed firearms in a vehicle, on January 14, 1997;
>
> possession of a dirk or dagger, on July 25, 1997 and October 20, 1997;
>
> battery on a prisoner, Normal [sic] Willover, on June 10, 1998; and assault against custodial officer, Chad Giraldez, on August 21, 2000.
>
> Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant Joseph Kekoa Manibusan did in fact commit the criminal activity. A juror may not consider any evidence of any other criminal acts as a aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(CALJIC 8.87[modified]; 7 CT 1927-1928; 92 RT 18247-18248.)

Prior to the penalty phase, counsel had sought to preclude the prosecution from presenting evidence on some of these acts. In a motion to exclude penalty phase evidence filed July 31, 2000, counsel argued that Kekoa's involvement in a street confrontation, his possession of a sawed off rifle, his alleged threat to a hospital security guard, his arrest from a vehicle containing firearms, and his two arrests from cars containing knives were not properly "criminal activity" involving the "use or attempted use of force or violence or which involved the express or implied threat to use force or violence" permitted under section 190.3 (b). (5 CT 1223-1337.)

The motion was heard on August 24, 2000. (44 RT 8638-8667.) There, the trial court agreed to exclude evidence of the street confrontation because the evidence was equivocal and just as likely to support a finding of self-defense as of any violent conduct. (44 RT 6847.)

Counsel argued to exclude three separate weapon possession scenarios. The first arose when Kekoa was a passenger in a car with three other people. When the car was stopped for speeding, the driver gave permission to search the car. Kekoa was searched as well, and a single round of .357 ammunition was found in his shirt pocket. Also found in the car were two handguns, both .357 caliber. At no time did anyone in the car attempt to use or threaten to use either of the handguns. The trial court

denied the motion to exclude this incident. (44 RT8656-8660.)

The defense also objected to evidence regarding two incidents involving the possession of knives. The first involved Kekoa and prosecution witness Adam Tegerdal. Kekoa was riding with Tegerdal when the car was stopped to execute a warrant. Officers found two knives in the car, one in a sheath located between the passenger seat where Kekoa was sitting and the center console of the car. When he was searched, Kekoa had a drug pipe in his pocket. The trial court ruled that the drug related items were not admissible, but the presence of the knife was ruled admissible. (44 RT 8660-8664.)

The last incident also involved Tegerdal and again Kekoa was a passenger. Again two knives were found, one closer to Tegerdal, the other located between the passenger door and the passenger seat. Drugs were found in a wallet associated with Tegerdal. The court again excluded any reference to the drugs, but allowed the prosecution to present evidence concerning the knife found closest to Kekoa. (44 RT 8664-8667.)

When the parties later discussed instructions for the penalty phase, the trial court questioned whether the wording of the instructions would determine whether the court should instruct on the elements of the factor (b) crimes. The matter arose when the prosecutor suggested both plain English and penal code descriptions of the crimes. The comment to the hospital

security guard was phrased as a violation of section 136.1 (witness intimidation) and also a violation of section 422 (criminal threats) The entire interchange between the trial court and counsel reflects their fundamental difficulties in determining how to instruct the jury:

> MR. BIEGEL: Now, the other problem that I have with the format of the instruction, which is now what I'd like to turn my attention to, is that this is not an instruction under 190.3(c), which is the conviction section. This is the criminal acts section. And Mr. Alkire has done a couple things here that concern me. Number one, rather than using -- he's used both explanatory English and Penal Code sections. But quite frankly, other than maybe two of these things, I don't believe -- two or three of them, Mr. Manibusan was never -- I know conviction is not a prerequisite to this, but some of these he wasn't even charged or didn't go to court on. And secondarily, he has repeated them in another form. For example, --
>
> THE COURT: Take a look at 136.1.
>
> MR. BIEGEL: Right. 136.1 and 422 are basically -- they are different ways of expressing in a charging document, like a complaint, the same act. That is, telling Dennis Jarvis allegedly that snitches don't live long. I think that's the graveman [sic] of that. And we are now making that into something that looks like more than it is.
>
> THE COURT: Well, now here's the problem that I see though. If he has to prove up the elements of that conduct beyond a reasonable doubt and the jury may need to be instructed on these elements, how can they make the transition from assault by means of
> force likely to inflict great bodily injury when we're talking about 245? That's what I'm getting at. How can we not confuse the jury? So if they have to be instructed on certain elements, he has to meet those elements in order to show this beyond a reasonable doubt.

Then how do you get the jury to correspondingly connect the evidence that he's introduced with the act?

MR. BIEGEL: Well, is the Court suggesting that based on this predicate instruction we would then have to instruct the jury --

THE COURT: I'm not suggesting anything. I'm asking a question.

MR. BIEGEL: Yeah. I hadn't thought about that. I hadn't actually thought that was required. I really thought that what you do is you use English as opposed to Penal Code sections. You describe what the act is generally, and then his burden is did Mr.
Manibusan assault -- you could be very specific -- assault Yolina Manibusan by means of force likely to produce great bodily injury and personally inflict great bodily injury upon her? If that's going to require that we go out and go back into something that we would normally do in a guilt phase, I hadn't actually considered that possibility. I frankly don't know.

THE COURT: Say that again.

MR. BIEGEL: I don't know.

THE COURT: About what?

MR. BIEGEL: Well, whether or not you have to go back and define the Penal Code section, so that the jury would then know what it was that Mr. Alkire was having to prove beyond a reasonable doubt. As opposed to kind of a plain English description of what he's alleged to have done.

THE COURT: Anything else on that point?

MR. BIEGEL: Submit it.

THE COURT: Mr. Alkire.

MR. ALKIRE: I'm not sure what the point is. I don't mean

that sarcastically.

THE COURT: No. I think his point is by using Penal Code sections and then assault by means of force likely to produce great bodily injury. Great bodily injury, Penal Code Section 12022.7. Penal Code Section 12020, possession of sawed-off rifle. As opposed to skipping Penal Code Section 12020, Penal Code Section 245, and simply saying in plain English he committed assault by means of force likely to produce great bodily injury, personal infliction of great bodily injury. Also possessed a sawed-off rifle. Intimidated a witness. Possessed firearm concealed on his person. Made a threat to inflict great bodily injury and death.

MR. ALKIRE: If that's all it amounts to is the elimination of the references to the section, then that's easy enough to do.
THE COURT: I think the original CALJIC that I asked you to modify talks about describing the criminal acts or activity. Although they don't say this, it seems to me -- it doesn't say anything in there on it. It seems to me that it would be useful to put, for example, your preface here like you do in CALJIC for the purpose of showing, et cetera, that he committed the following criminal acts, which involve, so and so forth. And then say, maybe, on January 7th, 1997, assault by means of force likely to produce great bodily injury on or about that date. Something like that.

Now the jury, who may be taking notes on this, has a frame of reference as to what we're talking about here, without necessarily having to put in Penal Code sections.

MR. ALKIRE: I understand. That is easy enough to do. Sort of flesh out the descriptions and leave out the section numbers. By "flesh out," I don't mean put in factual details, but rather put in a date so everyone is clear what conduct is being referred to.

