IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. JAMES DAVID BECK AND GERALD DEAN CRUZ, Defendants/Appellants.	Crim. S 029843 Alameda Superior Court Case No. 110467

AUTOMATIC APPEAL FROM THE JUDGMENT AND DEATH SENTENCE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

The Honorable Edward M. Lacy, Jr.
Superior Court Judge

Appellant Beck's Opening Brief

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MISCELLANEOUS

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STATEMENT OF THE CASE

By complaint dated May 24, 1990, appellant James David Beck and five co-defendants[1] were charged with five felony counts: Count I charged the murder of Franklin Raper, (Pen. Code § 187), with enhancements for the use of handguns and clubs and knives, (Pen. Code §§ 12022.5 and 12022(b)). Counts II through IV alleged the murder of Richard Ritchey, Dennis Colwell, and Emmie Darlene Paris in violation of Pen. Code § 187 and each count charged the same weapons enhancement as Count I. Count V alleged a conspiracy to commit murder in violation of Pen. Code § 182(1) with six overt acts.

[1]The co-defendants were Richard Vieira, Gerald Cruz, Ronald Willey, Jason LaMarsh, and Michelle Evans.

(Clerk's Transcript, hereinafter referred to as "CT," 798-800.) A special circumstance allegation of multiple murder was alleged pursuant to Penal Code section 190.2(a)(3) as to all counts.

Prior to preliminary hearing Michelle Evans entered into a plea bargain with the prosecution and testified against the other defendants,[2] who were held to answer on all charges on December 11, 1990. (CT 792-93.)

On December 21, 1990, Beck was arraigned before the Honorable Charles V. Stone on an information filed that day. (CT 827; Reporter's Transcript, hereinafter "RT," 1-7.) The information charged Beck with the following violations: Count One: murder of Richard Ritchey in violation of Penal Code section 187, with a weapons enhancement pursuant to Penal Code section 12022(b); Count Two: murder of Franklin Raper in violation of Penal Code section 187, with a weapons enhancement pursuant to Penal Code

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[2]Because of his counsel's conflict with a witness, Richard Vieira's was severed during the preliminary hearing. (CT 731.) He was subsequently tried separately; his conviction and sentence of death has been affirmed. (*People v. Vieira* (2005) 35 Cal.4th 264 [25 Cal.Rptr.3d 337, 106 P.3d 990].)

section 12022(b); Count Three: murder of Dennis Colwell in violation of Penal Code section 187 with a weapons enhancement pursuant to Penal Code section 12022(b); Count Four: murder of Emmie Darlene Paris in violation of Penal Code section 187 with a weapons enhancement pursuant to Penal Code section 12022(b); and Count Five: Conspiracy to commit murder in violation of Penal Code section 182, with a weapons enhancement pursuant to Penal Code section 12022(b). Count Five alleged five overt acts in furtherance of the conspiracy. The information alleged on special circumstance in that the offenses charged in Counts One through Five constituted multiple murder pursuant to Penal Code section 190.2(a)(3). (CT 820-826.) All offenses were alleged to have occurred on or about May 21, 1990. On December 21, 1990, an information was filed alleging the same five counts as contained in the complaint, along with the same enhancements and special circumstance allegation. (CT 820-826.)[3]

Beck entered a not guilty plea to all charges and denied the enhancements and special circumstance allegation. (CT 827.)

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[3]On February 21, 1992, the first overt act charged was stricken and the remaining overt acts were numbered 1-5. (CT 824, 1612.)

By minute order dated February 13, 1991, Beck's case was assigned to Judge Edward M. Lacy, Jr. (CT 829.) A motion for a peremptory challenge to Judge Lacy was denied on March 21, 1991. (CT 858.)

Beck filed and joined in various pre-trial motions, including motions to suppress evidence and motions to sever the co-defendant trials.[4] After numerous motions to continue the trial and trial was eventually reset for February, 1992. Beck filed a motion for change of venue on January 2, 1992. (CT 1220.) After hearings, the venue was ordered moved to Alameda County on February 10, 1992. (CT 1517.) The previously set trial date of February 24, 1992 was kept.

Beck's further motions to continue the trial were denied and the trial began on March 3, 1992, with jury selection. (CT 1631.) The jury was sworn on March 23, 1992. (CT 1712.)

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[4]At the joint trial for the four remaining co-defendants, Cruz was represented by Seymour Amster, LaMarsh was represented by Ramon Magana, Willey was represented by William A. Miller, and Beck was represented by Kent Faulkner.

The jury retired to deliberate on May 19, 1992. (CT 1794.) After ten days of deliberation,[5] the jury returned guilt verdicts on all counts, the weapons enhancements and the special circumstance allegation.[6] (CT 2295-2301.)

Beck's penalty phase was held separate from and after the penalty phase for Cruz. (RT 829.) Beck's counsel had agreed to follow the Cruz penalty phase on the promise that the Cruz trial would present no aggravating evidence against appellant.[7] (RT 828.)

Cruz's penalty trial began on June 23, 1992. (CT 2338.) On July 1, 1992, the jury returned death verdicts against Cruz on each count. (CT 2402-2406.)

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[5]The verdicts for Beck were signed on May 29, 1992; however, the jury was instructed that they may wish to continue their deliberations as to all defendants so that there is no telling when in fact the jurors finally decided its verdicts against Beck.

[6]The jury also convicted Cruz on all counts, but could not reach a verdict on Willey or LaMarsh.

[7]This promise was not kept as discussed below. See, Argument I, *infra*.

Beck's penalty trial began on July 13, 1992. (CT 2422.) On July 24, 1992, the jury returned death verdicts on all counts. (CT 2446-2451.)

A motion to reduce the sentence pursuant to Penal Code section 190.4 was heard and denied on October 23, 1992. (CT 2649.) A motion for new trial was heard and denied the same day and Beck was sentenced to death on each of the five counts. A one year consecutive sentence on the enhancement pursuant to Penal Code section 12022(b) was imposed on Count I and the remaining enhancements were stayed. (CT 2650.)

This automatic appeal followed.

STATEMENT OF FACTS

I. THE GUILT PHASE

A. Prosecution's Case

On May 20,1990, Franklin Raper, Dennis Colwell, Darlene Paris, and Richard Ritchey were bludgeoned and stabbed to death at 5223 Elm Street, Salida, California. The house at Elm Street was rented by Tanya Miller who was not living in the residence at the time of the killings. Shortly after the homicides, six people were arrested:

Gerald Cruz, James Beck, Richard Vieira, Jason LaMarsh, Ronald Willey and Michelle Evans.[8] Cruz, Beck, LaMarsh and Willey were tired together. Vieira was tried separately.

During the joint trial of Cruz, LaMarsh, Willey and Beck, the prosecution presented evidence that at the time of the arrests Gerald Cruz lived with his wife Jennifer Starn and their two children in a one room cabin on Finney Road in Salida, California. James Beck and Richard Vieira lived in a trailer behind the cabin. Jason LaMarsh lived in a second, smaller trailer in the same location. The trailers and cabin were located in a small residential community known as "the Camp," which was composed of several small cabins and trailers in an area near Salida. Ronald Willey, who lived in nearby Ceres, California, was friends with Cruz, Beck and Vieira. Michelle Evans, sister of Tanya Miller, lived with her grandmother in Salida, but visited the Camp daily

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[8]Michelle Evans testified against the others in exchange for a plea agreement that would allow her to spend one year in county jail. Like the others, Evans was charged with four counts of murder and conspiracy to commit murder. Under the terms of her agreement with the prosecution, Evans' exchanged her testimony against the others for an amended charge of accessory, which carried a maximum penalty of three years in prison. However, the state agreed to recommend one year in county jail.

because she was close to Cruz and was romantically involved with LaMarsh.

One of the victims, Franklin Raper, had lived at the Camp before being forcibly evicted by Camp residents. (RT 5022-5029.) He then moved into Tanya Miller's Elm Street house. (RT 3710-3714.) Cruz and Raper had a history of animosity stemming from Raper's antisocial behavior when he lived at the Camp. Raper, a heavy drug user, often became violent and belligerent. (RT 5022-5024.) Cruz, who was the manager of the Camp, and other Camp residents were unhappy about the drug activity at Raper's trailer, the use and littering of hypodermic needles by Raper's visitors and Raper's loud drug parties that lasted late into the night. The residents eventually forced Raper to move out of the Camp. (RT 5024-5029.) Raper's car, which he left behind because it was inoperable, was later set on fire by Camp residents. (RT 5029-5032.)

Miller was in the process of being evicted when Raper moved into the Elm Street house and was not living at the residence. She gave Raper permission to stay at the house until she could arrange to move her belongings. (RT 3703-3734.)

Two nights before the killings, on May 18th, 1990, Vieira called Willey and asked him to come to the Camp. Cruz, Beck, Vieira, Evans and LaMarsh were there. They ate dinner, listened to music and drank beer. Evans asked them to help her move some of her sister's belongings, so they all went to Miller's house intending to move furniture for Miller. (RT 5042.) They took Beck's van and LaMarsh's pickup. (RT 5035, 5043.) They also took beer as a peace offering. (RT 5037, 5042.) Raper and others were. (RT 5039, 5969.) Evans went into a back bedroom while Cruz and the other Camp residents waited in the living room. (RT 5039, 5044.) While the men were waiting for Evans to come back and tell them what to move, Raper and LaMarsh got into an argument. (RT 5945-5946.) LaMarsh believed Raper had stolen a gun from him, which Raper denied. (RT 5046.) When disagreement got physical, Cruz said they had to leave, and no furniture was moved that night. (RT 5046-5052, 5970.)

On the night of the killings, Raper, Colwell, Paris and Ritchey were at the house. Also present was Donna Alvarez, a homeless woman who was spending the night at Colwell's invitation. With the

exception of Alvarez – who escaped when the dispute began – everyone in the house was killed.

When the authorities arrived at the crime scene, Alvarez was standing in the street, hysterical. Ritchey was laying dead in the street. Raper, Colwell and Paris were dead inside the house. The front door of the house was locked and the house was dimly lit. (RT 2721-2734.)

Police found an open window in the back of the house with a missing screen and exposed curtain. They found a ski camouflage mask[9] and a dark knit cap on the front lawn and a similar mask in the street between the legs of Ritchey. In a field approximately 200 yards from the house, police found tire tracks, an aluminum blood-stained baseball bat, a metal police-style baton and a blood-stained "Ka-Bar" knife. (RT 2772-2798.)

Several possible weapons were found in the house, including kitchen knives, a pocket knife, a chrome table leg and an iron bar. None of the kitchen knives or other sharp instruments in the house

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[9]These masks were also described as paint ball masks by different witnesses.

were seized or processed as evidence. The chrome table leg was seized but not examined for finger prints. (RT 2859-2861.)

Initial police investigation focused on Camp residents, including the defendants. A search warrant was obtained for the residences belonging to Cruz, Beck and LaMarsh. Masks, two knives, and martial arts weapons were found in Cruz's cabin. (RT 2752-2758, CT.) A red spiral notebook (diary of Richard Vieira), 8 poloroid photos, 1 9 MM magazine (loaded), black nylon bag with five holsters, 2 paper bags with live and empty ammunition and magazines and ammunition boxes, and a Ka-Bar box with serial #1219C2-4 were found in Beck's trailer. (CT 1400, 10733.)

A state expert testified that the tire tracks found in the gravel road near the railroad tracks were consistent with the type of marks that would be left by the tires of Cruz's car. (RT 2898-2904.)

A state criminalist testified that blood found on the bat and knife belonged to Paris, and blood on the baton belonged to Colwell. (RT 3868-3886.) Blue fibers found on the baton were similar to fibers from the carpet in Cruz's car. (RT 3983.)

Donna Alvarez testified that Ritchey invited her to stay at the Elm Street house that night. (RT 2978.) She went to sleep in the bedroom at the end of the hall, but was awoken around midnight by Michelle Evans, who told her that her sister needed the room and she had to get her things and leave. (RT 2982-2984.)

Alvarez picked up her bags and went into the living room where Raper was sitting in a chair sharpening a knife. (RT 2984.) Colwell was sitting in a chair across from Raper and Paris was sitting on an ottoman between the couch and the stereo. Alvarez asked if there was anyplace else where she could sleep, and was told her she could sleep anywhere she liked. (RT 2984.)

Alvarez went into the second bedroom and discovered Jason LaMarsh with a gun standing near the window. (RT 2986-2987.) As Ritchey entered the room behind her, LaMarsh cocked the handgun and ordered Alvarez and Ritchey into the living room. (RT 2987, 2992.) Alvarez turned and ran from the room, leaving Ritchey behind. (RT 2992.) As she ran into the kitchen she saw Michelle Evans standing in the back bedroom doorway looking down the hall. (RT 2993-2994.) Alvarez ran into the kitchen and hid behind the kitchen

counter. She heard Ritchey say, "He's got a gun," and heard scuffling noises in the hallway. (RT 2994-2996.)

Alvarez left the kitchen through the door to the garage and hid in a pile of clothes in the garage. After a minute she heard a woman scream and more scuffling. Fearful of being discovered, Alvarez pushed the garage door open wide enough to escape and ran to a neighbor's house where they called the police. (RT 2997-2999.)

The neighbor testified that he was awakened by something hitting his bedroom window and he got up to investigate. He found Alvarez down on her hands and knees moving across his lawn away from 5223 Elm Street. The neighbor went outside and after a few minutes saw four people leaving 5223 Elm Street, in single file and moving in a military-style trot as they headed toward the railroad tracks. Then neighbor was unable to identify the any of men he saw that night, but testified that Cruz, LaMarsh, Willey and Beck were consistent with the size of the people he saw that night. (RT 3312-3335.)

A second neighbor testified that he heard a noise and went outside to investigation. He saw two men beating up on a third man.

The neighbor identified the two men doing the beating as Cruz and Willey. Cruz left Willey with the man and went into the Elm Street house, returning within a few seconds. Cruz then picked up the man by the front of his shirt and made a cutting motion at the man's throat. Willey stood and watched. (RT 3409-3436.)

A third witness testified that she was driving to her boyfriend's house, which was located across from the Elm Street house, when saw three men scuffling together in the street. It appeared that one man was drunk and the other two were scuffling with him. The man who appeared to be drunk was falling to the ground on his hands and knees and the other two men were reaching for him to pick him up.

When she got out of her car at her boyfriend's house she realized that the men were fighting. Her boyfriend opened the door to the house and told her to get inside. She immediately went in and called 911. She also identified the men doing the beating as Cruz and Willey. (RT 2927-2947.)

A military supplies store employee testified that Cruz, Beck, LaMarsh and Willey had been to the store, and that Cruz was a frequent customer. Cruz, accompanied by Willey, had previously

purchased a Ka-Bar knife from his store. The purchased knife was similar to the blood-stained knife found by police in the field near the Elm Street house. On a separate occasion Cruz also bought four paintball masks and a police baton similar to those found at the crime scene. Willey was with Cruz that time as well. (RT 3657-3676.)

A gun store employee testified that about a week before the Salida homicides he sold Cruz and Beck a baton of the exact type found by police in the field. Cruz and Beck were frequent visitors of the store's shooting range. They typically came to the store together and were primarily interested in rifles, but Beck once bought a satin nickel .38 Star handgun similar to the one found by police at Cruz's house. Vieira and Cruz's wife Jennifer Starn sometimes accompanied the men to the store. (RT 3961-3967.)

Co-defendant turned state's witness Michelle Evans testified against the defendants pursuant to her plea agreement with the prosecution. Evans supplied the only evidence supporting the conspiracy charge.

Evans testified that she went to the Camp on the evening of the killings at Cruz's request and because she wanted to spend time with

LaMarsh. (RT 4198.) Cruz asked Evans to draw the floor plan of her sister's house, which she did. (RT 4200-4201.) According to Evans, later that evening, Cruz, Beck, Vieira, LaMarsh and Willey gathered together and planned to attack Raper and leave "no witnesses." (RT 4208-4211.) Her assignment was to go into the house with LaMarsh to count heads and then go to the back bedroom to open a window so the others could enter the house. (RT 4209.) LaMarsh was to make sure nothing happened to Evans. (RT 4210.) Vieira was supposed to guard the hallway to make sure no one could escape, and Beck and Willey were to go into the house and "do" everyone in the living room.[10] (RT 4211.)

However, on cross-examination, Evans testified that when they were talking about "doing" people Evans did not intend to kill anyone, and her understanding of "do 'im and leave no witnesses" was to beat them up. Evans was not planning on killing anyone or helping to kill

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[10]Evans's testimony about what "do" meant was extremely inconsistent. In support of the state's theory she testified on direct that during the planning, no one asked what "do" meant, but Evans thought at the time it meant "kill." (RT 4208-4211, 4338.)

anyone when she left the Camp for her sister's house, and she had no intention of using the knife Cruz gave her. She not believe at that time that anyone was going to be killed. (RT 4375-4376.) Evans also testified that she doubted on the way to the house, that the men would kill anyone (RT 4261), even though they had knives, because she had seen them with knives before, although they typically carried guns. (RT 4414.) They also wore camouflage clothing often. (Ibid.)

According to Evans, Cruz decided that Evans and LaMarsh would enter the house through the front door, make a head count, get everyone to the living room and then let Beck and Vieira in through the bedroom window. Cruz and Willey would come in through the side door.

Evans further testified that after discussing the plan, they went outside and Cruz handed out weapons. (RT 4217-4219.) Cruz gave Evans a small fixed blade knife (RT 4225-4226), Willey a Wildcat knife (RT 4219) and Vieira an aluminum bat. LaMarsh had his own bat, Beck his own M9 knife (RT 4218) and Cruz his own K-Bar knife and police baton. (RT 4218-4222.) About 2 hours later they got into Cruz's car and drove Miller's house. (RT4215, 4222-4223.)