MR. BIEGEL: And I also think you have to be mindful when you're doing this. I might provide an alternative for the Court. Maybe Mr. Alkire and I can work on our separate versions and the Court can choose. But for example, the possession of that sawed-off rifle was described twice. It was described as

possession of a sawed-off rifle and later possession of a firearm concealed on his person, also as a sawed-off rifle. There is probably a way of boiling it down just a bit, so the jury will understand that's one act. It may be punishable two different ways, but it's one act.

THE COURT: Well, it would be almost like a complaint or information. On or about a certain date, he did possess a firearm concealed on his person.

MR. BIEGEL: Exactly.

THE COURT: I didn't see the second one that you're referring to from that same incident.

MR. BIEGEL: The 12025.

THE COURT: Oh, I see it here. Yes. I see.
MR. ALKIRE: They are separate offenses.
THE COURT: And they can be stated that way. Possession of a sawed-off rifle and possession of a firearm concealed on his person. They are still separate criminal activity that come under 190.3.
(78 RT 15444-15449.)

Ultimately, no instructions were given defining the elements of the crimes the jury was to consider, nor were any other instructions given to assist the jury in determining how to apply the requirement of proof beyond a reasonable doubt to these events.

B. 190.3 (b) and Possessory Crimes

The scope of evidence a jury is allowed to consider in making their choice between LWOP and death is defined in section 190.3. The prosecutor may, pursuant to subsection (b) introduce evidence of "[t]he

presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" in order to sway the jury towards death. (§ 190.3 (b); *People v. Michaels* (2002) 28 Cal.4th 486, 535; *People v. Bacon* (2010) 50 Cal. 4th 1082, 1126-1127.) Unique in California law, this subsection allows sentencing consideration of unadjudicated and unprosecuted criminal acts, without the constitutional protections of a jury verdict or guilty plea, and does not even require an arrest or charge. (§190.3 ["As used in this section, criminal activity does not require a conviction."].)

The limitations placed on the use of factor (b) evidence are few. The act must, by definition involve "the use or attempted use of force or violence or the express or implied threat to use force or violence". (§ 190.3 (b).) It must constitute a crime. (*People v. Phillips* (1985) 41 Cal. 3d 29, 72 ["We therefore conclude that evidence of other criminal activity introduced in the penalty phase pursuant to former section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute."].) Finally, a juror must find beyond a reasonable doubt that the defendant committed the act before the juror is allowed to consider it in the sentencing choice. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-55.)

Further, there is no requirement that the criminal activity be

specifically defined for the jury to be used in the penalty phase. (*People v. Cain* (1995) 10 Cal. 4th 1, 72; *People v. Tuilaepa* (1992) 4 Cal. 4th 569, 591-592; *People v. Davenport* (1985) 41 Cal. 3d 247, 281.) While a request by the defense to instruct as to the elements of any of the criminal acts alleged will trigger a duty for the trial court to do so, the question is generally viewed as tactical and subject to the defense determination of whether performing the task of evaluating the elements of factor (b) crimes would distract the jury from evidence deemed more important. (*People v. Cain*, *supra*, 10 Cal.4th at p. 72-73.) Under such circumstances, a juror may decide to use factor (b) evidence without first obtaining a unanimous decision that the act has occurred, and/or without determining (either individually or collectively) that the evidence would have supported a conviction of a defined crime.[68]

The acts in question here, possession of weapons, raise peculiar problems. In and of itself, the possession of a knife or a gun is not unlawful and does not involve the use or attempted use of force or violence or the express or implied threat to use force or violence and does not therefore qualify as criminal activity under factor (b). (See *People v. Belmontes*,

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[68] Counsel addresses the general constitutional ramifications of the defects regarding the use of factor (b) evidence in a separate argument. See Argument XVI, *post*.

supra, 45 Cal. 3d at p. 809 [defendant who slapped his side indicating he had a handgun, and stated he had "all the protection he needed" was not directed at a particular victim or victims, and did not amount to criminal conduct in violation of a penal statute].) On the other hand, if the possession of a weapon is unlawful, either because of the nature of the weapon or the circumstances of possession, this Court has found an inherent threat of violence, even if other circumstances do not indicate that the defendant contemplated the use of force or violence at the time. (See *People v. Bacon* (2010) 50 Cal.4th 1082, 1127 [parolee with handgun kept under pillow]; *People v. Michaels*, *supra*, 28 Cal. 4th at p. 536 [possession of concealed firearm and knife violated § 12020 (a)]; *People v. Garceau* (1993) 6 Cal.4th 140, 203-204 [possession of illegal weapons in a residence by ex-felon].)

Another question left hanging was the whether any of the knives found in Tegerdal's car was a "dirk or dagger" as prohibited in section 12020 (a). That section provides that it is unlawful to carry "concealed upon his person any dirk or dagger". A juror considering the applicability of this circumstance would thus need to decide, beyond a reasonable doubt, whether the object was concealed "on Kekoa's person", and whether it was a "dirk or dagger". The knives were apparently fairly obvious inside the vehicles, being noticed by the police without conducting a thorough search. Whether they could be considered "concealed" was a question that needed to be

answered, yet the jury was not informed that it was an element of the offense.[69] Further, no evidence suggested that any knife was found concealed "upon his person", and the jury was not alerted that there would be no violation of this section unless a dirk or dagger was concealed upon Kekoa's person, not merely lying in a car.

The terms dirk and dagger are defined as "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. A nonlocking folding knife, a folding knife that is not prohibited by Section 653k, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position." This broad definition includes most knives, including ordinary kitchen knives. (See *People v. Ferguson* (1970) 7 Cal.App.3d 13, 18-19.) Objects that are essentially identical have been held both to be among those prohibited by the section, and among those falling outside of the section. (See *In re Robert L.* (1980) 112 Cal.App.3d 401, 405 [icepick found to violate the section] and *People v. La Grande* (1979) 98 Cal.App.3d 871, 873

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[69] In fact, the implication was that concealment was not required. In two other sections relating to firearms, the instruction mentioned that the weapons needed to be concealed. (7 CT 1927 ["firearm concealed on his person", "concealed firearms in a vehicle"].)

[awl found not to violate the section].)