Cruz dropped Evans and LaMarsh off at the corner of Mason and Elm around midnight and went to park the car. RT 4224.) Evans had the knife and a sharpening stone in her jacket pocket; LaMarsh had his bat. (RT 4225-4226.) Evans told LaMarsh to leave his bat outside so they would not alarm the occupants. (RT 4227.) When they entered the house, Raper and Colwell were sitting in the two upholstered chairs in the living room. Raper was sharpening a survival knife. Colwell greeted her with a smile. (4227-4228.) Paris and Ritchey were in the kitchen snorting lines of methamphetamine, which they offered to Evans but she refused. (RT 4228-4229.)

Evans checked the garage, made her head count and found the back bedroom locked. When Evans began pounding on the door, Ritchey asked her not to wake up Alvarez. Alvarez opened the door and Evans told her to "grab her shit and crash in one of the other rooms." (RT 4229-4230.) Evans then went into the bedroom, locked the door and looked out the window. She testified that saw the four men coming toward the house from the direction of the warehouse. They were dressed in camouflage and were wearing paintball masks. (RT 4230-4233.)

Evans heard Cruz yell, "Get 'im, get 'im," as they approached the house and Willey and Cruz took off running toward the front door. (RT 4234.) Vieira and Beck ran towards her and came in the bedroom window. Beck handed her the sheath to his knife and went down the hallway to the living room and Vieira stopped to check the two bathrooms and the closet. Evans forgot to tell the men how many people were in the house. (RT 4235.) Vieira was wearing a dark blue or black ski cap and a mask. (RT 4236.) Evans testified that she heard a woman scream from the front of the house she climbed out the window and headed toward Cruz's car. (RT 4237.)

When she was under the street lamp, Evans heard a man calling for help and looked back. She saw Willey sitting on top of a man who was on his stomach in the street. Evans could not see what Willey was doing because it was too dark. (RT 4238-4240.) Evans found the car which on a grassy knoll facing the house and climbed in. (RT 4240.) After Evans was in the car, she saw Willey and Cruz bent over the man in the street. Cruz walked back into the house with a police baton in his hand and then returned to Willey. Both Cruz and Willey went into the house for just a second, and then Willey, Cruz, Beck and

Vieira came out of the house, running for the car. (RT 4241-4242.) LaMarsh was already on his way across the field to the car when the men came out of the house. (RT 4243.)

The got into the car and drove to Willey's house. Evans did not see blood on Willey or LaMarsh, but testified that Beck was "soaked" in blood and Cruz had blood on his hands and feet. She sat between Beck and Cruz in the front seat of the car. Beck was holding his M9 knife, which was also stained with blood. (RT 4247-4248.) Vieira said he threw Cruz's K-Bar and baton and his bat in the field as they were crossing towards the car. Cruz was angered by this. (RT 4248-4249.)

At Willey's house the men cleaned up, disposed of their weapons and planned their alibis. (RT 4249-4257.)

Evans admitted that she was dealing drugs around the time of the killings and that she had taken drugs from some men without paying for them. (RT 4265-4269.)

When Evans was first arrested she lied to the officer who questioned her, explaining her actions by an assertion that she was under the influence of a valium overdose at the time. (RT 4279-4282.)

Contract medical examiner Dr. William Ernoehazy testified that Ritchey died from stab wounds to the chest (RT 3074-3080); Raper died multiple blows to the head (RT 3087-3099); Colwell died quickly from stab wounds to his neck and abdomen (RT 3099-3103); and Paris likely died from a cut to the throat, but suffered a knife wound to the chest was also potentially fatal. (RT 3103-3110.)

Toxicology reports conducted on the victims revealed that Ritchey had a small amount of methamphetamine in his blood, Raper had amphetamine, methamphetamine and phencyclidine (PCP) in his blood and Paris had small amounts of amphetamine and methamphetamine as well as alcohol in her blood. Colwell had no drugs or alcohol in his system. (RT 3111-3117.)

The medical examiner did not collect or analyze evidence from underneath the victims' fingernails. (RT 3124-3126.)

Willey's girlfriend Patricia Badgett testified that on the night of the killings she answered the phone and a man who sounded like Cruz asked for Willey. Badgett heard Willey say, "Can't we do this another night? I don't feel very good. Can we just move a different time?" Willey left Badgett at the house a few minutes later, sometime after

10:30 p.m., saying he had to go help some friends move. He was wearing camouflage pants at the time.

Willey arrived home around 1:30 a.m. with Cruz, Beck and two other people, a man and a woman. When Willey came to bed, he seemed scared and nervous. He made sure the bedroom door was locked and that Badgett had clothes on, even though they usually slept in the nude. When questioned by Badgett, Willey said, "It didn't go right." (RT 3538-3541.)

Tanya Miller testified that after she was served a three-day notice to quit she told her sister Evans that she had to move out as soon as possible. The day before the killings Evans told Miller that she knew someone with a truck and storage, and she would take care of moving the items in the house. When Miller next saw Evans – apparently the day of the crime – Evans came home and went straight to bed.

Although Miller considered Raper a friend, he kept odd hours, and would hang out in the park near the Camp with Colwell doing drugs. Raper injected and snorted methamphetamine on a daily basis and also smoked PCP as often as he could obtain it. Colwell also

injected and snorted cocaine and methamphetamine. Under the influence of drugs, Raper became irritable and fought with people. He would be loud, boisterous and angry. Sometimes he would cuss and hit people. (RT 3783-3790.) Unhappy about his drug use and the type of undesirable people he brought to the house, Miller asked Raper to leave a couple of times, but he did not.

Phillip Wallace, the boyfriend of Beck's former girlfriend, Rosemary McLaughlin, testified that Beck came to visit the night after the killings and said "I" or "We" "slit some throats." [11] (RT 3798.)

B. Defense Case

All four defendants testified and put forth conflicting defenses. Cruz's defense blamed Beck, Evans, LaMarsh, Willey and Vieira for the homicides. Beck's attorney blamed Evans, LaMarsh, Willey and Cruz.[12] LaMarsh and Willey blamed Cruz and Beck.

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[11]Beck's girlfriend, Rosemary McLaughlin, was called as a defense witnesses by Jason LaMarsh. McLaughlin testified that Beck had on brand new white tennis shoes when he came to see her the day after the killings. Beck said he had to buy them because he could not get the blood out of his others. He also said they "had to do them all." (RT 5553-5554.)

[12]Although Beck did not testify against Cruz and did not present any defense evidence which incriminated Cruz, Cruz, during his direct

1. Gerald Cruz

Cruz testified that although he anticipated confronting Raper and Colwell when he went to the Elm Street house, Cruz did not intend to kill anyone and did not enter into a conspiracy to kill anyone. (RT 5008-5009, 5061-5062.) When the situation turned violent, any harm caused by the men was out of self defense, and Cruz left the house before anyone was actually killed. (RT 5105.)

Cruz's defense theory was that Evans was using her sister's house to sell drugs, and she needed something she was storing in the house that she could not get access to while Raper and Colwell living there. (RT 6560-6561.) Thus, Evans schemed to take advantage of the mutual animosity between Raper and Cruz and played the two men against each other in order to gain access to whatever was stored in the house and to get revenge on Darlene Paris. Evans told both men that the other meant to attack, and this resulted in the unplanned violence. (RT 6562.)

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testimony, told the jury that Beck went out to the street to assist Willey, who was fighting with Ritchey. In closing argument Beck's attorney argued that Cruz killed Ritchey.

Cruz admitted that he had an ongoing hostile relationship with Raper because of Raper's disrespect for others and his abusive drug use RT 5022-5029, 5065, but testified that he tried to mend fences with Raper.[13] (RT 5033-5038, 5042.)

Cruz went to the Elm Street on the night of the killings as Evans' request. (RT 5069.) Evans told him earlier in the evening that she heard that Raper and his biker friends panned to kill everyone at the Camp. (RT 5067-5068.) Cruz had Vieira call Willey so they would have more men for protection. (RT 5067.) The men often patrolled the Camp grounds to guard against attacks by Raper. (RT 5065.)

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[13]Cruz testified that when Evans first asked him to help Miller move her belongings out of the Elm Street house, he, Vieira, Beck, Evans, Willey and LaMarsh went to the Elm Street house with a 12 pack of beer as a gesture of good will.

Raper and Colwell were at the house with a woman named Diane, Little Debbie and another woman named Darlene. As soon as they got to the house, Evans disappeared into a bedroom. The men sat in the living room, socializing and drinking. Cruz and the others were waiting for Evans to come back to tell them what to move. When she did not return Raper and LaMarsh got into a fight and Raper became increasingly unhappy with their presence. When Evans came out of the bedroom, Cruz told her they could not move furniture because the situation had changed and it was time to go. This occurred two nights before the killings. (RT 5033-5059.)

Later, however, Evans insisted that she needed to get a wedding dress out of the house that night and asked the men to go with her for protection. (RT 5069.)

Cruz testified that everyone went to the house armed for protection in case trouble broke out. (RT 5077-5078, 5083.) This was because Evans told Cruz that she had seen Raper earlier and he had threatened to kill her and to call his biker friends to assault the Camp residents. (RT 5063-5064, 5067.)

Evans armed herself with Cruz's Ka-Bar knife and a small bat. Vieira always wore a Ka-Bar knife and likely had it with him at the time. Cruz had his cane, which he always carried. A police baton was in the car, where it was always kept. LaMarsh had an aluminum baseball bat. Beck had no weapon. They took these items for protection. Cruz owned a Wildcat knife at the time, but no one took it to the house. Beck at one time owned a M9, but it ended up missing and no one had it that night. Cruz testified that he owned several paintball masks of the type found at the house, but they did not take the masks with them that night. (RT 5069-5077.)

They drove to Miller's house in Cruz's car. It appeared as if no one was home, so they dropped LaMarsh and Evans off at the house. (RT 5078-5079.) Cruz parked on the grassy knoll so his car would not be seen by others but they could see the house. (RT 5080.) Cruz was worried that Raper's friends would drive by and see his car and start trouble. (Ibid.) Cruz testified that they did not take guns because guns are meant to kill people at a distance and these weapons were strictly for hand to hand defense. It also would be difficult to explain a car full of assault weapons to the police if they were stopped. They did not all go into the house because Evans had been there earlier and heard that Raper was going to kill them. (RT 5081-5085.)

Cruz instructed Evans and LaMarsh not to take their bats into the house. (RT 5087.) He did not see whether Evans had the knife with her when she got out of the car. (Ibid.) After they parked, Willey, Beck and Vieira got out of the car. (RT 5089.) Vieira had the baton with him, but the other men had no weapons. Cruz testified that the three men suddenly started running toward Miller's house. Cruz got out of the car and heard someone say, "What's up" and "He's gone crazy" or something to that effect. Cruz followed the men to the

house. (RT 5089-5091.) As he got near, he saw Willey and Ritchey fighting in the street. They were punching each other and grappling with each other. When they fell to the ground they continued to wrestle with each other. (RT 5092-5095.)

A man approached Cruz out of the dark and said, "What's going on?" and gesturing to Willey and Ritchey. Cruz told Willey, "Let's go," and headed into the house. Willey and Ritchey were still fighting at the time. (RT 5096-5098.)

As he entered the house he saw Raper sitting in a chair "incapacitated." (RT 5097-5099.) In the kitchen area Colwell was on top of Vieira. (RT 5100.) Beck picked Colwell up and threw him off Vieira. (RT 5101.) Vieira and Colwell continued to fight, Vieira with the baton. Cruz told Beck about the man on the street and that Willey might need help. Beck ran out of the house. (RT 5101-5102.) Vieira dropped his baton and drew his knife as Colwell assaulted him. Evans popped up from behind the kitchen bar. Not wanting to see more, Cruz turned and left the house. (RT 5103-5105.) He walked directly to the car, not looking for Ritchey, Willey or Beck. Vieira ran past him towards the car. Evans ran past shortly after Vieira. At some

point Beck appeared at Cruz's side and they walked to the car. LaMarsh was already at the car. Cruz never saw LaMarsh until that point. (RT 5107-5116.)

Several defense witnesses were called to impeach the testimony of Michelle Evans. A former friend of Evans, Michelle Mercer, testified that she knew Evans for 15 years and Evans was a "habitual liar" (RT 4532) who had a "high reputation of violence" (RT 4552.)

Approximately a year after the killings, Evans told Mercer that she participated in the killings by going "into detail on how they sliced Darlene's throat and she [Evans] loved every minute of what Raper got. [Evans] said he deserved everything and that she was glad to be part of it." (RT 4533.) Evans said that she "helped slice up Darlene," and that she had "watched Franklin die," and "it was kind of neat." (RT 4551.) On this same occasion, When Mercer told Evans to "shut up" about the killings, Evans said she "sill had friends out there that could take care of [Mercer] too." (RT 4551.)

Mercer also testified that she knew Paris for several years. About a week before Paris was murdered, Mercer walked into the

back bedroom at the Elm Street house and discovered Paris and Evans kissing while they were "half undressed." (RT 4534.)

James Richardson testified that Evans called him following the murders and asked him for a ride. While driving around, Evans told Richardson that she was present at the killings, and watched and laughed. (RT 4563-4570, 4570-4571.) Richardson's testimony also contradicted Evans' testimony that her initial lies to police were the result of over-dosing on Valium. Richardson testified that prior to her arrest Evans was wide awake and exhibited the symptoms of being high on methamphetamine. Her pupils were dilated, she was sweating and he could smell the ether sweating from her. Evans had no trouble walking or talking and did not fall asleep when they were together and her mental state was not affected by the drugs. (RT 4592-4593.)

Evans was arrested in the early morning hours on May 22, 1990, approximately 24 hours after the killings. (RT 4272-4276.) Mark Ottoboni, the Stanislaus homicide detective who interviewed Evans on the day of her arrest, testified that although Evans was intoxicated she was alert and coherent. (RT 4916-4918, 4928-4930.) Ottoboni never felt Evans was incapable or impaired to the extent that she could not

answer his questions. She did not fall out of her chair or fall asleep. (Ibid.) Ottoboni first made contact with Evans at 3:30 a.m, and the taped interview, which began at 4:30 a.m., lasted 2 hours and 50 minutes, ending around 7:30 a.m. (RT 4927-4928.)

Ottoboni also testified that Evans told him that the occupants were told five times "to get the fuck out of the house but never would." (RT 4922.) Evans told Ottoboni, "It's my sister's house. It's not a flop house for a bunch of fucking hypes." (RT 4922, 4940.)

Despite Evans' testimony that she left the house before anyone was killed, Evans provided accurate details about Paris's death during the first interview death without seeing any police reports. (RT 4923-4926.) Ottoboni gave her no information about the crime scene, so anything she said came directly from her own knowledge. (Ibid., RT 4932.) For example, Evans stated that she saw Paris hiding under the table in the kitchen when Vieira approach Paris. (RT 4924, 4926.) Evans also stated that she saw blood on the floor in the kitchen. (4923.) Evans told Ottoboni that Colwell got out of the house and had to be dragged back in. RT 4940.) She also stated that she saw Raper pull a knife on LaMarsh, LaMarsh hit Raper's arm with the bat, and

the arm break. (RT 4925, 4933.) Then the other men rushed in and a big guy, dressed in camouflage and wearing a mask started beating Raper with the bat. Raper was lying on the floor. (RT 4933-4934.) They covered this area several times to clarify that Evans actually saw this. (RT 4938.)

Evans said Beck was not at the scene in her statement. (RT 4926.) At the end of the interview Ottoboni told Evans that a deal could possibly be worked out if she would tell them who was involved. (RT 4955.) This was punctuated with the threat that she was facing the gas chamber. (Ibid.) At that point Evans asked for an attorney. (Ibid.) Ottoboni arrested her after the interview because he felt that her responses showed that she was participated in the killings. (RT 4955.)

Approximately one month later, Evans' attorney informed her that she had "hung herself" with her statements to police and she then decided to make a deal with the prosecutor. (RT 4441-4450.) Evans then asked for and received the police discovery in the case, which she reviewed while making her statement. (RT 4461-4467.) She entered into her first plea agreement with the district attorney's office

in October. (RT 4701.) A condition of that agreement was the Evans was not armed on the night of the killings. (RT 4713.)

Evans violated her that plea agreement by neglecting to tell police that she was armed with a survival knife on the night of the killings. (RT 4700-4710.) A new agreement had to be negotiated, and the plea agreement was modified to allow for this fact. (RT 4725-4726.)

Witnesses were called to testify about Raper's impulsive and violent nature. Several witnesses testified that Raper was a drug addict who became belligerent and violent when under the influence. (RT 3784-3787, 4107-4110, 4648-4666, 4666-4651, 4655-4665, 4666-4668, 4899-4900.) He would threaten to kill those he was angry with. (RT 4900-4901.) Raper had little respect for others and would throw his garbage, including used syringes, directly onto the ground outside his trailer. (RT 4650.) He had visitors at all hours who would defecate and urinate in the open, and tear around the lot doing doughnuts. (RT 4653, 4659, 4667.)

On one occasion, during a police encounter shortly before the killings, Raper became violent and angry. (RT 4886.) Officers had to

draw their guns and order Raper to put his hands up several times, but he refused, saying "Go ahead, shoot me." (RT 4883.) Eventually he did as ordered. When searching his car police found a 10-inch straight razor, an 11-inch survival knife, and an ice pick. (RT 4883-4884, 4885.)