One Court of Appeal addressed this problem directly:

> There is no precise statutory definition of a dirk or dagger. In attempting to define "dirk or dagger," the court in *Bills v. Superior Court* (1978) 86 Cal.App.3d 855, 859 noted: "In six appellate decisions we find this quote: 'A dagger has been defined as any straight knife to be worn on the person which is capable of inflicting death except what is commonly known as a "pocket-knife." Dirk and dagger are used synonymously and consist of any straight stabbing weapon, as a dirk, stiletto, etc. (Century Dict.) They may consist of any weapon fitted primarily for stabbing. The word dagger is a generic term covering the dirk, stiletto, poniard, etc. (Standard Dict.)' " (Citations omitted.)
>
> Not every knife is a dirk or dagger. That determination may be a question of fact for the jury to determine. (*People v. Bain* (1971) 5 Cal.3d 839, 851; *People v. Cabral* (1975) 51 Cal.App.3d 707, 712.) *Bain* involved a folding knife with a pointed five-inch-long blade with dull beveled sides that could be locked into position when opened manually. Because the knife could be folded, and because a pocket-knife is not considered a dirk or dagger, the *Bain* court held it to be a close question of fact whether the knife was a dirk or dagger. In *People v. Ferguson* (1970) 7 Cal.App.3d 13, the defendant carried an ordinary kitchen knife, having a wooden handle and a steel blade eight inches long, with a point and one cutting edge. (*Id.* at p. 18.) The *Ferguson* court reasoned that because the butcher knife had the characteristics of a stabbing and cutting weapon, it was properly left for the jury to determine whether it was a dirk or dagger. (*Id.* at p. 19.)
>
> In contrast, in *People v. Forrest* (1967) 67 Cal.2d 478, it was held that an oversized two-bladed pocket-knife was not a dirk or dagger as a matter of law because the blades did not lock into place, thus severely limiting its effectiveness as a stabbing instrument. And in *Bills v. Superior Court, supra*, 86 Cal.App.3d 855, 862, the court concluded that a pair of ordinary unaltered barber scissors could not be deemed a "dirk or dagger" because scissors, not having been designed as weapons but only for use as a cutting tool, "are not primarily

> fitted as a stabbing instrument." The *Bills* court recognized that a pair of barber scissors can be used as a stabbing weapon and as such could inflict a fatal wound. However, as the court emphasized in Bills, "a pair of barber scissors *as constructed*" (italics added) does not have the characteristics of a stabbing weapon. (Id. at p. 860.)
>
> Thus, as illustrated by the cases discussed above, depending on their characteristics and capabilities for stabbing and cutting, some objects present a question of fact for a jury as to whether they are a "dirk or dagger," whereas others are considered a "dirk or dagger" as a matter of law.
> (*People v. Villagren* (1980) 106 Cal. App. 3d 720, 725-726.)

Whether a knife was a "dirk or dagger" was not the only unexpectedly complex question that a juror needed to resolve. To justify the use of any of the incidents alleged as aggravating circumstances in this case, the juror must also have tackled the legal requirements of possession. Like the difference between a lawful knife and an unlawful dirk, possession at law and a layperson's understanding of possession may differ dramatically. Possession requires knowledge that the item possessed is present, knowledge of what it is, and the right to exercise dominion and control over the object. (*People v. Showers* (1968) 68 Cal.2d 639, 643.) Possession can be actual or constructive, and is constructive when the accused maintains control or a right to control the object . (*Id.* at pp. 643-644.)

Thus for a juror to lawfully use any one of the allegations as a factor in determining the penalty in this case, the juror would have three tasks: to determine if the circumstances presented a threat or an inherent threat of

violence; to determine if Kekoa was in actual or constructive possession of a concealed handgun or a concealed "dirk or dagger" (in two different situations); and finally to determine if the evidence presented by the prosecutor was sufficient to prove these things beyond a reasonable doubt. As shown below, the trial court erred both in admitting the evidence of these allegations, and in choosing the instructions given to the jury explaining how to deal with the evidence.

C. The Trial Court Improperly Directed the Jury to Presume That Possession of a Weapon Involved the Use of Force or Violence, or the Threat of Force or Violence

Section 190.3, subdivision (b) allows a jury to consider as an aggravating factor any criminal activity that involves the use or attempted use of force or violence, or the express or implied threat of force or violence. Assuming there was evidence of appellant's possession of concealed firearms in a vehicle or of a dirk or dagger, and that this evidence was admissible under factor (b), the ultimate issue of whether the incident rose to the required level of force or violence was one for the jury to decide. However, the trial court took this issue out of the jurors' hands by instructing them that if they found appellant possessed a such a weapon, the possession alone constituted an express or implied use of force or violence or an actual threat of force or violence:

Evidence has been introduced for the purpose of showing that

> the defendant Joseph Kekoa Manibusan has committed the following criminal acts *which involved the express or implied use of force or violence or the threat of force or violence*: [acts described]. Before a juror may consider any such criminal activity as an aggravating circumstance in this case, a juror must be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance. [¶] It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation. (7 CT 1927-1928; 92 RT 18247-18248 emphasis added.)

The instruction essentially defined the alleged criminal activity as one that involved the express or implied use of force or violence or the threat of force or violence. By removing this issue from the jury's consideration, the trial court violated appellant's right to due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15) and a reliable penalty verdict. (U.S. Const., 8th Amend.).

The prosecution must prove criminal activity offered under factor (b) beyond a reasonable doubt. (*People v Jones* (2003) 30 Cal.4th 1084, 1127; *People v. Phillips, supra,* 41 Cal.3d at p. 65.) Under the plain language of factor (b), the jury must find that the alleged criminal acts involved actual or threatened force or violence before this evidence can be considered in aggravation. This is a question of fact rather than law: "[W]hether a particular instance of criminal activity 'involved ... the express or implied threat to use force or violence' (§ 190.3, subd. (b)) can only be determined by

looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) Accordingly, the jury must determine both that a particular act occurred, and that the act involved the requisite force or violence or the threat thereof. (See *People v. Lucas* (1995) 12 Cal.4th 415, 466-467 [jury must determine the existence of preliminary facts]; *People v. Figueroa, supra,* 41 Cal.3d at p. 734 [factual determinations are for the jury to decide].)

Appellant had a due process right to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Here, the trial court's instruction violated due process by creating a mandatory presumption that the alleged criminal activity constituted a use of, or a threat of, force or violence. Once the jury found the underlying fact that Kekoa possessed a weapon on any of these occasions to be true, they were to presume that this conduct constituted an actual or threatened use of force or violence, and apply the aggravating factor against appellant. (See *Francis v. Franklin* (1985) 471 U.S. 307, 314 ["mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts"]; *People v. Figueroa,* supra, 41 Cal.3d at p. 724 [instruction effectively directed verdict by removing other relevant considerations if the jury found one fact to be true].) This foreclosed any

independent consideration of all the required elements of the aggravating factor, and the preliminary facts necessary to support the aggravating factor. (See, e.g., *Carella v. California* (1989) 491 U.S. 263, 266.)

The trial court's instruction to the jury precluded any defense to whether the alleged criminal acts involved a threat or implied use of force or violence; it directed the jury to infer actual or threatened force or violence once the criminal activity was proved. It improperly removed that factual issue from the jury's consideration and thereby violated appellant's statutory and due process rights (see *People v. Figueroa*, *supra*, 41 Cal.3d at pp. 725-726), and compromised the reliability of the penalty verdict in violation of Eighth Amendment standards. The instruction also deprived appellant of his due process and statutory rights under Evidence Code section 403 to have the jury determine all the preliminary facts that are at issue before applying an aggravating factor. (*People v. Lucas*, *supra*, 12 Cal.4th at pp. 466-467.)

D. The Failure to Instruct the Jury on the Elements of Possession in this Case Was Prejudicial Error

Possession was a common element of the three alleged acts, and each involved facts suggesting that Kekoa, as a mere passenger in someone else's car, was not in possession of the weapons. In one, Kekoa was one of four people in a car. Two guns were found under the seat in front of Kekoa.[70]

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[70] At one point a juvenile probation officer testified that in

(79 RT 15678-15682.) In another, Kekoa was a passenger in Tegerdal's car when he was seen and arrested on a warrant. The officer saw a sheathed knife[71] in the area between Kekoa and the center console, near Kekoa's leg. (80 RT 15825-15831.) In the third, Kekoa was again a passenger in Tegerdal's car along with Kekoa's father and one other person. (80 RT 15839.) A survival type knife was found on the floor, next to Kekoa's seat. (80 RT 15842.)

Thus in each case there were more people in the car than there were weapons. As a result, in each instance the prosecution was required to prove that Kekoa was in possession of the weapon. The jury was not instructed, however, what is necessary to show possession, particularly when multiple people have access to an item. Including the standard instruction defining possession could have cured this defect.

CALJIC No. 1.24 would have informed the jury:

> There are two kinds of possession: actual possession and constructive possession.

January, 1997 at the Los Banos police station, he had asked Kekoa about two .357 pistols that had been found in a vehicle in which he was riding, and that Kekoa had admitted purchasing the pistols. (80 RT 15843.) While likely the same incident of firearm possession alleged to have occurred on January 14, 1997, the prosecutor failed to directly connect the two.

[71] The knife had a blade approximately 4.5 inches long, and was a type that is commercially available. (80 RT 15827, 15831.)

> Actual possession requires that a person knowingly exercise direct physical control over a thing.
>
> Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons.
>
> One person may have possession alone, or two or more persons together may share actual or constructive possession. (CALJIC No. 1.24; see also *People v. Showers* (1968) 68 Cal.2d 639, 643-644.)

Here, the question of constructive possession was apparent from the circumstances in all three incidents. As presented, however, the jury was allowed to infer possession from mere proximity and as a result could apply an aggravating factor that could not legally exist. Further, that factor likely played a role in the verdict since it was a link in the chain that the prosecutor used for his theme.

The theme of the prosecutor's opening statement was that Kekoa and Willover went hunting. (60 RT 11807-11813.) In concluding the penalty phase this theme was prominently replayed, this time bolstered with the picture of Kekoa habitually driving about with Tegerdal, armed and ready to commit violence, making it seem as though the shootings on January 31 and February 1 were part of an ongoing plan for random violence. (See 91 RT 18006.) As such, this evidence played a crucial part in the prosecutor's theme, and thus likely contributed to the verdict.

E. Mere Possession of a Knife or a Gun Is an Unconstitutionally Overbroad Aggravating Factor

The factors presented to the jury described *possession*, not use, of certain weapons. Such possession standing alone, however, does not necessarily imply a threat of violence pursuant to section 190.3, factor(b).

An application of section 190.3, factor (b) that permits mere possession of "potentially" deadly weapons to be used as an aggravating factor does not meaningfully assist the jury in determining who among the defendants eligible for the death penalty should actually be sentenced to death. (See *Zant* v. *Stephens, supra,* 462 U.S. at p. 878.) Instead, the broad reach of such an aggravating factor "inject[s] into the individualized sentencing determination the possibility of 'randomness'" and "invite[s] 'the jury to be influenced by a speculative or improper consideration[.]'" (*People* v. *Bacigalupo* (1993) 6 Cal.4th 457, 477, citations omitted.) Evidence that a defendant possessed an object with the potential for violence therefore amounts to an overbroad and invalid aggravating factor.

F. The Juror's Consideration of Evidence That Kekoa Possessed Weapons Was Prejudicial and Requires Reversal of the Death Sentence

As this Court has recognized,"evidence that the defendant committed other violent crimes is often of overriding importance . . . to the jury's life-or-death determination." (*People v. Anderson* (2001) 25 Cal.4th 543,

589, citing *People v. Miranda, supra,* 44 Cal.3d 57, 98, internal quotations omitted.) That recognition cannot be ignored in a case like this, where the later recounting of portions of the deliberations shows that the jurors had a difficult time sentencing appellant to death. (See Argument II, *ante.*) The prosecutor argued Kekoa's possession of weapons in cars when urging the jurors to sentence appellant to death, asking the jury "Does that incident remind you of anything in particular that might relate to this case?" (91 RT 18006.) This Court cannot know beyond a reasonable doubt that the jurors' consideration of this incident did not contribute to their decision to sentence appellant to death. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Ashmus, supra,* 54 Cal.3d 932, 965.) Nor can the Court know whether the jury, if properly instructed, would have found this incident rose to the level of force or violence required under factor (b). Because the jury was allowed to consider this evidence without proper instructions, the death penalty must be reversed.

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XVI

THE TRIAL COURT PLACED UNCONSTITUTIONAL LIMITATIONS ON THE PRESENTATION OF MITIGATION EVIDENCE BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE TO EDUCATE THE JURY CONCERNING COMMON MISPERCEPTIONS ABOUT LIFE WITHOUT POSSIBILITY OF PAROLE

In Argument II above, appellant addressed the jury's misconduct in obtaining and discussing the conditions Kekoa would face behind prison walls. As noted there, misperceptions about the nature of prison life were stated and "confirmed" by the juror who worked at a local prison.[72] Before the trial, defense counsel had sought to introduce testimony that would have addressed some of the commom misperceptions about life without possibility of parole, but was prevented from doing so. Particularly due to the juror's receipt and use of extrajudicial evidence on this point, the trial court's act of excluding a qualified expert's testimony on the issue was prejudicial error.

Prior to trial, defense counsel filed a motion for "Pre-Instruction, Instruction, Voir Dire and to Present Expert Testimony Concerning the Penalty of Life in Prison Without the Possibility of Parole. (3 CT 842-865).

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72 The misconception recalled most clearly was that inmates had access to cable TV. This allowed the jurors to believe that inmates had a full range of channels available and unlimited access to programming, rather than a limited and tightly controlled menu. (See 7 CT 1806.)

The testimony sought was specified as "expert testimony which would explain the source of common misconceptions regarding the penalty of life in prison without parole". The motion specifically referred to the misconception that prisoners sentenced to life without the possibility of parole would still be eligible for release. (3 CT 858.) The prosecutor, filed a response objecting to the proposed instructions and testimony alleging that there was no authority permitting the use of an expert witness for this purpose. (5 CT 1195-1199.)

At the hearing, the trial court addressed the request for expert testimony more broadly. Citing *People v. Fudge* (1994) 7 Cal.4th 1075 and *People v. Ray* (1996) 13 Cal.4th 313[73], the trial court held that evidence concerning "the nature and quality of life or the rigors of confinement have no bearing." The court noted, however, that evidence of Kekoa's "ability to assimilate" was a different matter and likely admissible. (40 RT 7925.)