2. James Beck

Beck's defense theory was partially consistent with that of Cruz. Testifying on his own behalf, Beck's testimony supported Cruz's description of the events leading up to the killings. (RT 5289-5311.) Beck admitted going to Miller's house to assist Evens with getting her clothes, but denied that anyone drew a map of the house or gave orders or assignments. (RT 5294-5296.) He testified that no plans were made to enter the house through windows, no weapons were passed out and no one said they were "going over there and doing them all leaving no witnesses." (RT 5296.) Beck admitted to striking Dennis Colwell several times with his fist in order to get him off Vieira but denied any other violence. (RT 5306.) Beck denied killing anyone that night. (RT 5321.)

3. Jason LaMarsh

Defendant Jason LaMarsh denied any knowledge of a plan to kill Raper and the occupants of Miller's house and accused Cruz, Vieira and Beck of secretly planning the murders. (RT 5671, 5641-5642.) LaMarsh agreed to go to the Elm Street residence after Evans asked him to help her get her Sister's things put of the house. (RT 5636-5637.) LaMarsh took a bat along because he wanted it for protection. He anticipated receiving "a lot of hostility" from Raper because of the anomisity bewteen Raper and the Camp residents and because of his continuing feud with Raper over LaMarsh's stolen gun. (RT 5637-5638, 5640.)

LaMarsh admitted to striking Raper with a bat once at the ElmStreet house, but claimed to be acting in self defense. (RT 5653-5656.) LaMarsh testified that Cruz killed Raper (RT 5656-5657), Beck killed Colwell (RT 5657, 5756-5757) and Vieira killed Paris. (RT 5657-5658.) LaMarsh did not see who killed Ritchey.

LaMarsh first became aware of Cruz, and then Beck and Vieira about 2 months before the killings. (RT5596-5597.) Before he became acquainted with the men, he observed an encounter where

Vieira was ordered by Cruz to stand at attention. (RT 5599-5601 .) Cruz was yelling at Vieira, saying he was going to have to learn more responsibility. (RT 5600.) Beck was ordered to hit Vieira and Beck hit him in the stomach. Vieira doubled over, crying. (RT 5595-5601.) LaMarsh thought the three men were a survivalist group because the first time LaMarsh sat down with Cruz, Cruz had Vieira bring out all their guns, one at a time, so he could show them to LaMarsh. (RT 5615-5616.) Cruz possessed M-16s, A-Ks and a LAWS rocket. Cruz and Vieira often wore a knife, but not Beck. (RT 5616-5617.) Cruz also had the police baton in his possession from time to time. (RT 5617.)

Cruz, Vieira and Beck were very tight. Willey appeared to be their friend, but was not part of the tight knit group and he did not take orders from Cruz. (RT 5860.) Cruz would urge LaMarsh daily to join the group, telling LaMarsh that "you look after us, we look after you." (RT 5618.) He did not want to join, but they kept at him until he agreed just to appease them. LaMarsh joined the group by cutting his finger and placing a bloody print on a piece of paper. (RT 5618-5619.)

LaMarsh testified that Evans was his girlfriend for several months before the killings. (RT 5632.) On the evening of the killings Evans broke up with him. (RT 5634.) LaMarsh left the Camp and went to Modesto. (RT 5635.) He returned to the Camp around 11:30 p.m. and found Evans, Cruz, Beck, Willey and Vieira sitting at the picnic table drinking beer. (Ibid.) Evans said she wanted to go to her sister's house to get some clothes and she wanted LaMarsh to go with her. (RT 5636-5637.) Cruz said he, Beck, Vieira and Willey would go along and make sure nothing happened to them. (RT 5637.) LaMarsh took his baseball bat because of the ongoing hostility between Raper's group and the people from the Camp. (RT 5638, 5717.) He also had Cruz' gun, which he had borrowed two weeks before.[14] (RT 5644.) No one knew he had the gun. (RT 5645.) Vieira also took a bat (RT 5640-5641), Cruz was wearing his baton and a knife on a nylon belt (RT 5641), and Beck had a knife in a sheath (RT 5641). No one said they were all going to go beat up the occupants of the house and

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[14]A stipulation was entered that the gun actually belonged to Beck. (RT 5646.)

LaMarsh did not make an agreement with anyone to beat up anyone. (RT 5642.)

Cruz drove them to the house and LaMarsh and Evans were dropped off. LaMarsh assumed the others would simply wait outside the house. (RT 5644.)

At the house, Evans went in first and LaMarsh followed. (RT 5646-5647.) She greeted Raper, who said, "I'll kill you bitch." (RT 5647, 5725.) She ignored him and went to the back bedroom. (RT 5728.) LaMarsh wanted to avoid everyone so he went into the first bedroom and stood by the dresser. (RT 5649, 5730.) A few minutes later he saw someone pass the doorway and go into the living room. Then Alvarez, Ritchey and Colwell entered the bedroom and Ritchey said, "It's time to go Jason." (RT 5634.) LaMarsh pulled his gun and cocked it. The three ran from the room at the same time. (RT 5650, 5652, 5736.) LaMarsh left the room through the bedroom window and grabbed his bat. He did not want to use his gun because he did not want to shoot anyone. (RT 5737.) He came around the front of the house, passing Ritchey who was leaving though the front door. (RT 5651-5652.) Ritchey was not hurt or bleeding. (RT 5741.) Cruz

and Willey were nearing the house at that time. (RT 5740.) LaMarsh stepped into the house to find Evans and encountered Raper who said, "I'll kill you, you fucking punk," and then came at him with the carpet knife. (RT 5741.) LaMarsh hit Raper's arm with the bat and felt it break. (RT 5656, 5746.) Raper grabbed his arm in shock and stepped back. (RT 5656, 5746.) Cruz came in and hit Raper on the head, very hard blows in large awkward swing two or three times. (RT 5748-5749.) Raper started falling back towards the ottoman as LaMarsh turned to look into the kitchen. (RT 5656-5657, 5750.) He saw Vieira pulling someone by the legs out from under the table and Beck on top of Colwell. (RT 5657.) Colwell was on his back kicking his legs like a little kid. (Ibid.) According to LaMarsh, Beck grabbed Colwell, lifting him with his left hand and stabbing him in the stomach, all the way to the hilt of the knife. (Ibid., RT 5747, 5752-5753.) At that point, LaMarsh saw Evans standing at the edge of the hallway. She looked into the kitchen, glanced at LaMarsh and turned around, taking off up the hallway. LaMarsh followed her. (RT 5658.) When he got outside the house he went around to the front door again and saw Ritchey and Willey fighting in the street. (RT 5759-5761.)

Ritchey was on his knees and Willey was standing over him. (RT 5760.) LaMarsh looked in the front door and saw Raper sitting in the chair, with his head slumped forward and his hands on his knees. Raper took two large, shuddering breaths. (RT 5659, 5762.) When a woman drove up in a car LaMarsh took off in the direction he saw Evans run. (RT 5758.) When he got to the car he hit the ground with his bat because he was frustrated and scared. (RT 5561, 5764.) The others arrived in twos, out of breath. (RT 5662, 5764-5765.) Willey and Beck came first. (RT 5764.) Cruz and Vieira second. (RT 5765.)

When the others arrived at the car they got into the car very quickly. (RT 5662.) According to LaMarsh, the other men all had blood on their hands and Beck was holding his knife. (RT 5662.) Cruz tossed something into the field with both hands. (RT 5765.) Willey was very angry and said, "I want to go to my house right fucking now." (RT 5766.) While on their way, Cruz said to Beck, "You know what we did back there was real serious." (RT 5663.) Beck responded, "Yeah." Cruz asked Evans, "How many people were in that house?' Evans said five. Cruz asked Beck, "Well how

many did we get?" Beck said four, and Cruz said, "Fuck." Cruz asked who they got and Beck said, "Dennis, some dude, a chick and Frank." Cruz responded, "Well, they're all dead, aren't they?" Beck said, "Yeah." LaMarsh said, "Frank ain't dead." Beck laughed and said, "I seen his face crumble on the way out the door. He's dead." (RT 5663-5664.) LaMarsh wanted to throw his bat out the window but he was told to just hang onto it. (RT 5664.) He took his gun out and held it because he had the feeling that they were going to kill him and Evans as well. (Ibid.) LaMarsh realized that he did not know these people well. (Ibid.)

LaMarsh accused Cruz and Beck of lying in their testimony (RT 5876) and testified that he was "scared" of Beck and Cruz (RT 5669).

Evidence was presented supporting LaMarsh's testimony that he is left handed (RT 5592), and that Raper possessed a knife. A knife was found near where Raper was killed. (RT 5591.)

A forensic pathologist testified that in his opinion Raper's abraded broken arm was caused by a blunt force object similar to a baseball bat, but the four injuries to his head were likely caused by a

blunt force object similar to a police baton, not a bat. Thus the evidence was consistent with the theory that LaMarsh caused the injury to the arm while someone wielding a baton cause the head injuries. (RT 5508-5517.)

La Marsh called Beck's former girlfriend, Rosemary McLaughlin, to testify about the relationship between Cruz, Beck and Vieira, and how Cruz dominated the two other men. (RT 5543-5545, 5559-5566.) She testified that Beck, Cruz and Vieira had been friends for years, but that Willey and LaMarsh were relatively new to the group, and Cruz, Beck and Vieira were trying to recruit LaMarsh to join. (RT 5551-5552, 5567.) McGlaughlin had witnessed Cruz and Beck attempt to recruit numerous into their group over the years. (RT 5551.) McGlauhlin also testified that Cruz, Beck and Vieira owned "lots" of guns, including a "mini-14," semi-automatic weapons, pistols and knves. (RT 5552-5553.)

On the night of the killings Cruz called and asked Wallace and McLaughlin to come to the Camp. (RT 5547.) He said the men were going to go to the Elm Street house to "even a score, get into a fight." He wanted McLaughlin to stay with his wife. (RT 5547-5548.)

The following morning, Beck came to her house and she overheard him tell Wallace that Vieira was ordered to clean the blood off everyone's shoes but he [Beck] had to get a new pair of shoes because his would not come clean. (RT 5550.)

4. Ronald Willey

Willey's defense theory was that Cruz, Beck, Vieira and Evans conspired to kill Raper and the others and that Willey was duped into accompanying the group by Evan's ruse of needing help to move furniture. Willey stated that he did not kill anyone at the house, denied any knowledge of a plan to kill Raper and the others, and testified that although he did strike Ritchey, Beck actually killed him. (RT 5996-5998.)

Willey testified that he met Cruz, Beck and Vieira about five years before the killings when he worked with them on one occasion installing flooring. (RT 5957-5958.) They had a common interest and Cruz seemed very knowledgeable about the subject so Willey liked talking to him. (RT 5957.) At that time Willey was living with his parents and the three men were living together. (RT 5958.) Cruz was the leader and Beck and Vieira followed Cruz. (RT 5961.) Vieira

would have to get Cruz' permission to do things, like go to bed, and would be hit if he did something that displeased either Cruz or Beck. (RT 5960-5962.) Later, Willey went away to trade school in Arizona for a year and when he returned he was no longer interested in the same things, yet he still wanted to be friends with Beck, Cruz and Vieira. (RT 5958-5959.)

Willey first went to the Camp in May, 1990, when LaMarsh was initiated into the group by cutting his hand and putting a bloody thumb print on a piece of paper. This was the first time Willey met LaMarsh or Evans. (RT 5962-5965.) Willey did this same initiation in 1985. (RT 5965.) Cruz and Jennifer drove him home after the initiation. (RT 5967.)

The next time Willey went to the Camp was on May 18th, 1990, for the failed attempt to move furniture from the Elm Street house. (RT 5967.)

On May 20th, Willey slept until noon and then went to the gym and then played basketball with his brother and friends. (RT 5975.) Around 11:00 p.m., Cruz called him and asked him to help move furniture. Willey was not surprised that they were going to move

furniture at this late hour because the men always did things late at night. (RT 5976.) He agreed to help, but called Cruz back 10 minutes later, declining to go because he did not feel well, which was the truth. Cruz told Willey that Beck was on his way to pick him up. (RT 5976-5977.) When Beck arrived, Willey went outside in his shorts and told him he was not going. Beck asked Willey to reconsider because LaMarsh and Vieira were small and Cruz had a bad back. He promised to help Willey out sometime. Willey agreed and went to change, putting on camouflage pants, two t-shirts and a sweat shirt. He put his hair into a pony tail. (RT 5978-5979.) On the way back to the Camp, Beck talked about the need to move furniture. (RT 5981.)

Before leaving for the Elm Street house, no one looked at a diagram and no assignments were given. (RT 5983.) They all got into Cruz's car and drove over to Elm Street. At this point Willey knew they were not going to move furniture with the car, but he assumed they were going to the house to see if it would be all right to start moving furniture. He was not aware of any death threats made by Raper. (RT 5984-5985, 6047-6048.)

They dropped off LaMarsh and Evans and parked the car out of the way in case Raper's friend came by. (Ibid.) The men got out of the car and walked to the house. (RT 5985.) Cruz did not have his cane. Everyone was dressed in camouflage which was their normal, daily attire. (RT 5986, 5991-5992.) Cruz, Vieira and Beck also had knives which was not unusual as they typically wore these items. (RT 5991.) Cruz had his baton and LaMarsh and Vieira had bats. (RT Ibid.)

As they approached the house, Willey saw Evans standing at the bedroom window. Beck and Vieira ran towards her. He and Cruz continued to walk toward the front door. Ritchey came running out of the house. Willey saw LaMarsh standing at the front door and heard LaMarsh say, "The shit is starting." (RT 5992.) Willey assumed a fight had broken out and he tackled Ritchey to do his part in the fight. Ritchey fell to his hands and knees and Willey started hitting him in the kidneys and face. (RT 5992-5993.) Cruz came over and then went into the house. (RT 5994.) Ritchey hit back, saying "Hey, man, it's cool, it's cool." (Ibid.) Earl Creekmore came up and asked what was going on, and Ritchey threw Willey off. (Ibid.) Willey testified that

Ritchey continued to hit him, until Beck knocked Ritchey off and then slit his throat. (RT 5996-5999.) Willey testified that he was shocked by Beck's action, and stood backing away. He looked toward the house and saw Cruz standing in the doorway. (RT 5999.) Willey could see Raper in the chair, his head was distorted and he was covered in blood. He looked dead. Vieira came running out, closing the door behind him. Cruz said, "Let's go," and they took off toward the car. (RT 6000-6001.)

At the car Willey demanded to be taken home. (RT 6002.)

On the way to Ceres, Beck, Evans and Cruz discussed how many people were in the house and how many were killed. Cruz was upset that they had missed one. Willey mentioned Creekmore and this upset Cruz even more. Cruz said they needed to get alibis. (RT 6004-6005.) Willey told everyone they could not stay at his house. (RT 6006.)

When they arrived at Willey's house, Cruz asked if he could use Willey's phone. (RT 6008.) Willey went directly into his bedroom, removed his clothes, throwing them on the floor, told his girlfriend to stay in bed. He went to the bathroom, where he washed Ritchey's

blood off his hands. (RT 6006-6008.) When he returned to the living room Cruz was calling Jennifer and telling her to take the kids to Oakdale to get a motel room. He told her he would meet her there. Cruz ordered Vieira to clean the blood off Cruz' shoes and to clean the car. He also order Vieira to get the gun out of the glove box and give it to Willey. (6008-6010.) Willey hid the bat and a knife under the house. (RT 6010.) Cruz asked Willey for money for the hotel room and Willey gave him $10, and Cruz, Vieira and Beck left. (Ibid.)

LaMarsh and Evans stayed at his house. (RT 6011.) Badgett poked her head out of the bedroom, asking for a glass of water. He gave her one and she went back to bed. He put his clothes in the laundry, rolled a joint and smoked it with Evans. Willey, Evans and LaMarsh did not discuss what happened. Willey then went to bed. (RT 6011-6012.) Badgett noticed he was shaking and upset and asked what was wrong. He told her things just didn't go right and that she did not want to know. He told her to get dressed and sleep in her clothes because he was worried that Cruz or Beck might come back and hurt them. He realized that he didn't know Cruz and Beck at all.

He put Cruz's gun and the gun he got from LaMarsh in his closet. (RT 6012-6013.)

The next morning Willey and his roommate drove LaMarsh to Oakdale and Evans to Ripon. (RT 6014.) Willey returned home and took the bat and the knife from under the house, and a knife he found on an end table, along with his clothes, tennis shoes and a gallon of gasoline to his favorite fishing hole on the Tuolome River. He burned his clothes, threw the bat in the river and hid the two knives under separate cement slabs along the river. (RT 6015-6016.) He never told anyone about what happened. (RT 6018.) He thought if he kept quiet no one would know he was there. (RT 6018-6019.) Then he went to the house he did not know anyone was going to be killed, he did not stab anyone and did not agree to kill anyone. (RT 6021.) Willey did not know any of the occupants of the Elm Street house. (RT 602)

During his entire friendship with Cruz, Beck and Vieira, Willey was never in the inner circle, which consisted of Cruz, Beck, Vieira and Jennifer. (RT 6140-6141.) LaMarsh was treated like Willey and was not part of the inner circle. (RT 6142.) Willey only went to the

Camp on the night of the killings because Cruz and Beck asked for his help to move things. (RT 6144.)

A former police officer working as a private investigator testified that the physical evidence he found inside Miller's house was consistent with the use of a police baton. Indentations in the walls were consistent with a police baton but not a bat, and there were blood spatter marks on the ceiling, which was 8 feet high. (RT 5568-5576.)

A defense toxicologist testified that at the time Raper died he had alcohol, methamphetamine and PCP in his system. The level of methamphetamine was very high and would have caused Raper to be hostile and aggressive – someone who should have been treated with extreme caution. The level of PCP, which causes the release of adrenaline and a distortion of perceptions, was twice that consistent with mild intoxication and would have had a substantial effect on Raper. (RT 5770-5778.)