In *People v. Fudge*, this Court considered two areas of testimony considered by a proffered prison conditions expert, the "execution ritual" and an opinion that the defendant "was a suitable candidate for life without the possibility of parole" and would not present a danger in the future. In order to accomplish the latter, the expert would present evidence "to show how life

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73 The trial court mistakenly identified the citation to *Ray* as 12 Cal.4th 415, actually the site for *People v. Lucas*, from the previous year and not relevant to the issue of prison conditions.

is lived there and what they do with lifers as opposed to [condemned inmates]" (*People v. Fudge*, *supra*, 7 Cal.4th at pp. 1112-1113. The trial court excluded the expert's testimony in both areas. This Court held that the trial court committed constitutional error by prohibiting the proper mitigation evidence that the defendant would do well in prison. (*Id* at p.1118.) *Fudge* thus allows introduction of evidence regarding prison conditions, if presented to show that the defendant could lead a "productive and nonviolent life in prison." (*Ibid.*)

In *People v. Ray*, the issue arose in the context of a claim that the prosecutor's argument impermissibly referred to the appellant's future dangerousness, and that the defense was powerless to rebut an argument of that nature because this Court had prohibited evidence concerning the daily routine and general conditions of confinement. The Court disagreed, summarizing the law on point succinctly:

> Evidence concerning the rigors of confinement has no bearing on the character or background of the individual offender or the circumstances of the capital offense. It is therefore irrelevant and inadmissible under section 190.3, factor (k). (*People v. Thompson*, *supra*, 45 Cal. 3d 86, 139.) However, the same prohibition does not apply where a capital defendant seeks to inform the sentencer of his good behavior as an inmate or of his suitability as a life prisoner. "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) *must* be considered potentially mitigating. Under *Eddings* [*v. Oklahoma* (1982) 455 U.S. 104 (71 L. Ed. 2d 1, 102 S. Ct. 869)], such evidence may not be excluded from the sentencer's consideration." (*Skipper v. South Carolina* (1986) 476 U.S. 1,

> 5 [90 L. Ed. 2d 1, 7, 106 S. Ct. 1669], fn. omitted and italics added; e.g., *People v. Fudge*, *supra*, 7 Cal. 4th 1075, 1117 [error to exclude evidence that defendant would lead a productive and nonviolent life in prison]; *People v. Garceau* (1993) 6 Cal. 4th 140, 204 [24 Cal. Rptr. 2d 664, 862 P.2d 664] [defendant allowed to present evidence and argument of his successful adjustment to prison].) Thus, defendant was not precluded by law from disputing the prosecution's claim that he was prone to violence in prison. The prosecutor's argument therefore was not improper on this ground..
> (*People v. Ray*, *supra*, 13 Cal.4th at pp. 352-353.)

Evidence designed to correct misconceptions held by jurors regarding issues in controversy been deemed admissible in various contexts. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299 [child molestation]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 247 [rape trauma syndrome]; *People v. Humphrey* (1966) 13 Cal.4th 1073 [battered woman syndrome].) Recently, this Court has refused to review a claim that juries misunderstand and misapply the concepts of aggravation and mitigation in capital sentencing because there was no testimony subject to cross-examination that the jurors did not understand, tacitly indicating that the evidence may have been admissible had the proper foundation been laid. (*People v. Jackson* (2009) 45 Cal.4th 662, 695.)

In its ruling, the trial court appeared to grasp the exclusionary aspect of *Ray*, while missing the inclusionary aspect of *Fudge*. By ruling the requested testimony inadmissible, and by extending the scope of the ruling to include testimony concerning prison conditions, the trial court precluded the

use of valuable mitigating evidence and thus violated Kekoa's constitutional right to present evidence in mitigation of a death sentence.

Improper exclusion of mitigating evidence raises the *Chapman* standard of review, that the error requires reversal unless shown to be harmless beyond a reasonable doubt. (*People v. Fudge*, *supra*, 7 Cal.4th at pp. 1117-1118.) In this case, the error is not harmless. As shown above, the jury ***did*** receive evidence regarding prison conditions, but without the proper safeguards and without supervision. Had the defense been allowed to present the evidence, the harm done by the jury misconduct would have been ameliorated to some degree. As it was, there was nothing to counteract or rebut the juror's assertions on the nature of prison life. As a result, the penalty verdict must be reversed.

XVII

INSTRUCTIONAL AND CONSTITUTIONAL CHALLENGES, PRESENTED PURSUANT TO THE PROCEDURE STATED IN *PEOPLE v. SCHMECK*

Despite this Court's regular rulings to the contrary, the concern remains that the California capital punishment scheme is deeply and fatally flawed. As a result, numerous constitutional and instructional challenges to California's capital punishment provisions are regularly presented to the Court in automatic appeals of death judgments in order to preserve the claims for subsequent review. This Court has labeled such claims as "[r]outine instructional and constitutional challenges," and declared that the arguments will be deemed "fairly presented" for the purposes of state and subsequent federal review so long as the appellant's brief (1) identifies the claim in the context of the facts, (2) notes that the Court has rejected the same or a similar claim in a prior decision, and (3) asks the Court to reconsider that decision. (*People v. Schmeck, supra,* 37 Cal.4th at pp. 303-304 [citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257, *Baldwin v. Reese* (2004) 541 U.S. 27, 29, 33)

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court

has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6. See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

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

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the

victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.")

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.

Each of the claims raised below have been rejected by the Court in prior decisions. (See, e.g. *People v. Young* (2005) 34 Cal.4th 1149, 1233, citing *People v. Box* (2000) 23 Cal.4th 1153, 1217, *People v. Arias* (1996) 13

Cal.4th 92, 190, *People v. Cleveland, supra,* 32 Cal.4th at p. 769; see also *People v. Schmeck, supra,* 37 Cal.4th at p. 304; *People v. Gray* (2005) 37 Cal.4th 168, 236-237.) Pursuant to *People v. Schmeck*, appellant asks the Court to reconsider those decisions.

In the context of the facts of this case those claims are as follows:[74]

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

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"
> (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section

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[74] Prior to the Court's opinion in *Schmeck*, the Office of the State Public Defender submitted detailed briefing to the Court on these instructional and constitutional challenges in the opening briefs in *People v. Michael Soliz*, S075616, filed June 14, 2005, and *People v. Christopher Geier*, S050082, filed November 5, 2004. Although not as recently, counsel has personally provided detailed briefing on such challenges in opening briefs filed in *People v. Billy Ray Riggs*, S043187, filed January 28, 2005 and *People v. Alphonso Howard*, filed September 15, 2003. Should the Court decide to reconsider any of the claims identified below and seek more detailed analysis of a particular claim, appellant refers the Court to the arguments made in those briefs.

190.2. (*People v Bacigalupo, supra,* 6 Cal.4th at p. 468.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In 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, supra*, 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close

to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 246.)The scheme devised by the drafters of the Briggs Initiative gave an outward appearance of adopting the constitutional requirements while creating a system that could sweep any murder into its "narrow" categories of death eligibility.

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

B. The Instructions on the Mitigating and Aggravating Factors in Penal Code Section 190.3, and the Application of These Sentencing Factors to this Case, Render Appellant's Death Sentence Unconstitutional

The jury was instructed on section 190.3 pursuant to CALJIC No. 8.85, the standard instruction regarding the statutory aggravating and mitigating factors to be considered in determining whether to impose death or life without the possibility of parole (7 CT 1925-1926; 92 18244-18247), and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of these sentencing factors. (7 CT 1930-1931; 92 RT

18248-18251.) These instructions, together with the application of the statutory sentencing factors, render appellant's death sentence unconstitutional.

1. The Instruction On, and the Application Of, Penal Code Section 190.3, Subdivision (a) Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Pursuant to section 190.3, subdivision (a), appellant's jury was instructed to consider and take into account "[t]he circumstances of the crime of which the defendant was convicted . . . and the existence of any special circumstance found to be true." (7 CT 1925; 92 RT 18244.) While the phrase "circumstances of the crime" may in the abstract have a "common-sense core of meaning . . . that criminal juries should be capable of understanding" (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-976), the concept in practice has become so vast as to open the doors for evidence that extends far beyond the happenings at the crime scene.

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. Nor has this Court applied a consistent 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. 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, or having had a "hatred of religion," or threatened witnesses after his arrest, or disposed of the victim's body in a manner that precluded its recovery. 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 they 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).

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been

permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale. As applied, section 190.3, subdivision (a) leads to the arbitrary and capricious decision making that the Eighth Amendment condemns. (See *Sawyer v. Whitley* (1992) 505 U.S. 333, 341; see also *Maynard v. Cartwright* (1988) 486 U.S. 356, 362-363.)

2. The Instruction On, and Application Of, Section 190.3, Subdivision (b) Violated Appellant's Constitutional Rights to Due Process, Trial by Jury and a Reliable Penalty Determination

Section 190.3, subdivision (b))permits jurors to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." Appellant's jurors were told they could consider this aggravating factor in determining whether he should die, and were instructed to consider specific unadjudicated crimes under this factor. (7 CT 1925, 1927-1928; 92 RT 18244, 18247-18448.) The jurors were not told that they could rely on the alleged unadjudicated crimes as aggravating evidence only if they unanimously agreed that appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required. (7 CT 1928; 92

RT 18248.)

This aspect of factor (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not unanimously agreed, violates the Sixth Amendment right to a jury trial (*Ring v. Arizona* (2002) 536 U.S. 584.) The instructions on section 190.3, subdivision (b) also create an unreliable procedure that allows individual jurors to impose death on the basis of factual findings that have not been debated, deliberated or even discussed, and thereby contravene the Eighth and Fourteenth Amendments requirement of "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

3. The Failure to Delete Inapplicable Sentencing Factors

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case, yet the trial court did not delete those inapplicable factors from the instruction.[75] (7 CT 195-1926; 92 RT 18244-18247.) Including

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[75] Inapplicable factors in this case include: (e) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, (e) whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act, (f) whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct, (g) whether or not the defendant acted under extreme duress or under the substantial domination of another person. No evidence on these factors was presented, and as set forth in the following argument, such evidence could only be presented in mititgation. As instructed ("whether or not") the jury could reasonably view the absence of any

these irrelevant factors in the list of statutory factors the jury could consider introduced confusion, capriciousness and uncertainty into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth, and Fourteenth Amendments to a reliable determination that death is the appropriate punishment in this case. (See *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Godfrey v. Georgia* (1980) 446 U.S.420, 428; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

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, supra,* 48 Cal.3d at p. 1184; *People v. Edelbacher, supra,* 47 Cal.3d at p. 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.)

Further, the jury was also left free to aggravate a sentence upon the

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such evidence as an aggravating circumstance.

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, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias, supra*, 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.) (*People v. Morrison* (2004) 34 Cal.4th 698, 730.)

This assertion is demonstrably false as shown even in *Morrison* itself. There, 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.) Notwithstanding its conclusion that a reasonable juror would not be so misled, this Court recognized that a presumably competent and learned trial judge had become confused about what was mitigation and what was

aggravation and thus erred, although harmlessly. (*Ibid.*) If a legally astute judge could be misled by the language at issue, how can lay 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.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343; *Fetterly v. Paskett*, *supra,* 997 F.2d at p. 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

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 instruction.

Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

4. Failing to Instruct That Statutory Mitigating Factors Are Relevant Solely as Mitigation

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating or which could be either aggravating or mitigating depending upon the evidence. As a matter of state law, each of the factors introduced by a prefatory "whether or not" – in this case factors (d), (e), (f), (g), (h) and (j) (7 CT 1925; 92 RT 18245) – were relevant solely as possible mitigating factors. (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1184; *People v. Edelbache* , *supra*, 47 Cal.3d at p. 1034.) Without guidance on which factors could be considered exclusively as mitigating, the jury was free to conclude that a "not" answer to any of the "whether or not" sentencing factors would establish an aggravating circumstance, and thus was invited to aggravate appellant's sentence upon

the basis of nonexistent or irrational aggravating factors. This, in turn, precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens, supra*, 462 U.S. at p. 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

5. Restrictive Adjectives Used in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors read to appellant's jury of adjectives such as "extreme" and "substantial" (see CALJIC No. 8.85, factors (d) and (g); CT 1317-1318; RT 5221-5222) acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Mills v. Maryland* (1988), 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

6. The Failure to Require the Jury to Base a Death Sentence on Written Findings

The instructions given in this case under CALJIC Nos. 8.85 and 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Eighth and Fourteenth Amendment rights to due process and meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Further, because California requires the

sentencer in noncapital cases to state on the record the reasons for the sentence choice (§ 1170(c)), the failure to require such express findings also denied appellant his Fourteenth Amendment right to equal protection of the law (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), and his rights under the Sixth, Eighth, and Fourteenth Amendments to more rigorous procedural protections than those afforded to noncapital defendants. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 994.)

C. The California Death Penalty Statute and Instructions Are Unconstitutional Because They Fail To Provide Adequate Guidance For the Jury's Penalty Phase Decisions

The following omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

1. The Failure to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty

Appellant was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution to a jury instruction that the findings the jury was required to make before returning a death verdict had to be found unanimously and beyond a reasonable doubt, under the principles set forth by the United States Supreme Court in *Apprendi* v. *New Jersey* (2000) 530 U.S. 466 (hereafter *Apprendi*); *Ring* v. *Arizona*, *supra,* 536 U.S. 584

(hereafter *Ring*); *Blakely* v. *Washington, supra,* 542 U.S. 296 (hereafter *Blakely*) and *Cunningham v. California* (2007) 549 U.S. 270 (hereafter *Cunningham*). (See also *Jackson v. Virginia* (1979) 443 U.S. 307, 320, n. 14; *Brown v. Louisiana* , *supra,* 447 U.S. at pp. 330-334; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

The standard of proof required for any judicial determination is driven by the seriousness of the interest at stake. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 758 [standard of proof determined by nature of interest threatened and permanency of threatened loss].) At risk in a capital sentencing proceeding is the most serious interest possible, life itself.