Forensic experts were called by the defense to impeach the evidence collection and processing of the crime scene that was conducted by law enforcement. (RT 5899-5904, 5905-5926.)

Testimony by Willey's cousin was offered to support Willey's testimony about what he did on the day of the killings before going to the Camp. (RT 6234-2636.)

After deliberations, the jury returned guilt verdicts for Cruz and Beck on all counts. A mistrial was declared for both LaMarsh and Willey.

II. PENALTY PHASE

Although Beck and Cruz had separate penalty trials, the same jury heard both cases. Cruz's penalty trial was held first.

A. Gerald Cruz

1. Prosecution's Case

Cruz's wife, Jennifer Starn, was the only prosecution witness to testify. She testified pursuant to a plea agreement with the District Attorney which would result in the dismissal of two pending felony charges involving of possession of explosive devices in exchange for her penalty phase testimony. (RT 7330.)

Starn met Cruz in 1987, at age sixteen. He was twenty-five. She moved in with him but they never married. Vieira and Beck lived with them. Another fried of Cruz's, Steve Perkins, also lived with

them for a while. Starn testified that she saw Cruz beat Vieira approximately 25 times in three years. Usually, Cruz would make Vieira stand in the middle of the room, and Cruz would hit Vieira in the stomach with his fist repeatedly as hard as he could. Cruz would also use a stun gun on Vieira, which would cause Vieira to jump and scream when he was shocked. Cruz used the gun two times on Starn's arm, and it was painful.

Stars testified that Cruz beat Perkins twice as frequently as Vieira did in the three years she was with Cruz. Cruz also disciplined Vieira, McLaughlin and Starn by putting a gun in their mouths and saying, "Are you going to get your shit together or are you going to die?" In January 1990, she and Cruz got into a fight and he pushed her down. He knew she was pregnant, but he kicked her hard in the stomach and between the legs and caused a lot of bleeding. He told her to get out and she went to a women's shelter. She stayed there for four days and then returned to Cruz. She did not seek medical treatment.

Cruz struck her over 100 times with anything he could get his hands on, including his cane, and threatened to kill her if she got out of

line. He also threatened her if she left, saying she would die by decapitation. He used to beat their first daughter Alexandra with a fly swatter, ruler and his hands. He would slap her hard with his open hand, leaving bruises on her ears. Alexandra was conditioned to fall to the ground cowering and covering her ears with her hands when Cruz would say, "Do you want a clapping?"

As a baby, Alexandra had bruises all over. Cruz would put her in the rack, which was like a homemade swing and hang bottles of water from her feet. When she cried, he would dunk her or spray her with cold water until she stopped crying. Sometimes Cruz would try to make Alexandra cry so her lungs would get stronger. (RT 6979-6996.)

2. Defense Case

Cruz testified that he never knew for certain who his true mother or father was because he believed his mother lied about his paternity. Cruz heard rumors that the woman Cruz grew up believing was his mother was actually his grandmother while the woman he believed to be his sister was actually his birth mother. Cruz came from a family of

poor migrant laborers and was left alone as an infant for hours while his mother and siblings worked in the fields.

They moved lived like gypsies, moving from shack to shack. When he reached school age he was constantly picked on because he was different. Cruz developed a distrust of authority because of previous experiences where law enforcement and government failed him. For example, the police did nothing when his family was attacked when he was young and their restaurant bombed. Later, as an adult, Cruz came to believe that the courts and an attorney cheated him out of his inheritance. Cruz also felt he could not trust his parents because they lied about his paternity. Cruz also offered evidence that he was raised in a strict, sometimes violent, home environment which fostered a belief in authority and discipline. As a child Cruz witnessed his mother perform acts of cruelty on animals.

Cruz denied Starn's testimony, telling the jury he never hurt his daughter or wife, and expressed remorse for the victims' deaths. (RT 7369-7378.) Cruz also offered evidence that he would do well in prison. (RT 7331-7364 7386-7437.)

Several family members, friends and a former teacher testified on Cruz's behalf. (RT 7020-7476.)

An expert psychiatrist testified that Cruz was an anxious, insecure and fearful man. The ambiguity of Cruz' parentage resulted in his negative experiences with authoritarian figures as a child, and police as an adult. The absence of an extended family created in Cruz an insecurity and a distrust of his environment, relationships and authoritarian figures and caused him to search for an identity and to create relationships which gave him a sense of importance. The harsh treatment Cruz suffered as a child was the model he internalized for dealing with his own family. He believed it was necessary to treat his family harshly to make them strong enough to deal with the outside world. His insecurity about the world caused him to be over-protective of his children and family to outside threats. He took maters into his own hands because he felt he could not trust the police. Raper's actions towards Cruz and his family caused Cruz to try to protect his family in a hyper-vigilant way. Because of Cruz' background, he perceived the threats to be greater than they really were. (RT 7386-7437.)

The jury returned a death verdict in three hours. (RT 7570-7578.)

B. James Beck

1. Prosecution's Case

The prosecution presented the testimony of five witnesses to prove other acts of violence by Beck.

Steve Perkins Sr. testified that when his son, Perkins Jr., went to live with Cruz and Beck, he weighed 350 pounds. When he eventually returned home, Perkins had lost 100 pounds, was in very bad health and needed medical care. Perkins had marks on his ankles which looked as if the skin had been rubbed off. His feet looked almost gangrene, with black toes and a severe infection. Perkins had injuries on his forehead, a chipped tooth and an injury just below his nose. He also had a large bruise on his chest and several broken ribs. Perkins returned home withdrawn and moody. He would not answer the phone or talk to anyone and could not stand to be in a room with other people or in a closed-in space. He would not talk about his life with Cruz and Beck. (RT 7596-7605.)

Steve Perkins, Jr. testified (RT 7624-7652) that he has known Beck his entire life. He started working for Beck laying floor covering, and he eventually moved in with Beck, Cruz and Starn. Vieira joined them when his parents kicked him out of the house.

Perkins denied any acts of violence by Beck or Cruz. He claimed he sustained the injuries described by his father (broken ribs and a shattered chest bone) from a motorcycle accident that occurred by the river in an old orchard. He ruptured his spleen, broke his chest bone and the ribs that were attached to it and was anemic because of internal bleeding. He also suffered a head injury, shattered his nose, broke a tooth and bit through his lip from the motorcycle accident. Perkins denied ever being beaten by Cruz or Beck and denied seeing Vieira being beaten by either man. Perkins also denied Starn's testimony that he was electrocuted by Beck, instead blaming Starn for the electrocution.

Perkins asserted that his weight loss was intentional. He weighed 348 pounds when he went to live with Beck but lost 138 pounds on a vegetarian diet because his weight made him slow at work

and was hard on his knees. Perkins admitted he still talks with Cruz and Beck and they are still friends. (RT 7624-7652.)

Perkins testified that Cruz had saints books with pictures of pentagrams on them. Cruz would talk about these books and cross-reference them to the Bible. Cruz assisted Perkins with his religious questions and was like a teacher to him. Cruz also encouraged him to keep a diary. (RT 7652-7659.) Perkins tried to keep a diary on a daily basis but was unsuccessful. In his diary he would talk about day-to-day activities, things that happened at work and how he felt. He also often wrote lies in his diary at Starn's request.

Perkins was initiated into the group by pricking his finger with a pin and placing a bloody print in a book. Cruz, Beck, Willey, Whiteman, Vieira and several other people were present. (RT 7660-7679.)

Rosemary McLaughlin testified (RT 7690-7714) about the violence she witnessed and experienced during her relationship with Beck and Cruz. McLaughlin met Beck at the Cheyenne Social Club where she worked as a dancer. Beck was a customer at the time, and later because a bartender. About 8 months after meeting him, they

became romantically involved. Cruz also worked at the Club, and he and Beck were inseparable. Eventually Beck and McLaughlin moved into an apartment together. Later, they moved in with Cruz, Starn, Alexandra, Vieira and Perkins.

Cruz was their leader and instructed them in something called "The Cause." McLaughlin believed "The Cause" stood for God, because Cruz told her he was a church bishop, he knew so much about religion and he understood the way she was raised. Cruz was the head man and Beck was his enforcer. Cruz performed rituals where he stood in front of a coffee table and burned incense, lit candles and told them to say some words, possibly in Hebrew. He wore a white robe and a gold bishop hat.

When she met Beck and Cruz, McLaughlin was at a low point in her life – mixed up, confused, and alone. She was looking for love, truth, understanding of life, and security. Beck represented those things to her. They were happy and were going to get married. Then Beck informed her that he had to give her to Cruz. That was the first of many times that she left the group. She kept going back because

they would find her and tell her things were going to be better and they had changed.

Although Beck never beat McLaughlin, McLaughlin testified that on one occasion when she ran away from the house because she was upset and hid in a neighbor's garage, Perkins and Beck found her and forcibly returned her to the house. When they got back she was sent to her room. As she was going up the stairs, Beck, who was still angry, kicked her in the back, hurting her.

On another occasion, Beck was present when Cruz placed a loaded gun in her mouth. Cruz did this to Perkins, Vieira and Starn as well.

Cruz never beat McLaughlin, but he did beat Starn. McLaughlin denied seeing Beck beat Starn, Vieira or Perkins. He would verbally threaten them with punishment, but she never saw Beck carry through.

McLaughlin described two forms of punishment employed by the men. The punishment wheel was thought up by Cruz, Beck and Perkins. They saw the idea in a movie and liked it. Perkins built the wheel and the men came up with the punishments. When a person got

in trouble he had to throw the wheel up into the air and catch it. The punishment imposed was the punishment their hand landed on.[15]

A second punishment device was labeled "the Rack of Doom." It was built by Perkins. Although intended for adults, the finished product was too small and was used for Alexandra. Alexandra would be placed in the device, which was similar to a swing, and Gatorade bottles filled with water would be hung from her feet. She would hang for hours and never cried. She never cried because she was punished with ice cold water poured over her head until her breath was taken away. Beck participated in this punishment.

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[15]Starn described this as the "Wheel of Doom." Starn testified that the punishments included "Challenge," which meant that the person had to have a debate with Cruz on some issue, and if Cruz won the debate the person had to spin the wheel again, but if the person won he was off the hook; "Labor," which meant that the person had to do physical chores, such as wash cars; "Bazaar [sic] (Bizarre)," which meant that the person had to do something outlandish, like dress up in funny clothes and walk around the block; "Detention," which was solitary confinement for a period of time; "Solitaire," which was similar to detention; and "Double-Boner," which meant that you received twice the punishment. (RT 7758-7766.)

McLaughlin put her signature and her thumb print in a book to signify that she belonged to Beck and Cruz. All the others who signed the book belonged to Beck and Cruz.

Cruz never had a reason to punish Beck because Beck did everything Cruz asked. If Beck displeased Cruz, Cruz would tell him, "You're screwing up," and Beck would do what he was told. Perkins was the enforcer against McLaughlin, but Beck was the enforcer for everyone else. (RT 7690-7714.)

Jennifer Starn testified about incidents involving Beck's acts of violence against Vieira and Perkins and other acts of violence. Starn testified under the same agreement with the District Attorney that she had for Cruz's penalty phase.

Starn testified that Beck and Cruz starting beating Perkins when he did not do things the way Cruz thought they should be done and because Cruz and Beck thought he was not good enough. At first, they would just yell and scream at Perkins and then forced him to do things like wash the car. The behavior eventually escalated into beatings. Starn estimates that she saw Beck beat Perkins around thirty times. In a typical beating, Perkins would stand still in the middle of

the room and Cruz or Beck would hit him in the stomach as hard as they could.

Perkins was always covered in marks and bruises all over his body. Vieira was beaten less because he learned how to improve his conduct to avoid beatings. (RT 7749-7758.)

Starn described the "Orange Line Treatment" as electrocution with an orange extension cord attached to the toes. Both Beck and Cruz used a stun gun on Vieira, who would jump and yell and try to get away.

"The Cause" was a creation of Cruz's and was supposed to be a type of religious philosophy directed toward the advancement of mankind. Cruz was the founder and leader of "The Cause." Beck was devoted to Cruz and "The Cause."

Beck never hurt Alexandra, but would go get her and bring her to Cruz whenever commanded. He sometimes put her in the Rack for Cruz. Starn described the Rack as a home-made type of baby swing. Cruz would attach Gatorade bottles full of water to Alexandra's legs to make her strong. Beck never did this to Alexandra. (RT 7766-7772.)

Starn testified that Cruz told Perkins to explain the extent of his last physical injuries by saying he got into a motorcycle accident and Cruz told him exactly what to say. Perkins actually received his injuries from a beating by Beck and Cruz. Beck did most of the beating.

Starn testified that Cruz and Beck handcuffed her once at the Liberty Court apartment and made her sit on the couch for over an hour. She received this punishment because Cruz said she had a smart mouth. She was never beaten by Beck but Cruz beat her numerous times. She was kicked, punched, thrown to the ground and against walls, and throttled while being screamed at in the face.

Starn remained devoted to Cruz and "The Cause" for sometime after his arrest. He had control over her mind, body and soul. (RT 7781-7783.)

Although she did not think it was right, Starn participated with Beck, Cruz and others in getting her 6 month old daughter, Alexandra, high on marijuana and wrote about this in her diary. Cruz believed it was part of their religious experience and practice to smoke marijuana, a religious experience, so they all did.

Starn performed cleansing rituals and other rituals, like the magical rod, cleansing of the aura (taking a cold shower), the lesser ritual of the pentagram, private temple rite and middle pillar exercises with her daughter. She wrote in her diary about the fact that she put her daughter, 11 months old at the time, into the "cooler" or closet when she cried; that she slapped and threw her baby when Alexandra touched the stereo; and allowed Cruz to hit her daughter on the bottom of the feet with a ruler.

Cynthia Patricia Starn worked for Beck installing floors. Cynthia testified that Beck and Cruz electrocuted Perkins by tying an extension cord tied to his toes. Cynthia walked into the house and saw Perkins down on his hands and knees frantically sanding a gun rack. Beck and Cruz were seated in the room. Cruz asked Cynthia to turn on the lights and she did. Perkins started flopping around on the floor like a fish out of water, screaming. The end wires of an orange utility extension cord, which was plugged into the wall in a jack activated by the switch she turned on, were wrapped around the little toes on Perkins right foot. When Cynthia realized this, she turned the switch off and Perkins lay moaning on the ground. His feet looked

burned from shock with raw open wounds. Beck and Cruz were laughing when this happened. (RT 7726-7733.)

Cynthia also observed Beck hit Perkins on the head, in the groin, back, ribs and arms many times. Sometimes this was done playfully and sometimes not. Perkins never complained of broken bones. He would just stand and take it, yelling out in pain. He never fought back. Beck also beat Vieira in the same manner more times that Cynthia could count. (RT 7733-7736.)

Cynthia observed Cruz performing "religious rites" during which he would wear a white robe. Cruz appeared to be in control of the household and everyone, including Beck, did what he wanted them to do. Beck would beat Vieira and Perkins at Cruz's orders. Cruz would point guns at people, scream and yell, and rant and rave at the others to keep control. Cruz would sometimes make them go without sleep for long periods of time. Cruz once put a gun in Cynthia's mouth and to her head because he believed she stole a gun from him. (RT 7733-7736.) Beck, Vieira, Starn and Perkins were present and did nothing to intervene.

2. Defense Case

Family members testified about Beck's childhood, Beck's father's molestation of his two sisters, Beck's early devotion to the church, and his failed relationships with the two women in his life. They also testified about Beck's later disillusionment with the church and how Beck changed, after meeting, Cruz from a caring and kind individual to someone secretive, uncaring and distant. (RT 8026-8033.).

Mental health experts and sociologists testified about cults, how they work to indoctrinate members and how they prey on emotionally vulnerable individuals like Beck. They also offered testimony on Beck's indoctrination by Cruz.

Finally, testimony was offered to demonstrate that Beck would make a good life inmate.

a. Family Members and Friends

Beck's sister, Angela Moore, testified that as children they traveled a lot, picking fruit from Yakima, Sedro Woolley, and Oakdale. Beck, who is ten years older than Angela, taught the younger children in the family about scriptures from the bible. Beck attended

Bethel Assembly of God Church regularly and used to sing for the church choir. (RT 7797-7802.)

Angela was molested by their father from the time she can remember until she was in the third grade. Her father also molested their sister and was arrested and sent to prison for this. Their mother then divorced their father and married his brother, their uncle.

In high school Beck was very in love and planned to get married, however the relationship did not work out. This was devastating to Beck. He eventually met and married Barbara Scott and moved to Colinga where he worked on an oil rig. They had three children. Beck's wife became an addicted to drugs and alcohol and began neglecting the children. The marriage eventually failed. Beck was left with the children. He tried to live on his own but could not afford a baby sitter so he moved in with his parents. The children are still with their grandparents who now have custody.

After his failed marriage, Beck began hanging out with Cruz and changed dramatically. Beck went from caring about his children to neglecting them. (RT 7803-7818.) Beck stopped teaching from the Bible after he became involved with Cruz. (RT 7821-7822.)

Steven Beck, Beck's youngest brother, testified that Beck was a good brother who took Steve hunting and fishing. Beck went to church and knew the Bible forward and backwards. Beck was a good father who fed and bathed his children after coming home from the oil fields.

Steven knew Cruz all of Steve's life. Cruz was always into the occult and Satan worship. He would keep his room dark, read books on witchcraft and black magic, make potions and other weird stuff and was not a very nice person. Cruz was a good talker, though, and was very convincing about his beliefs. Cruz convinced Steve that he should treat his wife as subservient because women were inferior to men. For a short time Steve emulated Cruz in this regard, mistreating his wife. Cruz also convinced him to get into gang fights as Cruz liked others to do his dirty works for him. (RT 7825-7835.)