Accordingly, *Apprendi, Ring, Blakely* and *Cunningham* and the cases cited within them, have established that, under the Fifth, Eighth and Fourteenth Amendments: (1) a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence, other than a prior conviction, are also submitted to the jury and proved beyond a reasonable doubt (*Apprendi, supra,* 530 U.S. at p. 478); (2) that any factual finding that can increase the penalty beyond the statutory maximum allowed by the jury's verdict is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached to it (*Ring, supra,* 536 U.S. at p. 609); and the statutory maximum is the punishment the jury's verdict alone

allows without any additional findings, not the maximum that may be imposed after such findings (*Blakely, supra,* 542 U.S. at p. 303.)

The United States Supreme Court has long held that the prosecution must prove every element of an offense beyond a reasonable doubt (*In re Winship,* 397 U.S. 358 (1970), and the trial court must so instruct the jury (*Victor v. Nebraska* (1994) 511 U.S. 1, 5; *Jackson v. Virginia, supra*, 443 at p. 320, n. 14).

Under California's capital punishment scheme, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" and that "death is the appropriate penalty under all the circumstances" before they are authorized to return a death verdict. (§190.3; *People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown, supra*, 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under this scheme, however, neither the aggravating circumstances - with the exception of the aggravating factor of unadjudicated violent criminal activity (§ 190.3, subd. (b)) nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof. The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth

Amendments.

This Court has repeatedly rejected the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black*, 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. Rather, 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." (*People v. Black* (2005) 35 Cal.4th 1238, 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham* where the principle that any fact which exposed a defendant to a greater potential sentence must be found 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.) Directly addressing the holding in *Black*, the Court expressly rejected *Black*'s interpretation of the DSL, finding that it "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 rationale for continuing to interpret the DSL to allow judicial fact-finding:

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").
> (*Cunningham*, *supra*, 549 U.S. at pp. 291.)

In *Cunningham*, the high court has plainly stated that to determine whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed. If so, those

facts must be found to be true beyond a reasonable doubt by a unanimous jury.

In its effort to avoid the application of *Apprendi* to capital sentencing proceedings, 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) indicates, the maximum penalty for any first degree murder conviction is death. Similarly, under the DSL, the top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL. Yet *Cunningham* recognized that the middle rung was the most severe penalty that could, at the time, be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether

related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.) The application of these principles to California's death penalty scheme is clear.

The State of Arizona advanced this Court's 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 United States Supreme Court squarely rejected Arizona's argument:

> 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 (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances "are so substantial in comparison with the mitigating circumstances that it warrants death". (Section 190.3; CALJIC 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, *supra,* 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." (*Blakely*, 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 fact-finding in the penalty phase to be made

unanimously and beyond a reasonable doubt violates the United States Constitution.

In this case, the jury's verdict finding him guilty of first degree murder and the special circumstances to be true made Kekoa death-eligible; it did not authorize the imposition of the death penalty. For the death sentence to be imposed, additional findings had to be made by the jury. First, it was required to determine whether any factors in aggravation or mitigation of the sentence existed. (§ 190.3.) Second, it was required to weigh the relevant factors in aggravation set out by statute against any relevant factors in mitigation, and determine whether the aggravation outweighed the mitigation. (*People v. Melton* (1988) 44 Cal.3d 713, 761; *People v. Brown* (1985) 40 Cal.3d 512, 544.) Finally, the jury was required to determine whether the factors in aggravation were so substantial that death was the appropriate punishment. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.)

Because these additional findings were required before the maximum sentence could be imposed on appellant, the jury needed to understand that it was required to find the facts supporting them beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 478; *Ring, supra,* 536 U.S. at p. 609; *Blakely, supra,* 542 U.S. at pp. 302-303.) The trial court was therefore required to explain this law to the jury, pursuant to its duty to instruct the jury sua sponte on the legal principles "'necessary for the jury's understanding of

the case.'" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 320, n. 14.) The trial court did not explain to the jury that it must to make the needed factual findings beyond a reasonable doubt before the death penalty could be imposed, and thereby violated the Sixth and Fourteenth Amendments to the United States Constitution.

2. The Failure to Instruct Jurors That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

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, where life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment (*In re Winship* (1970) 397 U.S. 358, 364), and the reliability guarantee of the Eighth Amendment. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 ["the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause."]; see also *Presnell v. Georgia* (1978) 439 U.S. 14, 16 ["fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial."].) The Eighth and

Fourteenth Amendments further mandate that a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

3. The Failure to Require That the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions in this case failed to assign any burden of persuasion whatsoever regarding the ultimate penalty phase determinations the jury had to make. In fact, the opposite was true - the jury was specifically instructed that there was no measure of persuasiveness governing their sentencing choice. "There is no burden of proof on the issue of whether the penalty the jury decides upon should be death or confinement in the state prison for life without the possibility of parole." (7 CT 1929; 92 RT 18248.)

This failure to assign a burden of proof is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments because allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. (See *Eddings v. Oklahoma* (1982) 455 U.S. 102, 112 ["Capital punishment must be imposed fairly, and with reasonable consistency, or not at all."].)

Additionally, in noncapital cases, California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420(b).) 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.)

4. The Failure to Require Juror Unanimity Regarding the Applicability of Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous, and the trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. The absence of a unanimity requirement as to aggravating circumstances is inconsistent with the Sixth Amendment jury trial guarantee (*Ring v. Arizona, supra,* 536 U.S. 584), and the Eighth and Fourteenth Amendment requirements of due process and enhanced reliability in capital cases. (*Lockett v. Ohio, supra,* 438 U.S. at p. 604; see (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.) [Jury unanimity ... is an accepted, vital mechanism to ensure

that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community."].) And, because the failure to require that capital case juries unanimously find the aggravating factors true stands in stark contrast to rules applicable in to noncapital cases (see, e.g., § 1158, subd. (a)), this defect in California's death penalty sentencing scheme denied appellant his Fourteenth Amendment right to equal protection of the law (see *Myers v. Ylst, supra,* 897 F.2d at p. 421), and his rights under the Sixth, Eighth, and Fourteenth Amendments to more rigorous procedural protections than noncapital defendants. (See *Harmelin v. Michigan, supra,* 501 U.S. at p. 994.)

5. The Failure to Require Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances, there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293,

313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.) The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at

p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, supra; Section D, post), the sentencer in a capital 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, supra,* 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would 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.

6. The Failure to Instruct on the Presumption of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, and a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) Although the stakes are much higher at the penalty phase of a capital trial, there is no statutory requirement that the jury be instructed as to the presumption of life. The failure to instruct California juries that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Eighth and Fourteenth Amendment guarantees of freedom from cruel and unusual punishment and heightened reliability in the determination that death is a defendant's appropriate penalty.

D. The Instructions Left the Jury Without Proper Guidance For the Exercise of Their Sentencing Discretion

The trial court's concluding instruction in this case was CALJIC No. 8.88. (RT 5227-5228; see also CT 1330-1332.) This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed.

1. The Instructions Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

Pursuant to CALJIC No. 8.88, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The words "so substantial" provided the jurors with no guidance as to "what they have to find in order to impose the death penalty" (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362; see also *Godfrey v. Georgia, supra,* 446 U.S. at p. 428), and the instruction therefore violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify.

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2. The Instructions Failed to Inform the Jurors That The Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, and Not Simply an Authorized Penalty

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1037.) CALJIC No. 8.88 did not make this standard clear, and instead instructed the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole. The central inquiry was not whether death was "warranted," which the jurors would have understood to mean there were "adequate ground[s]" for imposing the death penalty (see *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) p. 1328), but instead whether it was "appropriate," meaning "especially suitable or compatible." (*Id.* at p. 57.) Accordingly, the instruction violated the Eighth and Fourteenth Amendments by allowing the jurors to return a death verdict simply on the basis it was a permitted, as opposed to an "appropriate" or "especially suitable" punishment.

3. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs that the jury "shall impose" a sentence of life without the possibility of parole if "the mitigating circumstances outweigh

the aggravating circumstances." This mandatory language is not included in CALJIC No. 8.88, which informs the jury only that death may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. The phrase "so substantial" does not properly convey the "greater than" test mandated by section 190.3, and therefore violates the Fourteenth Amendment by failing to conform to the specific mandate of section 190.3. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) The instruction improperly reduced the prosecution's burden of proof below that required by section 190.3, and therefore cannot be deemed harmless. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281.)

E. The Failure to Provide Intercase Proportionality Review Violates Appellant's Constitutional Rights

California does not provide for intercase proportionality review in capital cases[76], although it affords such review in noncapital criminal cases. This failure to require comparative appellate review violates a capital defendant's Fourteenth Amendment right to equal protection of the law, and rights under the Eighth and Fourteenth Amendments to be protected from the arbitrary and capricious imposition of capital punishment. (See *Gregg v.*

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[76] See Argument XIV, *ante*, regarding the trial court's refusal to allow evidence of the juvenile co-defendant's LWOP sentence in Kekoa's penalty phase.

Georgia, supra, 428 U.S. at p. 198 and *Proffitt v. Florida* (1976) 428 U.S. 242, 258 [pointing to the proportionality review undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants]; see also *Barclay v. Florida* (1983) 463 U.S. 939, 954 [noting that written findings ensure meaningful appellate review by allowing the reviewing court "to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'"].)

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*, 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." (*Pulley v. Harris*,

supra, 465 U.S. at p. 51.)

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 challenge for lack of comparative proportionality review, itself noted that the 1978 law had greatly expanded the list of special circumstances. (*Pulley v. Harris*, *supra*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can not be charged with a "special circumstance" a rarity.

As we have seen, the expanded list of special circumstances 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*. 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., intercase 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 intercase proportionality review now violates the Eighth Amendment.

F. The Death Penalty Is Cruel and Unusual Punishment

The death penalty is "an excessive and unnecessary punishment that violates the Eighth Amendment." (*Furman v. Georgia* (1972) 408 U.S. 238, 358-359, conc. opn. of Marshall, J.) Moreover, as appellant has demonstrated above, the California death penalty scheme is "fraught with arbitrariness, discrimination, caprice, and mistake." (*Callins v. Collins* (1994) 510 U.S. 1141, 1144, dis. opn. of Blackmun, J.) This is because there is an irreconcilable conflict between the requirements of individualized sentencing under *Lockett v. Ohio, supra*, 438 U.S. 586 and of consistency under *Furman v. Georgia, supra,* 408 U.S. 238. (*Callins v. Collins,* supra,

510 U.S. at pp. 1155-1157.) For the reasons explained in Justice Marshall's concurring opinion in *Furman* and Justice Blackmun's dissenting opinion in *Callins v. Collins* the imposition of the death penalty violates Kekoa's right under the Eighth Amendment to be free from cruel and unusual punishment and his sentence should be reversed. (*Furman v. Georgia, supra,* 408 U.S. 238, 315-372, conc. opn. of Marshall, J.; *Callins v. Collins, supra*, 114 S.Ct. at pp. 1128-1138.)

G. California's Use of the Death Penalty Violates International Law and the Eighth Amendment, and Lags Behind Evolving Standards of Decency

The continued use of capital punishment in California and the United States is not in step with the "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101) which the framers of the federal Constitution sought to emulate, and therefore violates the Eighth and Fourteenth Amendments. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 [dis. opn. of Brennan, J.].) Additionally, the California death penalty law violates specific provisions of international treaties, including The Universal Declaration of Human Rights, and Articles VI and VII of the International Covenant of Civil and Political Rights, and therefore violates Article VI of the federal Constitution. (See also *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.)

XVIII

THE CUMULATIVE EFFECT OF THE ERRORS DESCRIBED HEREIN UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT AND REQUIRE THAT APPELLANT'S CONVICTION AND SENTENCE BE REVERSED

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) (en banc) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Williams, supra*, 22 Cal.App.3d at pp. 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional

magnitude combined with other errors].)

The numerous jury misconduct, jury selection and guilt phase evidentiary and instructional errors identified herein resulted in the skewing of the evidence in the prosecution's favor by permitting the consideration of unreliable, irrelevant, and inflammatory evidence against appellant while restricting appellant's ability to challenge the prosecution's case. The cumulative effect of these errors so infected Kekoa's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal' "]); *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of the trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this

context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [guilt phase error requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The errors committed at the penalty phase of Kekoa's trial include, inter alia, admission of improper aggravation evidence, exclusion of proper mitigating evidence and numerous instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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CONCLUSION

For all of the foregoing reasons, appellant's convictions and death sentence must be reversed.

DATED:

Respectfully Submitted,

David S. Adams
Attorney at Law

Attorney for Appellant
JOSEPH KEKOA MANIBUSAN

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36(B)(2))

I, David S. Adams am the Attorney assigned to represent appellant, Joseph Kekoa Manibusan, in this automatic appeal. I conducted a word count of this brief using the word count feature in Microsoft Word 2007. On the basis of that computer-generated word count, I certify that this brief is 70, 952 words in length excluding the tables and certificates.

Dated:

_____

David S. Adams

DECLARATION OF SERVICE

Name: **People v. Joseph Kekoa Manibusan**
Supreme Court Case No. Crim. S094980
Monterey County Superior Court No. SM980198

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My business address is P.O. Box 1670, Hood River, Oregon, 97031.
On _____, I served a copy of the following document:

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelope/s to be deposited with the United States Postal Service at Hood River, Oregon, with postage thereon fully prepaid.

Ronald Matthias
Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-3664

Joseph Kekoa Manibusan
No. T06046
San Quentin State Prison
San Quentin, CA 94974

Monterey Co. Superior Court
For Delivery to Hon. Jonathan Price
Salinas, CA 93901

California Appellate Project
Attn: Linda Robertson
101 2nd St. Suite 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on _____ at _____, Oregon.

_____