When Steve went to see Beck after his arrest, Beck was not the same person Steve knew as a child. Beck laughed and said, "If I had the chance to do it all over, I would." (RT 7836-7854.)

Beck's sister-in-law, Karen Beck, testified that she meet Beck for the first time when she was going with Steven. After Beck's

divorce Beck was upset by the split-up and under a lot of stress. Karen observed Beck gradually change after he started hanging around Cruz. Beck would get defensive if Karen tried to talk to him about how he was changing. She would try to listen to what he had to say and not challenge what he was experiencing. He became secretive and had an attitude that he had some kind of power and control. (RT 7855-7866.)

Kevin J. Scott, Beck's former brother-in-law, testified that he moved to Colinga and lived with Beck and Barbara for about a year and a half when he started working in the oil fields. Eventually he worked with Beck on the same oil rig. Beck did very well at the job, starting low and quickly moving up through the ranks until he was an operation supervisor. The house in Colinga had 3 bedrooms, a swimming pool and a big recreation room for the kids. Barbara and Beck had new cars and things were good for a while. The couple went to Pentecostal church on Sunday, and Beck talked about the Bible with Scott and others after church.

Beck was not violent or hostile and did not get into fights at work. He was an easy going guy who was not into military things like guns, knives or camouflage. (RT 7870-7879.)

Lawrence Scott, father of Barbara and Kevin Scott, testified that he meet Beck through his daughter Barbara. He sent Beck to school to learn the oil drilling business. Beck was a very good son-in-law, treating him well. From what he observed Beck was a good father as well. He and Beck went fishing together. He never saw Beck being violent or mean. The fact that Barbara and Beck divorced did not change the way Lawrence felt about Beck. (RT 7882-7888.)

Jeff Beck, Beck's younger brother, testified that he was the closest to Beck. Jeff testified that the family was never violent and though the boys would argue, it never came to blows. All the kids were brought up as Pentecostal and were regular church goers. Beck was liked and respected by the other adults involved in the church. The entire Beck family was well known in the community because it was a large extended family. The family was well respected, and did not get into trouble. When Jeff was a freshman in high school, his father dropped him off at school and told him he loved Jeff. That was

the day his father left for Washington, where he was eventually arrested. Jeff was aware before that of the problems between his mother and father. His father used to call his sister out in to the field a lot and Jeff knew something was going on. (RT 7890-7895.)

On cross-examination, despite their age difference and the fact that Jeff had not spent any time with his bother for years, Jeff testified that Beck understood right from wrong and had the self-respect to handle his problems rather than complain or turn to others for help. Beck was a leader who took control of his life. (RT 7906-7914.)

David Sondeno grew up in Ripon and knew Beck in high school. He and Beck attended the same church and sang in the choir together. In high school Beck was an outgoing, congenial, pleasant person. He always had a smile. Beck's family was not well off, but Beck was always willing to help or add what he could. Beck had strong spiritual beliefs, like those of a born-again-Christian. Beck was more of a follower than a leader, rarely taking the initiative, but always willing to help. (RT 7926-7938.)

Beck's half sister Linda Willis also testified that he was a follower, not a leader. She had never seen him or known him to be

violent. Before meeting Cruz, Beck was a good father when he had his kids and was responsible and loving. She saw him verbally discipline them but never physically. She met Cruz when Beck brought him to her house. (RT 7955-7962.)

Cruz talked to her about Satanism and the occult. He dominated the conversation and the other men with him, including Beck, who did not talk unless Cruz allowed him to. Cruz controlled the entire situation. He spoke in some kind of code and did not make much sense. They tried to get her to join their church, but she refused.

Beck became more like Cruz over time and his whole belief system changed. About 2 weeks before the murders, Beck, Cruz and some other men happened to drive by her house and stopped in to say hello. Beck and Cruz were wearing Pentagrams. Beck told her they had to earn the Pentagram. Cruz talked about taking out Raper. She became upset by the conversation and asked them to leave. Beck remained after Cruz left the house, and she told him she did not like the direction he was headed. He appeared to be scared, but told her

everything would be okay and he said that if Cruz wanted someone taken out, they would be taken out. (RT 7962-7971.)

Willis identified Cruz, Beck, LaMarsh, Willey and Perkins as the men who came to her house two weeks before the murders. Cruz did all the talking. Cruz was upset about Raper for giving drugs to the kids. After Cruz left the house, she told Beck he was headed down a dangerous path. Beck reassured her that Cruz was in control, he knew what he was doing, and Beck could not stop Cruz. Cruz would make sure nothing happened to Beck. Willis asked Beck about the others that might be hurt by their actions.

Beck said Cruz could not be stopped and the only people who were going to be hurt would be those who deserved it. After Beck was arrested, Willis went to see him in jail. Beck told her that Cruz had powers and contacts on the outside, and people would be taken care of. If anyone tried to go against them, Cruz would be sure they were taken out. Cruz was going to make sure they got out of this. (RT 7972-7982.)

Beck's high school teacher and former wrestling coach testified that Beck was a quiet kid who did everything Wingo asked him to do.

Wingo could not have asked for a better person in the wrestling program. (RT 7989-7994.)

Christy Shulze, Beck's cousin and step-sister, testified that Beck was a very good father when he had custody of his kids. He was gentle, read to his kids, fed them, bathed them and spent time with them. He was good to her own kids and they thought of him like a big brother. He was never mean to anyone. (RT 8040-8048.)

b. Expert Testimony on Mental Health and Cults

A former Stanislaus County Deputy Sheriff, Randy Cerny, testified that he monitored a cult group termed the "Cruz Group" in 1985. He became aware of this group when he was contacted by Rosemary McLaughlin, who was a topless dancer at a nightclub in Empire. Cruz was a bouncer at the club.

The Cruz group had the characteristics of a cult in that Cruz was a charismatic leader, very vocal, verbal and sophisticated in the ways of the magical system which he was utilizing. He demanded total allegiance from people in his group, and was skilled in emotional manipulation. He was heavily influenced in his upbringing with a form of Afro-Caribbean type belief system that involved rituals and pagan

worship. The group members typically did not have strong family backgrounds and often came from dysfunctional families. The group used mind-altering drugs in its rituals. Various control techniques such as torture, forced sodomy and the like were being used on group members. Many of the books belonging to Cruz, Beck and Starn were books that are common to cults.

Cerny testified about the common cult theme of Armageddon, or the coming of the end of the world, and how many cults arm themselves in anticipation of Armageddon by living in compounds. The compound serves to isolate members for better control and allows the group to prepare for Armageddon. The Camp was set up as a such a compound. (RT 8064-8082.)

Cerny also testified that the type of torture that Vieira and Perkins suffered was also a common cult characteristic. Cult members tend to come from broken families and are looking to belong and to fill a void in their lives. Although cults can have two leaders, Cruz was definitely the leader of the group. Beck was second in command, Cruz's enforcer. (RT 8082-8091.)

It is Cerny's opinion that Beck was controlled by Cruz. Often times cult members are brainwashed and do not run away even when they are free in the community. (RT 8092-8094.)

James Moyers, a mental health expert, testified (RT 8095-8113) that people with fundamentalist backgrounds like Beck who have left their churches often encounter psychological issues in resolving their religious backgrounds and that in Moyers opinion, Beck suffered from Shattered Faith Syndrome when he left his church. Moyers explained that "Shattered Faith" syndrome involves much confusion, often deep depression, and a sense of emptiness and gave detailed testimony about the negative impact the syndrome has on an individual, such as the loss of friends, family, and the social network of the church. The person may begin rebel against the teachings of the church and do things that have been formerly forbidden. Subconsciously, they feel these things are sinful and they suffer a terrible moral conflict. There can also be a compulsive search for something to give one's life new meaning to fill the spiritual vacuum. An individual suffering from Shattered Faith Syndrome is prone to susceptibility to authority figures who have knowledge of subjects that the person does not have.

Groups that provide for social and spiritual needs become very attractive to the individual. (RT 8095-8102.)

Beck described an increasing disillusionment with the church and its teachings and how he left a church service never to go back again. Thereafter he described meeting a woman and impulsively marrying her after a brief courtship, how the marriage failed, and he met Cruz within a few weeks of his failed marriage and became very intensively involved with him. He also described drug and alcohol use, which is very typical. Cruz's religious beliefs would be attractive to someone suffering Shattered Faith syndrome because it was based in part on Beck's fundamentalist beliefs while at the same time providing some answers that Beck felt his previous church had not answered satisfactorily. (RT 8102-8105.)

Clinical psychologist Lowell Cooper testified (RT 8113-8142) that he performed psychological testing on Beck and concluded, based on the testing results, that on a superficial level Beck appeared to be an ordinary person, but beneath the surface appearance, Beck was emotionally empty. His functioning was driven by ways trying to manage the emptiness.

Cooper testified that Beck was not an antisocial personality, not psychotic and not a borderline personality. Beck also was not not violent because the feelings of violence and aggression were also absent. Beck exhibited no sense of love, tenderness or even the average amount of hostility. Because Beck's empty feeling is intolerable, he attempts to erase this feeling by latching on and seeking out people who provide direction, routine, structure in order to fill the emptiness. Beck become intensely loyal to the person who filled this void for him and lost the distinction between himself and Cruz. Becks's loyalty is driven by a desperation that if Cruz is lost, the empty feeling comes back.

In Cooper's opinion, Beck's seeking behavior will continue. However, Beck will not be a difficult-to-manage prisoner.

Beck's worst function was his ability to make social judgments. Once loyalty bond was formed with Cruz, Beck did not have the ability to break that bond when the relationship required him to do something of poor judgment. Because of the loyalty bond Beck was unable to avoid a destructive relationship. Beck gravitated to people who represent higher ideas in the spiritual area for betterment of self

and mankind, and Cruz originally represented that his spirituality and beliefs were for the betterment of mankind. (RT 8113-8126.)

Psychologist Daniel Goldstein testified (RT 8142-8191) about how Beck was able to participate in the killings without any apparent motive and in a manner so out of character with the rest of his life. Goldstein concluded that Beck does not suffer from antisocial personality disorder and suffers from no mental illness. When Beck met Cruz, he was set-up psychologically for Cruz to take advantage of him. Beck was beset with a sense of personal failure, he was lonely, and experienced a feeling of strong personal failure. He was a classic candidate for manipulation.

Cruz made Beck feel like he was a captain or a lieutenant, but he was at best a sergeant. He was always controlled by Cruz. Cruz put the cult members through a series of humiliations and always walked around with a gun, in charge. He made them feel powerless without the group and suppressed behavior that he did not want. Cruz had them studying and going through various rituals and incantations, which only he knew the meaning of. Such techniques are extremely powerful at influencing behavior. Cult members typically suffer from

the "Stockholm Syndrome," a syndrome where victims of kidnappers begin to identify with their captors and start to root for them. Beck's flat effect and his guardedness when being interviewed is directly attributable to being part of Cruz's cult.

In Dr. Goldstein's opinion, Cruz's control over Beck will fade as time passes. This is based on the fact that Beck has his own identify vastly different from Cruz's to return to and the fact that Beck's belief that Cruz will rescue him from this situation will not manifest itself. Beck will wake up to the fact that the cult is not operating anymore and he will respond to the prison system. Beck's flat effect will be replaced by family visits, etc and the void will start to fill up. As Beck is de-programmed, he will form a close relationship with a religious person, pastor, minister, etc. in the prison system and try to atone for his terrible deeds. (RT 8142-8157.)

Richard J. Ofshe, a professor of sociology at the University of California, Berkeley and an expert in cults, testified (RT 8191-8233) that the Cruz group satisfies the criteria of a cult. Cruz's techniques are of the type used in other control groups, but substantially more brutal. The group had an ideology of a belief in magic, the occult that

was supposed to benefit the members. It had all the components of a high control group. (RT 8191-8201.)

Cruz promised personal transformation and promised that the group would become important and powerful. He used physical torture to increase members' desire to be transformed so they would no longer be tortured. Perkins and Vieira stayed in this abusive situation because they believed it was necessary; and they believed that at some point down the road they would receive whatever it was they were seeking, thereby making the suffering tolerable and worthwhile. There was also the specter of what will happen to the person if he leaves the group – something bad will happen, a terrible accident or illness, or the leader will kill you. This created the a belief and an acceptance of, "I couldn't escape in any case." (RT 8201-8207.)

Beck was the person Cruz could manipulate with the greatest confidence. He used Beck to carry out punishments and to be the principal source of funding. Beck's position was no different than the others, but his role was different. Cruz nevertheless had control over Beck. Beck was Cruz's platoon sergeant, and as such Beck had no discretion. Despite the fact that Beck was not physically tortured by

Cruz, it is clear that Beck was controlled by Cruz from the fact that he followed Cruz's orders and did not order Cruz. He worked for Cruz. He did not share the benefits of his labor more than the others in the group. In fact, the absence of torture is an indication that Cruz's control over Beck was greater than the other members – he did not have to resort to torture to get Beck to comply. (RT 8207-8213.) In Ofshe's opinion, Beck was under pressure to conform to the directive of Cruz, the duress involved was a general threat of death should Beck not follow orders and break from the group. (RT 8213-8219.)

c. Correctional Testimony

Evidence was presented that while incarcerated for this case, Beck was not the subject of any disciplinary proceedings and was not a disciplinary problem. A correctional expert testified that based on Beck's employment history and his conduct while awaiting trial, Beck would be a good candidate for housing in the California Department of Corrections. (RT 7923-7925, 8001-8006.)

C. Prosecution Rebuttal

The prosecution called Jennifer Starn for rebuttal. Starn gave birth to Alexandra in 1988 and was living with Beck and Cruz at the

time. One night Alexandra was put into her crib in the dark to go to sleep. A tape recorder was placed next to her. As she drifted off to sleep, Cruz and Beck snuck up to her and screamed at her in order to wake her up and to stare her screaming. Cruz and Beck did not tell her why they did this. Starn testified that it was Cruz's idea.

Starn also testified that she received many threatening phone calls from Cruz from jail. They only stopped just recently, when he found out she was going to be a witness against him. He has not contacted her since. She was getting threatening phone calls from Cruz right up to his penalty phase. She also received some threatening phone calls from Perkins. (RT 8282-8284.)

The tape of Alexander screaming was played for the jury. (RT 8278-8282.)

The jury returned a death verdict after one hour and forty-five minutes of deliberation.[16]

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[16]The penalty phase deliberations began at 3:15 on Thursday, July 23, 1992 and ended at 4:00 p.m. that same day. The following morning, Friday, July 24, 1992, the jury resumed deliberations at 9:30 a.m. and rendered its verdict by 10:30 that morning. (RT 8362-8367.)

LAW AND ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO SEVER BECK'S TRIAL FROM HIS CO-DEFENDANTS VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRIVACY, A FAIR TRIAL, AND TO DUE PROCESS, AND RELIABLE GUILT AND PENALTY DETERMINATIONS

Beck unsuccessfully moved to sever his case from his co-defendants before trial and before the penalty phase. Prior to trial Beck objected to a joint trial on the ground of that suppressed evidence would be admitted against him by the co-defendants and that prejudice would result from the admission of co-defendant statements and joined the co-defendants' motions based on inconsistent defenses. (RT 795-796, 827; CT 1399-1400; 1508.) Beck renewed the severance motion during the improper nature of the cross examination of Beck by LaMarsh's attorney.[17] (RT 5399-5405.)

The trial court's denial of Beck's severance motion violated Beck's Fourth, Sixth, Eighth, and Fourteenth Amendment rights. (*See, e.g.*, *Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct.

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[17]See Argument VII., *infra*.

2382, 65 L.Ed.2d 392] [procedural rule must not diminish reliability of guilt determination in capital case]; *Bruton v. United States* (1968) 391 U.S. 123, 135 [88 S.Ct. 1620, 20 L.Ed.2d 476] ["[t]he powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, which are deliberately spread before the jury in a joint trial threatens a fair trial that the Confrontation Clause protects."]; *People v. Aranda* (1965) 63 Cal.2d 518 [47 Cal.Rptr. 353, 407 P.2d 265] ["the only alternative to separate trials is for the people to effectively edit or delete the extrajudicial statement made by the codefendant]; *People v. Ervin* (2000) 22 Cal.4th 48, 69 [91 Cal. Rptr.2d 623, 990 P.2d 506] [a reviewing court may reverse a conviction when, because of consolidation, gross unfairness has deprived the defendant of a fair trial]; *cf. Zafiro v. United States* (1993) 506 U.S. 534, 539 [113 S. Ct. 933, 122 L. Ed. 2d 317] [federal district court should grant severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence"; "[w]hen many defendants are tried together in a

complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened"].).

Joint trials are favored because they "promote [economy and] efficiency" and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" (*Id.* at p. 537.) When defendants are charged with having committed "common crimes involving common events and victims," the court is presented with a "'classic case'" for a joint trial. (*People v. Keenan* (1988) 46 Cal.3d 478, 499-500 [250 Cal. Rptr. 550, 758 P.2d 1081], quoting *People v. Massie* (1967) 66 Cal.2d 899, 917 [59 Cal. Rptr. 733, 428 P.2d 869].)

Although a legislative preference exists for joint trials,[18] the decision to sever is nevertheless one for the trial court's discretion. Nonexclusive factors to be considered in deciding a motion to sever include: "the existence of an incriminating confession, prejudicial

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[18]Section 1098. The statute provides in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." (See *People v. Boyde* (1988) 46 Cal.3d 212, 231 [250 Cal. Rptr. 83, 758 P.2d 25], affd. on other grounds sub nom. *Boyde v. California* (1990) 494 U.S. 370 [110 S. Ct. 1190, 108 L. Ed. 2d 316] [acknowledging legislative preference].)

association with co-defendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (Id. p. 917 [ns. omitted].) Severance should be granted when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States*, *supra*, 506 U.S. 534.) A joint trial is not proper where damaging evidence would be inadmissible at a separate trial. (*People v. Terry* (1970) 2 Cal.3d 362, 390 [85 Cal. Rptr. 409])

The trial court's denial of a motion for severance is reviewed for abuse of discretion and is judged on the facts as they appeared at the time of the ruling. (*People v. Hardy* (1992) 2 Cal.4th 86, 167 [5 Cal. Rptr. 2d 796, 825 P.2d 781].) Where a trial court abuses its discretion in failing to grant severance, reversal is required where there is a reasonable probability that the defendant would have received a more favorable result in a separate trial. (*People v. Keenan*, *supra*, 46 Cal.3d at p. 503.)

Once a severance issue is presented the court has a continuing duty to take adequate measures to guard against unfair prejudice from joinder. (*See Schaffer v. United States* (1960) 362 U.S. 511, 516 [80 S. Ct. 945, 4 L. Ed. 2d 921].) A ruling that was correct when made cannot stand if joinder caused such "'gross unfairness'" as to violate defendants' due process rights. (*People v. Arias* (1996) 13 Cal.4th 92, 127 [51 Cal. Rptr. 2d 770, 913 P.2d 980].)

A. The Trial Court's Failure to Sever Violated Beck's Constitutional Rights During the Guilt Phase

This case presents the classic context in which joinder of the co-defendants' cases violates the many constitutional principals set forth above. Where, as here, a joint trial is constitutionally impermissible because the "defense" presented by the co-defendants' deprives the defendant of a fair trial and guilt determination, courts consistently have held that conflicting defenses offered by bo-defendants may require severance.

Here, the four defendants presented differing defenses. Cruz, who presented his defense first, denied the prosecution's conspiracy theory; testifying that he did not plan to kill anyone and did not

participate in any of the violence that ensued. Cruz implicated Evans and LaMarsh in Raper's death, Willey and Beck in the death of Ritchey. He also implied that Evans killed Paris and Vieira killed Colwell.

Although he admitted everyone armed themselves with a weapon[19] due to the threats made by Raper, he testified that the fighting had already started when he got to the house; Raper was already "incapacitated;" Willey and Ritchey were fighting in the street; Evans was fighting with Paris under the kitchen table, and Colwell was assaulting Vieira in the kitchen area. Beck pulled Colwell off Vieira and then went out to the street to aid Willey. (RT 5110-5116.)

Beck's defense inculpated LaMarsh and Evans in Raper's death, blamed Evans for Paris's death and Vieira for Colwell's death.

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[19]Cruz testified that Evans armed herself with Cruz's K-Bar knife and a small (child's) bat. Vieira always wore a K-Bar knife and likely had it with him at the time. Cruz had his cane, which he always carried. A police baton was in the car, where it was always kept. LaMarsh had an adult aluminum baseball bat. Beck had no weapon. They took these items for protection. Cruz owned a Wildcat knife at the time, but no one took it to the house. Cruz identified the K-Bar knife, baton and bat found by the police in the field near the house as the ones taken by them that night. (RT 5073-74.)

Contrary to Cruz's testimony, he denied any participation in the assault on Ritchey. Beck testified that Ritchey was already dying when he reached Willey, who was just standing in the street next to Ritchey while an unidentified man walked away. (RT 5296-5311.)

Both LaMarsh and Willey claimed that they were duped into participating in the violence and that they had no knowledge of the others' intent to kill the Elm Street residents that night. Both men testified that Cruz and Beck were lying in their testimony and that they, LaMarsh and Willey, were telling the truth. (RT 5864, 6021, 6146.) LaMarsh testified that Cruz, who often talked about killing Raper, (RT 5629), crushed Raper's skull with the police baton, (RT 5653-5657), and Beck attacked Colwell while Vieira went after Paris. (RT 5657-5660.)

Willey testified that Beck knocked Willey off Ritchey, and cut Ritchey's throat. (5992-5999.)

In support of their defense that Cruz, Beck and Vieira conspired to kill the victims and that neither LaMarsh nor Willey were a part of the conspiracy, LaMarsh and Willey introduced ample character

evidence of Cruz's and Beck's fascination with weapons,[20] and their prior bad acts. Both LaMarsh and Willey testified that Cruz, Beck and Vieira were a tightknit survivalist group that they were not part of. (RT 5615-16, 5860.) LaMarsh described how the three men heavily recruited him to join their group. LaMarsh and Willey testified that they were made to undergo a finger cutting ritual to show their alliegence to the group.[21] (RT 5618-19.)

LaMarsh and Wiley also presented evidence that Cruz, as the leader of the group, dominated Beck and Vieira and the two men would do anything Cruz asked of them.[22] As part of this testimony,

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[20]LaMarsh testified about the three men's fascination with weapons and their arsenal of firearms, including M-16s, Aks and a LAWS rocket, and how commonly Cruz and Vieira wore knives. (RT 5616-5617.)

[21]Willey performed the blood initiation in 1985 (RT 5965-5966), and was present when LaMarsh performed the same initiation ritual in 1990 (RT 5965-5967).

[22]Both Cruz and Beck objected and renewed the motion to sever when LaMarsh and Willey stated, mid-trial, their strategy to introduce evidence of cult activities and Cruz's and Beck's prior bad acts with regard to this activity. Beck argued that such evidence was not relevant to the charges against him and that there was no evidence of a separate conspiracy by the three men to dupe LaMarsh and Willey into participating in the killings. (RT 5601-5615, 5951-5955.)

LaMarsh testified about Cruz's and Beck's physical abuse of Vieira.[23] (RT 5599-5601, 5860-64.)

LaMarsh and LaMarsh testified that they were terrified of Cruz and Beck and, after the killings, feared the men would kill them. (RT 5664, RT 6012-6013.)

In order to further their respective defenses, it was essential for each defendant to discredit the others. LaMarsh and Willey, in particular, needed to do everything in their power to depict Beck and Cruz as evil; thus introducing a great deal of negative character

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The trial court denied the motion to sever, but excluded evidence of cult activities. However, it allowed LaMarsh and Willey to inquire into the bad acts between the defendants, and whether Willey and LaMarsh viewed the three men, Cruz, Beck and Vieira, as a group to which he did not belong. (RT 5614-5615.)

[23]LaMarsh testified that Vieira was standing at attention while Cruz was yelling at him. Cruz then ordered Beck to hit Vieira and Beck hit Vieira in the stomach, causing him to fall to his knee over and start crying. When Vieira stood up, Beck hit him again. (RT 5599-5601, 5860-64.)

Willey testified that Cruz, Beck and Vieira were living together when Willey first met them in 1985. Cruz was the leader. Beck always obeyed Cruz. (RT 5961.) Cruz treated Vieira like a child. Vieira would have to get Cruz's permission to do things, like go to bed, and would be hit if he did something that displeased Cruz. (RT 5960-5962.) Beck sometimes hit Vieira at Cruz's direction. (RT 5961-5962.)

evidence about Cruz and Beck. This resulted in competing defenses, pitting LaMarsh and Willey against Beck and Cruz. Cruz's indirect attempt to pin Ritchey's murder on Beck added to the conflicting nature of the defenses. The competing defenses were a windfall for the state because it resulted in four attorneys, rather that just one, in the courtroom playing the role of prosecutor. The prejudicial effect of this dynamic was compounded by the fact that the prosecutor and the attorneys for the other defendants were not procedurally on the same side, thus, co-defendants' counsel were able to go over the same evidence already covered by the prosecution, thereby repeating for the jury over and over again the evidence that discredited Beck. The jury was thus inundated with the state's theory of Beck's guilt from four different fronts. The prosecution had the luxury not only of three other attorneys presenting and arguing its case against Beck, but four separate and distinct opportunities to question witnesses and to present evidence. If the state prosecutor neglected to present evidence or testimony harmful to Beck, the attorneys for the co-defendants were ready to remedy the prosecutor's oversights. This ensured that the State's evidence against Beck was repeatedly

presented to the jury, thereby creating a cacophony or majority consensus in the courtroom that Beck was guilty.

In addition to the lopsided presentation of evidence, the state was allowed to rely on evidence that it would not otherwise have been permitted to use had Beck been tried separately.[24]

For example, prior to trial, Beck successfully moved to suppress on Fourth Amendment grounds evidence found in his trailer. (See CT 1063-1106, 1143-1144, 1127-1128, RT 345-348.) Although the trial court granted the suppression motion and barred the state from introducing this illegally seized evidence,[25] (RT 796, 825), the co-defendants were not so barred and at least one, LaMarsh, relied on some of the illegally-seized items to further his assertion of innocence Beck's guilt. In his cross examination of Beck, LaMarsh's counsel questioned Beck extensively about the suppressed Ka-Bar box found

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[24]Indeed, on at least two occasions co-defendant Willey presented evidence of Beck's guilt that the trial court has barred the state from introducing. (See Argument VII. *infra*.)

[25]At the hearing on Beck's suppression motion, the items illegally seized from his trailer were enumerated in a document entitled "Exhibit 4." No copy of the document admitted as Exhibit 4 has been found to date. (CT 10733.)

by police during their illegal search of Beck's trailer. (RT 5395-5398.) Additionally, LaMarsh introduced the Ka-Bar box into evidence during his case-in-chief as evidence supporting LaMarsh's assertion that Beck used the knife in the killings. (RT 5489-5492.)

Other highly prejudicial testimony was introduced not by the state, but by Beck's co-defendants. In their quest to depict Cruz, Vieira and Beck as co-conspirators, both Willey and LaMarsh sought to introduce highly prejudicial evidence of the cult-like nature of the Cruz group, including the militant and survivalist nature of the group. A key element of the men's defense was the domination by Cruz of Beck and Vieira and the bad acts Beck and Vieira performed at the request of Cruz. This defense strategy resulted in the introduction of character evidence that would have been inadmissible had Beck's trial been severed from that of his co-defendants. (RT 5402-5405.)

For example, on cross examination LaMarsh's counsel made several attempts to go into Beck's relationship with Cruz and Vieira and their living arrangements in 1985 to further LaMarsh's theory that the three men formed a tight-knit group and were co-conspirators. (RT 5389-5393, 5405-5406.) Moreover, throughout his entire cross

examination of Beck, LaMarsh's counsel used heavy sarcasm, was frequently argumentative, and posed questions that were speculative, lacking foundation or otherwise improper.[26] Consequently, the entire cross examination was interrupted over and over again by defense counsel objecting to this assault. Indeed, although the reporter's transcript contains only forty-three pages of cross examination by LaMarsh (RT 3970-5419) and approximately two pages of re-cross examination (RT5435-5437), counsel for Beck and Cruz were compelled to make approximately forty-five objections,[27] which equates to one objection for each page of transcript, thirty of those objections were sustained by the trial court.[28] Additionally, the trial court held a lengthy side-bar where Beck and Cruz renewed their

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[26]Counsel for LaMarsh asked improper, "were they lying" questions. (RT 5407, 5410.) (See e.g. *People v. Chatman* (2006) 38 Cal.4th 344, 379 [42 Cal.Rptr.2d 221, 133 P.3d 534], citing *Evid. Code*, § 210; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 238, [21 Cal.Rptr 160].)

[27]See RT 5371, 5372, 5373, 5374, 5375, 5379, 5380, 5381, 5382, 5383, 5384, 5387, 5391, 5392, 5393, 5396, 5397, 5398, 5399, 5405, 5406, 5407, 5410, 5411, 5412, 5413, 5414, 5416, 5417, 5436.

[28]See, RT, 5372, 5374, 5382, 5383, 5384, 5391, 5393, 5396, 5397, 5398, 5402, 5406, 5407, 5410, 5411, 5412, 5413, 5414, 5416, 5436.

severance motion and objected to the improper nature of LaMarsh's cross examination of Beck. (RT 5399-5405.)

The testimony of Beck's former girlfriend, Rosemary McLaughlin, provides another example of prejudicial evidence introduced by co-defendants in the furtherance of their defense. McLaughlin was called as a case-in-chief witness not by the *prosecution*, but by *co-defendant LaMarsh*. (RT 5540-5553.)

Despite the trial court's order to steer clear of any references to the occult or to the cult-like nature of the group, when presenting his case-in-chief, Willey's counsel made numerous attempts to introduce evidence of the occult and the cultish nature of Cruz's group and made repeated references to Cruz's dominance and the use of torture and intimidation to control the group's members. Clearly these questions by co-counsel were relevant and indeed critical to the defense of Willey and LaMarsh, but they were irrelevant and inadmissible to the state's case against Beck and were therefore extremely prejudicial to his defense. (See, *People v. Terry*, *supra*, 2 Cal.3d at 390 [joint trial improper when damaging evidence would be inadmissible at separate trial.].)

On direct examination by LaMarsh, McLaughlin testified that she lived with Cruz, Beck and Vieira for several years, that Cruz was the leader of Beck and Vieira, and Vieira was subservient to Beck and Cruz and subjected to abuse by the two men. (5541-5545.) She further testified that the Cruz group wanted LaMarsh to join their group. (RT 5550-5551.) LaMarsh inquired, over objection, whether she joined Cruz's group by putting "a thumb print in blood." (RT 5545.) LaMarsh also focused heavily on the living arrangements and the group hierarchy years before the killings in order to establish Cruz's cult-like domination of the group. (RT 5560-5562.)

Additionally, McLaughlin testified that the day after the killings Beck came over to her house and said Vieira was ordered to clean the blood off everyone's shoes, but Beck's shoes would not come clean so he had to buy a new pair. He smiled when he said this. (RT 5549-5550.)

On cross-examination by the prosecutor, McLaughlin added that Beck told her they "had to do them all." (RT 5553.) When further crossed by Willey, McLaughlin testified that when she lived with Beck and Cruz in Beck's apartment, Cruz gave the orders, which

Beck and the others always obeyed because they would be disciplined if they disobeyed. (RT 5560-5561.) Everyone worked, but Beck and Cruz took all the money earned by the others. (RT 5562-5563.) Vieira would stand attention next to Cruz for hours waiting for orders. (RT 5563-5564.) Beck never disobeyed Cruz. (RT 5564.)

Over objection, Willey's counsel asked McLaughlin whether Cruz preached to Beck, talked to him about the occult and whether he was Beck's spiritual leader. (RT 5565-5566.) Willey's counsel asked McLaughlin, who was crying during her testimony, whether she was crying because she was afraid of Cruz and Beck. (RT 5563.)

Following Ms. McLaughlin's testimony, Beck and Cruz moved for a mistrial on the grounds that counsel for LaMarsh and Willey deliberately violated the trial court's order that neither threats nor occult evidence was admissible. The *prosecutor*, defending LaMarsh's and Willey 's strategy, argued that the questions were proper. The trial court denied the motion. (RT 5584-5587.)

Together, the atmosphere of guilt created by the prosecution and the co-defendants and the introduction by co-defendants of evidence otherwise unavailable to the state created a prejudice that

requires relief. The type of harm resulting from Beck's joint trial is cogently explained in *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082 :

> [D]efendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant. In order to zealously represent his client, each codefendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor.

Here, in addition to the prejudicial association with co-defendants and conflicting defenses warranting severance (*Massie, supra*, 66 Cal.2d at p. 899), there was damaging evidence introduced that would not have been admissible at Beck's separate trial. (*Terry, supra*, 2 C.3d at p. 390.) Because these prejudicial circumstances were evident prior to trial, the trial court erred in failing to grant severance, and reversal is required. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 454 [204 Cal. Rptr. 700, 683 P.2d 699] [a heightened scrutiny is applicable in capital cases].)

Should this Court conclude that severance was not required at the time the original motion was made, severance was nevertheless required mid-trial when LaMarsh and Willey revealed their trial strategy of depicting Cruz as a cult leader and Beck as Cruz's enforcer.[29] The trial court's failure to grant the Beck's severance motion at this junction violated Beck's due process rights to a fair trial and a reliable guilt and penalty determination. (*People v. Arias*, *supra*, 13 Cal.4th at p. 127 [a ruling that was correct when made cannot stand if joinder caused such "gross unfairness" as to violate defendants' due process rights].) Because this error was not harmless, Beck's convictions must be reversed.

Beck's defense was that he did not intend to kill anyone at the Elm Street house and he did not participate in any of the killings. By joining the trials of codefendants Cruz, LaMarsh and Willey, the jury was exposed to evidence that would have been inadmissible at a separate trial. Moreover, the jury was bombarded with the presentation of not only the state's case, but with the three organized

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[29]See footnote 22, *supra*.

efforts by the codefendants to persuade the jury that Beck, not the others, was responsible for the murders. Had Beck been tried separately there is a reasonable probability that he would have received a more favorable result, thus reversal is required. (*Keenan*, *supra*, 46 Cal.3d at p. 503.)

B. The Trial Court's Failure to Sever Violated Beck's Due Process and Eighth Amendment Rights to a Fair Penalty Trial

In its pretrial rulings, the trial court held that the defendants' penalty trials would be conducted in the following order: Cruz, Beck, LaMarsh and then Willey. (RT 828-829.) Beck objected to this order on the ground that it would be prejudicial to him if Cruz was permitted to go first. (RT 848–849.) Cruz essentially joined this motion, arguing that given the nature of the two's relationship, regardless of which defendant went first the jury would be tainted with evidence about the other defendant. Cruz argued for separate penalty juries. (RT 489.) The prosecutor responded by arguing that he did not notice, and by inference did not intend to introduce, any of the evidence regarding Beck's mistreatment of Vieira at Cruz's behest.

MR. AMSTER: As far as I'm – as far as my position is, I really can't see how Mr. Cruz's penalty phase trial would *not* affect Mr. Beck. I believe – I don't think I'm telling any secrets when I say the minute I bring in character evidence of Mr. Cruz, that allows the People to bring in bad character evidence. And I believe that they're in possession of bad character evidence that relates to Mr. Cruz and Mr. Beck's actions together. I certainly have to be first, and I don't want to be behind any of these defendants. And that's my position.

MR. BRAZELTON: I think we have the cart before the horse really. We're not even close to that point yet. And if we arrive at that point, I think these are issues that can be brought up then and possibly resolved then. If there is evidence – I don't know specifically what Mr. Amster's referring to, but if there is evidence that would be admissible against Mr. Cruz in the penalty phase trial that would have some reference to Mr. Beck, I'm sure that it can be cleaned up in some manner.

MR. AMSTER: We, I – on that point I think the Court can take notice of the Ricky Vieira trial. I think there are any – if my recollection's correct, there are any number of times when Mr. Vieira was beaten up by Mr. Beck at the – this is all alleged – at the direction of Mr. Cruz. And that's just one specific thing that I'm directing at.

I don't feel it's premature from my argument that the defendant's entitled to the same jury who hears the guilt phase to hear the penalty phase. And if one defendant's penalty phase taints that jury, I believe then that they cannot get a fair penalty phase and they can't have the same jury then who is going to determine the guilty phase and the penalty phase. It's impossible. So as such I'm saying that each one should have their one jury, one jury determine guilt and penalty.

MR. BRAZELTON: *I haven't noticed any of that evidence as evidence in aggravation your honor.*

(RT 848-849 [emphasis added].)

The trial court let its ruling stand. (RT 849.) The trial court denied the severance motion, relying on the representations by the prosecutor that the state would refrain from introducing *any* evidence regarding Beck in defendant Cruz's penalty phase. (RT 849.)

> THE COURT: Correct – Mr. Brazelton, do you expect to present evidence in the penalty phase, if there are penalty phases, regarding the conduct of any or all of the co-defendants *outside the murders for wh8ich they're charged*?
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> MR. BRAZELTON: Let me address that. And thank you, Your Honor, for reminding me of that. The diary was mentioned . . . . I Don't intend to introduce the diary *for any purposes*. In fact, I mentioned earlier that I would not introduce any evidence coming out of the trailer, and that came out of the trailer. I have not noticed in any of the 190.3 notices that I can recall any mention of that diary or diaries, for that matter.
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> The penalty phase evidence that has been noticed against Mr. Cruz is merely the – the facts of the crime and the special circumstances that would be found to be true. I don't recall any other penalty phase evidence against Mr. Cruz *or Mr. Beck.*

(RT 816-817 [emphasis added].)

The prosecutor repeated this statement later in the hearing on the motion to sever.

> THE COURT: Based – okay. Again, Mr. Brazelton, your representations are you have no evidence

in aggravation against Mr. Cruz other than the facts of the offense; is that correct?

MR. BRAZELTON: At this point, none that I plan to introduce. If something happens between now and then, of course I'll come to the Court with it.

THE COURT: The same for Mr. Beck?

MR. BRAZELTON: That's correct.

(RT828-829.)

Beck filed a motion to reconsider the trial court's denial of severance and the order of the penalty trials. (RT 893-894.) This motion was also denied. (RT 961-969.) A subsequent writ was also denied (RT 1225, 1266-6). Thereafter, Beck renewed his motion a second time. (RT1300-1302.) The motion was again denied (RT 1303) after the following colloquy.

MR. FAULKNER: Your Honor, well, I have previously made a motion for severance which the court denied. I took a writ for Fresno. The writ was denied. [¶] . . . I believe the Court said a day after the ruling in clarifying its order, that the Court felt that the type of evidence that might be presented at a penalty phase was speculative as to whether or not it would involve Mr. Beck and damage Mr. Beck with the penalty phase jury. I think what we have here this morning is a perfect example of how it's not speculative. In fact, we know exactly what Mr. Brazelton is going to do if this case gets to a penalty phase, and that is that he is going to use a lot of evidence which not only involves Mr. Cruz, but by necessity involves Mr. Beck, and I don't think that that can be sanitized.

> There's a lot in the discovery which has to do with Rosemary McLaughlin and the fact that she was under duress both from Mr. Cruz, but – also, Mr Cruz and Mr. Beck together. I don't think it's going to be – it's not going to be possible for Mr. Brazelton to aggravate Mr. Cruz without involving to a great extent Mr. Beck, and I believe that speculation as to whether or not he can do that would be in violation of my client's right to have one jury go all the way through the proceedings, ...
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> THE COURT: Mr. Brazelton?
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> MR. BRAZELTON: I'll submit it on my prior arguments previously.
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> THE COURT: Your prior argument, if I'm not mistaken, is that you were not going to present any evidence in Mr. Cruz's penalty phase, if there is one, that it all involved Mr. Beck.
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> MR. BRAZELTON: I believe I indicated that, and it's still my representation to the Court.

(RT 1301-1302.)

In the state's case-in-chief against Cruz, the prosecutor called only one witness, Cruz's wife Jennifer Starn, to testify against Cruz. Starn told the same jury who would later decide Beck's punishment, about Cruz's acts of terror and violence against Starn, their infant daughter Alexandra, Vieira and a former roommate Steve Perkins.[30]

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[30]Starn told the jury that Cruz regularly beat Vieira and Perkins, punching them in the stomach with his fist as hard as he could. (RT 6983-6984.) She described how Cruz also used the stun gun against Starn, Vieira and Perkins, and how, on several occasions, Cruz put a gun into her mouth while threatening her, "Are you going to get your

After hearing Starn's testimony, the jury deliberated for less than a day, returning a sentence of death.[31] (RT 7570-7578.)

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shit together or are you going to die?" (RT 6988.) He also did this to Vieira and Rosemary McLaughlin. (RT 6985-6987.)

Starn testified that Cruz hit her over 100 times with anything he could get his hands on, including his cane, if he felt she got out of line. (RT 6990-6991.) When she was pregnant with her daughter, Cruz pushed her down and kicked her hard in the stomach and between the legs, causing bleeding. When she tried to leave, Cruz threaten to kill her by decapitation. (RT 6989-6990.) Once their daughter was born, Cruz beat the child with a flyswatter, ruler and with his hands. (RT 6992.) He would slap his daughter in the face with his open hand, leaving bruises. (RT 6992.) Their daughter was so terrorized by Cruz that she would fall to the ground, cowering and covering her ears, when Cruz said, "Do you want to have a clapping?" Cruz found his daughter's fear of him amusing. (RT 6993.) When Cruz was mad at Starn he would not let Starn attend to their infant daughter. He would banish Starn to a dark room and let her feed, hold and change Alexandra only every six hours. (RT 7016-17.)

When Alexandra was a toddler, Cruz built a swing-like contraption they called "The Rack" which he used to strengthen his daughter. Cruz would place her in the swing and hang water bottles from her feet. When she cried he would spray his daughter with cold water, or pour cold water over her head until she stopped crying. Other times Cruz would make her cry harder, saying the crying would strengthen her lungs. (RT 6994-6995.)

[31]While telling the jury about the abuse inflicted by Cruz on her and others, Starns let the jury know that Beck was living with them when the abuse was occurring and often implied that Cruz was assisted by Beck without actually naming him. For example, when testifying about the rack and how Cruz would put Alexandria in the rack and hang bottles of water from her feet, Starns testified that Cruz "had his friends build it for him." (RT 6978.)

In the state's case-in-chief against Beck, the prosecution exploited its penalty evidence against Cruz to obtain a death sentence for Beck. The state incorporated all of Starn's testimony against Cruz into Beck's penalty trial by tying Beck to Cruz, essentially arguing Beck's guilt by association. Because Beck was sometimes present or had knowledge of, and even sometimes participated, when Cruz beat, tortured and terrorized the members of the group, the state argued that Beck was just as evil as Cruz and deserved the same sentence. (RT 8295-8296, 8297.)[32] Thus, much of the state's aggravating evidence against Beck was actually about Cruz's bad acts. This strategy was perfected by the order of the penalty trials. The fact that Cruz's penalty trial was first allowed the prosecution to expose the jury to Cruz evidence that was inadmissible against Beck. The prosecution then exploited the jury's knowledge of the Cruz evidence during

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[32]In his closing argument, repeatedly associated Beck with Cruz, whom the jury had already determined was despicable enough to be eliminated by the death penalty. Indeed, the prosecutor spent a great deal of time focusing on the bad acts performed by Cruz against Starn and their children, Perkins, Vieira and McLaughlin. He attributed blame for these acts to Beck by arguing, "You didn't see David Beck objecting to anything Gerald Cruz was doing or asking of him." (RT 8297. See also, 7519, 8284, 8305.)

Beck's penalty trial by calling many of the same witnesses to testify that Beck was present or had knowledge of *Cruz's bad acts*.

For example, although Rosemary McLaughlin, as a witness for the state, testified that Beck never beat her and she never saw Beck beat Vieira or Perkins (RT 7697-7698), she repeated Starn's testimony about Cruz's water-bottle treatment of Alexandra, and told the jury Beck was present when this happened, and "took part" in it, McLaughlin did not explain how these bad acts were attributable to Beck. (RT 7704, 7706.) McLaughlin also testified about Cruz's irrational, controlling behavior and described how Cruz, *not Beck*, beat Jennifer Starn, Ricky Vieira and Steve Perkins (RT 7695,7697-7698) and put a gun in her mouth (RT 7695) and threatened on a number of occasions to cut off her head. (RT 7721-7722.) She was not sure whether Beck was present during these assaults. (RT 7722.) Only on one occasion did McLaughlin recall that Beck was present when Cruz threatened her. McLaughlin testified that Beck seemed to agree with Cruz only in order to appease Cruz. (RT 7722-7723.) McLaughlin testified that Beck never beat her (RT 7698) but Steve Perkins and

Beck used force to retrieve her when she tried to run away. (RT 7693-7694, 7698-7699.)

Starn told the jury that Beck never hurt Alexandra, but would sometimes bring her to Cruz and place her in the rack. (RT 7766.) Cruz was the only person to hang water jugs from the baby's legs. (Ibid.) She also told the jury that Beck never hit her, but that Cruz beat her numerous times in many, many ways. (RT 7771.)

Starn and her sister Cynthia both testified about how Cruz devised a scheme to get back at Cynthia, by placing a gun to her head and in her mouth, when he believe she had stolen a gun from him. Beck and Starn were present in the room when Cruz terrorized Cynthia. (RT 7768-7770.)

Starn testified about "The Cause" which was a cult religion developed by Cruz. They described how Cruz, not Beck, was the founder and leader. (RT 7761.) She testified about the "Wheel of Doom" which was a form of punishment devised by Cruz, not Beck. (RT 7764-7766.) She also testified "The Rack, the device that Cruz, not Beck, came up with and had built by Perkins. Starn testified that Cruz, not Beck, placed the baby Alexandra in the device and hung

water bottles from her feet (RT 7766), and told the jury how Cruz, not Beck, had manipulated Steve Perkins to lie about the beatings he received. (RT 7767.)

Starn's sister Cynthia also testified that Cruz, not Beck, threatened her by placing a gun in her mouth while Starn, Beck, Vieira and Perkins were present. Cynthia testified that no one present attempted to intercede on Cynthia's behalf and that Beck did not take part in the threat (RT 7745-7746, 7748.) She further testified that Beck never administered any kind of punishment to her, and she never observed Beck hurting Jennifer or McLaughlin. (RT 7736.)

By conducting the Cruz penalty trial first, the state was given the opportunity to taint Beck's jury with the highly prejudicial evidence against *Cruz*. This bootstrapping to Beck of incredibly inflammatory Cruz evidence, evidence that was otherwise irrelevant to the state's case against Beck, violated Beck's due process right to a fair penalty trial. Had Beck been tried separately, the state's aggravating evidence would have consisted solely of Beck's bad acts toward Vieira and Perkins; beatings similar to fraternity hazings which both Perkins and Vieira consented to and tolerated repeatedly. All of the evil acts

performed by Cruz which were recounted ad nauseam by the state's witnesses would have been inadmissible as irrelevant and prejudicial.

Because the trial court violated Beck's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process and a fair trial, and reliable guilt and penalty verdicts by denying the motion to sever, the guilt verdict and the sentence of death must be reversed.

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II.

BECK'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE REOPENING OF JURY SELECTION TO ALLOW A STATE PEREMPTORY CHALLENGE

Over defense objection, the trial court conducted jury selection according to Proposition 115 which mandates voir dire examination by the trial court. (RT 1260-1262.) At the start of jury selection, the trial court asked the jury venire to complete juror questionnaires. Counsel for both sides were then provided with copies of the completed questionnaires and were permitted to submit specific follow-up questions to be asked by the court in order to further inquire about or to clarify troublesome questionnaire responses. (RT 1262.) After nine days of jury selection, a panel of twelve jurors was seated, all the defendants and the state having passed all the jurors for cause and accepting the twelve members. (RT 2181.) When the clerk of the court began swearing the jury, Juror No. 4, Mario Lopez, raised his hand and asked to say something in private. (RT 2181-2182.) Once in camera, the juror stated,

> MR. LOPEZ: I am not really certain about the death penalty, sir, whether I can render death penalty as a

judgment. I would rather choose life in prison for the convicted person. I am not sure because of religion reasons and other reasons that, you know, I can render death penalty.

I believe that a man whose done something wrong, that he should be punished. I just am not absolutely certain right now, due to religious reasons, that I'm doing the right thing if I have to decide on the death penalty.

(RT 2183.)

Over defense counsels' objections, the trial court conducted the following voir dire of Mr. Lopez:

THE COURT: Mr. Lopez, as you sit here right this morning, do you know for a fact that you could vote for the death penalty if you felt it was appropriate?

MR. LOPEZ: Under one case which I think will be appropriate, you know. There's one thing – there is one case where I think I can vote for the death penalty, which is – you know, I don't know if I'm allowed to say it.

THE COURT: Go ahead.

MR. LOPEZ: If the persons are repeat offenders or the Court can prove that they will kill again.

THE COURT: Okay. Let me ask you again the four – excuse me, the six very specific death penalty related questions that I asked you yesterday.

Do you have feelings about the death penalty which are so strong that you would never vote for first degree murder?

MR. LOPEZ: No, sir.

THE COURT: Do you have feelings about the death penalty which are so strong that you would never find a special circumstance to be true?

MR. LOPEZ: No, sir.

THE COURT: Do you have feelings about the death penalty which are so strong that you would never impose the death penalty in any case whatever?

MR. LOPEZ: No, sir.

THE COURT: Do you have feelings about the death penalty which are so strong that you would always impose the death penalty in every case in which you had the opportunity to do so?

MR. LOPEZ: No, sir.

THE COURT: Do you have feelings about the death penalty which you believe would substantially interfere with your ability to function as a juror in this case?

MR. LOPEZ: Could you repeat that again?

THE COURT: Do you have feelings about the death penalty which you believe would substantially interfere with your ability to function as a juror in this case?

MR. LOPEZ: No, sir.

THE COURT: Do you have feelings about the death penalty which you believe would substantially interfere with your ability to function as a juror in this case?

MR. LOPEZ: I'm not sure whether that is substantial to your point of view or to the other people's point of view; *but as I have stated, you know, when I first answered my questionnaire*, I am really not sure about the death penalty in the sentencing of a person to death.

I know I can go through Phase 1 and find the person – you know, whether he's guilty or not. I'm just not absolutely sure whether I'm doing the right thing if I have to sentence a person to death.

(RT 2186-2187 [emphasis added].)

At this point, defense counsel again objected to any further questioning by the court, arguing that Mr. Lopez had met the *Witherspoon*[33] requirements to sit as a juror. The court implicitly overruled these objections when it continued to question Mr. Lopez:

> THE COURT: Mr. Lopez, do you believe a person who was convicted of successfully planning or the murder of multiple victims should automatically receive the death penalty?
>
> MR. LOPEZ: No, sir.
>
> THE COURT: [¶] Mr. Lopez, have your feelings about the death penalty changed in any manner since you answered the questions yesterday?
>
> MR. LOPEZ: Sir, since you mentioned last week that this is a case regarding the death penalty, I have been asking myself what – you know, how to judge the case or what to do in case I get selected. To this point I'm not 100 percent sure whether I'm – I can do it or not. I don't want to – if I get selected as a juror, I don't want to be the last person to say or to be the only different person.
>
> THE COURT: Do you understand that that is the right of all jurors, to be the one person who disagrees with the other jurors?
>
> MR. LOPEZ: I don't know the consequences of that, sir.
>
> THE COURT: But do you understand that you or any one of the 12 people can disagree with everybody else? Do you understand that?
>
> MR. LOPEZ: Yes, sir. I just felt –

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[33] *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [20 L.Ed.2d 776, 88 S.Ct. 1770].

THE COURT: Do you understand that you don't have to worry about what the consequences of that disagreement are?

MR. LOPEZ: I didn't know that, sir. Maybe in public, sir, yes. Personally –

THE COURT: Pardon me?

MR. LOPEZ: Maybe as a matter of court records, yes; but privately, personally, I'm not sure what you mean.

THE COURT: You said you didn't want to be the only person having one point of view and all the other jurors had a different point of view; and I said, did you understand that that is your right as it is with any other juror. Do you understand that?

MR. LOPEZ: Yes, sir.

THE COURT: And you mentioned something about you didn't know what the consequences of that would be, and I told you that what – if that's the way it is, that's the way it is; and you're not to concern yourself at all as to what the consequences are, if you and the other jurors disagree. Do you understand that?

MR. LOPEZ: I do understand what you're saying, sir, but I don't know – still don't know what – what's going to happen if I – disagree with the other jurors.

THE COURT: If you disagree with the other jurors or if there is any disagreement among the jurors and so a verdict can't be reached, then there is what's called a hung jury. But that is something you're not to concern yourself with in any manner. That's allowed by the law, and it certainly happens. Do you understand that?

MR. LOPEZ: Yes, sir. And I just have this feeling inside that if it comes to the death penalty, it may end up that way, sir.

THE COURT: Do you know whether it will end up that way?

MR. LOPEZ: No, sir.

(RT 2188-2190.)

> THE COURT: Do you recall me asking you – again I guess it was yesterday – that if at some point your – you decided that law was so contrary to your religious belief that you could not put your religious beliefs aside and could not follow the law that you would certainly come and tell us about that?
>
> MR. LOPEZ: I believe so, sir.
>
> THE COURT: May I have your assurance that if at some point down the road that you decide that you cannot follow the law that you will tell us about it?
>
> MR. LOPEZ: Yes, sir.

(RT 2219.)

Following this questioning, the state conceded it did not have a challenge for cause[34] but moved to re-open jury selection to peremptorily challenge Mr. Lopez. (RT 2190.) Although the trial

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[34]The trial court also found that there was an insufficient basis for the state to sustain a challenge for cause against Mr. Lopez:

> In view of the answers given by Mr. Lopez in court last Thursday, coupled with the answers he had previously given, I believe, two days earlier, coupled with his answers in the questionnaire, the Court finds as it did last Thursday that Mr. Lopez's beliefs re the death penalty are not such as would make him unfit to serve as a juror in this case. [¶] I still find that Mr. Lopez is not challengeable for cause.

(RT 2246-2247.)

court initially denied the state's motion, it ultimately re-opened jury selection over defense counsels' objections, and Mr. Lopez was then immediately removed by a state exercised peremptory challenge. (RT 2246-2250). The trial court's decision to re-open jury selection is error.

"A challenge to an individual juror may only be made before the jury is sworn." (*Code of Civ. Proc.*, § 226, subd. (a).) "Peremptory challenges shall be taken or passed by the sides alternately, commencing with the plaintiff or people; and each party shall be entitled to have the panel full before exercising any peremptory challenge. *When each side passes consecutively, the jury shall then be sworn*, unless the court, for good cause, shall otherwise order." (*Code of Civ. Proc.*, § 231, subd. (d). [Emphasis added].)

Here, both sides had consecutively passed the panel of 12 jurors. At that point the trial court's ability to allow the further use of peremptory challenges by either side was barred, and under the mandate of section 231(d) the trial court was required to swear the jury. The only exception to this rule being a showing of good cause. Because the swearing of the jury had not been completed when Mr.

Lopez raised his hand, the question before this court is whether Mr. Lopez presented the trial court with sufficient good cause to disregard the mandate of section 231(d).

In *People v. Niles* (1991) 233 Cal.App.3d 315 [284 Cal.Rptr. 423], the court of appeal considered the question of what constitutes good cause for the failure to administer the jurors' oath once both sides have passed the jury and accepted the jury. After Niles and the prosecutor had consecutively passed on their peremptory challenges, but before the jury was sworn, the trial court denied Nile's motion to re-open jury selection to allow him to exercise a peremptory challenge. The juror at issue was married to a sheriff's sergeant who was in charge of the jail where the defendant was being held. Although this information was known to defense counsel during jury selection, defense counsel passed this juror for cause and did not exercise a peremptory challenge. Due to procedural issues with the co-defendant's case, the panel of twelve jurors was selected but not actually sworn for several weeks. It was brought to the attention of the court that during the interim the defendant was occasionally talking with the juror's husband. Based on this information, both sides

questioned the juror in camera to determine whether she should be excluded for cause. They found no basis for a cause challenge. The following day, Niles moved to re-open jury selection to be allowed to use a remaining peremptory challenge to strike the juror. The trial court denied the motion. Niles appealed.

On review, the court of appeal construed Penal Code sections 1068[35] and 1088[36] to allow the exercise of peremptory challenges only until both sides pass consecutively, after which the jury *shall* be sworn. The court concluded that at that point, and even though the jury has not actually been sworn, any remaining peremptory challenges

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[35]Penal Code section 1068, repealed in 1988, allowed a defendant to "peremptorily challenge a juror at any time after his appearance in the box and before he is sworn to try the case."

[36]Penal Code section 1088, also repealed in 1988, was virtually identical to Code of Civil Procedure section 231, subdivision (d). In *People v. Cottle* (2006) 39 Cal.4th 246 [46 Cal.Rptr.3d 86, 138 P.3d 230], the Supreme Court addressed the issue of whether the trial court had discretion to re-open jury selection after the trial jury had been impaneled, but before the alternate jurors were sworn. In *Cottle*, after both sides consecutively passed their peremptory challenges, twelve trial jurors were sworn. The Supreme Court upheld the trial court's decision to disallow the reopening of jury selection noting that the trial court was statutorily barred from re-opening jury selection after the panel of twelve trial jurors had been sworn.

may be exercised only at the discretion of the trial court based upon a showing of good cause.

The *Niles* court explained that to demonstrate good cause, the moving party must make a sufficient showing to justify the belated exercise of that challenge. The trial court's exercise of discretion in reopening is reviewed for a clear showing of abuse. (*Niles*, *supra*, 233 Cal.App.3d at p. 321.)

In finding no abuse of discretion the *Niles* court noted that all the pertinent facts were known to the defense at the time Niles originally passed on peremptory challenges and accepted the juror. Because Niles presented no additional or new facts to justify the motion to re-open jury selection, the court of appeal found no error in the trial court's decision to disallow the peremptory challenge.

Here, in initially denying the state's motion, the trial court found that Mr. Lopez had provided no new information to the court:

> THE COURT: All right. Mr. Lopez in his answers to the questions in the questionnaire made it abundantly clear that he had concerns for his own ability to vote for the death penalty. I specifically refer to questions No. 24, 25, 108, 116, and 122.
>
> However, specifically referring to questions 110, 115, 117, 127, 128, and 129, he's also made clear that

> Mr. Lopez believed that the death penalty was appropriate in certain cases, and if it was appropriate he could vote to impose it.
>
> In questioning in open court yesterday [during voir dire], and specifically referring to pages 2034, line 23, and page 2036, line 20, page 2038, line 4 to 27, and page 2039, line 23, to page 2040, line 7, Mr. Lopez made it abundantly clear that he understood the law regarding the death penalty and agreed that if it was appropriate in the proper situation that he would put his personal feelings aside and follow the law regarding. [sic] And particularly at page 235, line 17 to 21, stated that if the law was so contrary to his religious belief that he could not follow the law, he would bring it to our attention.

(RT 2207-2210).

Yet, despite this factual finding the trial court nevertheless reopened jury selection even though no new facts were presented. As in *Niles*, the moving party in this case had prior knowledge of Mr. Lopez's feelings toward the death penalty when it accepted Mr. Lopez as a trial juror. Mr. Lopez clearly expressed his reservations about the application of the death penalty in his questionnaire.[37] Despite these

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[37]In response to question no. 24 of the Juror Questionnaire, "Would any of your religious views in any way affect your service as a juror?" Mr. Lopez wrote, "No," but qualified his answer with, "I am not sure in certain cases." Similarly, for question no. 25, "For religious or other reasons, do you feel you cannot sit in judgment on the conduct of a fellow human being?" Mr. Lopez wrote, "No," but added, "I am not sure in certain cases." (RT 8107-8108.) Regarding

responses, the prosecutor asked only one question of Mr. Lopez during voir dire and then accepted him as a juror. (RT 2039.) Because Mr. Lopez interrupted the swearing of the jury only to repeat the initial reservations he expressed in his questionnaire, the state had no new facts upon which to base its motion to reopen, and *Niles* is controlling.

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his attitude towards the death penalty Mr. Lopez wrote that he was "undecided" in his general feelings. (Question no. 108, RT 8135.) This indecisiveness was reiterated in question no. 115 which instructed:

> Check the entry which best describes your feeling about the death penalty.
> Would impose whenever I had the opportunity _____
> Strongly support _____
> Support _____
> Will consider _____
> Oppose _____
> Strongly oppose _____
> Will never under any circumstances impose the death penalty _____

Mr. Lopez checked "Will consider." (RT 8137.) Similarly, Mr. Lopez responded "not sure" to question no. 122, which asked, "If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote?" To question no. 127, "Under what circumstances, if any, do you believe that the death penalty is appropriate?" Mr. Lopez wrote, "On extreme cases, when the public is or will be endangered and the criminal is beyond reform." (RT 8140-8141.)

In justifying its decision to reopen, the trial court stated:

> In the instant case there were new facts, *Mr. Lopez's return to his questionnaire state of mind.* [¶] The Court finds that Mr. Lopez's volunteered comments to the Court, along with his subsequent answers to questions put to him, establish the good cause for the district attorney to reopen to exercise peremptory challenges.

(RT 2259 [emphasis added].)

The trial court's voir dire examination of Mr. Lopez resulted in only a cursory exploration of Mr Lopez's responses to questions no. 25 and no. 108. In both instances, Mr. Lopez explained that he could and would follow the law. (RT 2034-35, 2036.) He repeated this assurance to the trial court during his in camera voir dire. Under these circumstances, it was an abuse of discretion for the court to reopen jury selection. In finding good cause, the trial court essentially faulted Mr. Lopez for not repeating his questionnaire responses during voir dire.

Given that the trial court conducted the questioning of Mr. Lopez any fault in failing to review Mr. Lopez's questionnaire responses falls upon the trial court. Mr. Lopez's reservations in imposing the death penalty were clearly voiced in his questionnaire, yet

neither the trial court not the prosecutor chose to propound additional questions to further explore this issue.[38] Indeed, it was likely *because* Mr. Lopez was never directly questioned during voir dire about the reservations he expressed in his questionnaire that he felt it necessary to interrupt the swearing of jury to re-iterate these concerns to the court.

This is not a case where a juror's hidden bias is exposed after the juror is accepted. (See e.g., *Pearce v. Alaska* (1998) 951 P.2d 445 [juror's failure to reveal her own sexual assault during voir dire that was later exposed by an anonymous caller constituted good cause to reopen jury selection to exercise peremptory challenge]. Nor is it a case where a juror failed to respond to a question on voir dire. (See e.g., *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548 [104 S.Ct. 845, 78 L.Ed.2d 663] [juror's failure to provide response in juror questionnaire deprived a party of information that would have been useful in exercising a peremptory challenge].) Here,

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[38]Pursuant to the rules set out by the court for jury selection, the prosecutor initially asked the trial court to voir dire Mr. Lopez only about Mr. Lopez's sister's employment with the judiciary. (RT 2039.)

the prosecutor's own negligence in failing to use the information provided to him in the juror questionnaire to explore the state's use of a peremptory challenge in a timely manner does not constitute good cause warranting the re-opening of jury selection. (See, e.g., *Sykes v. Superior Court* (1973) 9 Cal.3d 83 [106 Cal.Rptr. 786, 507 P.2d 90] [in a motion for speedy trial, the prosecutor's careless or negligence does not constitute good cause].)

Under *Niles*, the record is insufficient to sustain the trial court's findings of good cause. As pointed out in defense counsels' arguments, Mr. Lopez's responses to the trial court's questions were consistent with the answers he gave in his juror questionnaire. (RT 2240-2244.) Consequently, no new information was developed by the trial court's individual voir dire of Mr. Lopez, and the trial court erred in reopening jury selection.

A. The Trial Court's Error Constitutes *Witherspoon–Witt*[39] Error Requiring Reversal of Beck's Death Sentence

A defendant cannot be sentenced to death if the jury that imposed it was chosen by excluding prospective jurors for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois*, *supra*, 391 U.S. 510 at p. 522.)

In *Witherspoon*, *supra*, the trial court excused nearly half the venire because of expressed qualms about capital punishment. Upon condemning this practice, the Supreme Court explained that a jury "uncommonly willing to condemn a man to die would not be impartial as required by the Sixth Amendment (*Id.* at p. 521.) "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty of expressed conscientious or religious scruples against its infliction. (*Ibid.*)

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[39]*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].)

In *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424, the Supreme Court refined the *Witherspoon* standard and held that a prospective juror may be properly excluded only if the juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Thus, those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137]; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 [36 Cal.Rptr.2d 235, 885 P.2d 1].)

Where the record is ambiguous, deference is given to the trial court's decision to remove a juror for cause. (*Witt*, *supra*, 469 U.S. at p. 426.)

The erroneous exclusion of a prospective juror because of that person's views on the death penalty is reversible per se. (*Gray v. Mississippi* (1987) 481 U.S. 648 [95 L.Ed.2d 622, 107 S.Ct. 2045]; see *People v. Coleman, supra*, 46 Cal.3d, at p. 768.)

In the instant case the twelve members of the jury had been selected, both sides had consecutively passed and accepted the jury, and the trial court was in the process of administering the jurors' oath. Once the trial court determined there was insufficient evidence to sustain a challenge for cause to Mr. Lopez, the trial court was required by section 226(a) to swear the jury.

As explained above, because the reopening of jury selection at this juncture was without good cause, the trial court's decision to allow the prosecution to strike Mr. Lopez based on his views about the death penalty was error, violated Beck's constitutional rights and was reversible error per se. (*Gray v. Mississippi*, *supra*, 481 U.S. 648.)

Although *Witherspoon* addresses the wrongful exclusion of potential jurors for cause rather than the improper use of peremptory challenges, the case is nevertheless applicable here. By allowing the state to re-open jury selection to exercise a peremptory challenge against Mr. Lopez *because of Mr. Lopez's views regarding the death penalty*, the exclusion of Mr. Lopez was, in effect, a wrongfully granted challenge for cause.

This is not a case where deference should be afforded to the trial court's decision. (See, e.g., *Witt*, *supra*, 469 U.S. at p. 426.) Indeed, the trial court made a factual finding that Mr. Lopez was death-qualified to sit as a juror. (RT 2246-2247.) Nevertheless, the trial court circumvented its own finding by allowing the prosecutor to re-open jury selection for the sole purpose of striking Mr. Lopez for the very views the trial court found had just been determined insufficient for a challenge for cause. The trial court's re-opening of jury selection created a jury that "was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty of expressed conscientious or religious scruples against its infliction." (*Witherspoon*, *supra*, 391 U.S. at p. 522.) As such, the trial court's decision violated Beck's state and federal due process right to an impartial jury.

B. The Wrongful Reopening of Jury Selection Was Not Harmless

In the event that a showing of prejudice is required, (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]), Beck has met this burden. *People v. Hamilton* (1963) 60 Cal.2d 105

[32 Cal.Rptr.2d 4, 383 P.2d 412], disapproved on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649 [36 Cal.Rptr. 201, 388 P.2d 33]), is instructive. In *Hamilton*, it came to light during the penalty phase of the trial that one juror had read the Penal Code and had become confused by the law. The prosecution moved the court to dismiss the juror on the ground that her questions indicated that she had read and misunderstood the Penal Code, that she had formed certain views which she would retain and urge on the other jurors, and that she had disclosed her opposition to a verdict imposing the death penalty. The defense opposed the motion. The next morning, over objection of the defense, the trial judge brought the juror into chambers to question her. The juror stated that during the noon recesses throughout the trial she had extra time on her hands which she utilized by browsing in the public library; that she had no intention of trying to interpret the law, or to learn it as it applied to this case; but that she was confused about the applicable law. She stated she did not intend to discuss it with anyone on the jury. The court discharged the juror and ordered her replaced by one of the alternate jurors on the ground that she became unable to perform her duty when she

"undertook to look at a law book." (*Hamilton*, *supra*, 60 Cal.2d, at p. 124.) In finding reversible error the Supreme Court stated,

> While it has been said repeatedly, . . . , that a defendant is not entitled to be tried by a jury composed of any particular individuals, but only by a jury composed of qualified and impartial jurors, this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during the trial, has given the impression that he favors one side or the other. It is obvious that it would be error to discharge a juror for such a reason, and that, if the record shows (as it does here), that, based on the evidence, that juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side. If it were not, the court could 'load' the jury one way or the other. That is precisely what occurred here. The juror asked, in good faith and in order to be instructed by the court, questions which indicated that (temporarily at least) she was considering the probability of a life sentence. To dismiss her without proper, or any, cause was tantamount to "loading" the jury with those who might favor the death penalty. Such, obviously, was prejudicial to appellant.

(*Hamilton*, *supra*, 60 Cal.2d, at p. 128.)

In the instant case, the trial court's actions resulted in the loss of a juror who seemed inclined to give serious consideration to a sentence less than death. "Such, obviously, was prejudicial to appellant." (*Ibid.*) Reversal of the death sentence is required.

C. The Trial Court's Reopening of Jury Selection to Benefit the State Violated Beck's Due Process Rights as Guaranteed by the Fourteenth Amendment to the United States Constitution

Although a defendant may have no constitutional guarantee to a certain procedure, the United States Supreme Court has recognized that a due process violation may result where a criminal defendant is denied a benefit that is provided to the state. Thus, in *Wardius v. Oregon* (1973) 412 U.S. 470 [93 S.Ct. 2208, 37 L.Ed.2d 82] the Supreme Court held that while the Due Process Clause does not prevent a state from experimenting with its criminal adversary systems in order to better achieve the goals of fairness and truth, it "does speak to the balance of forces between the accused and his accuser." (*Id.* at p. 474.) The Court held that state discovery rules requiring a defendant to provide pretrial alibi information but which have no corresponding pretrial discovery provision obligating the state to provide discovery violate due process. The Court noted that it has been "particularly suspicious of state trial rules which provide nonreciprocal benefits to the state when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." (*Id.*, n. 5,

citing *Washington v. Texas* (1967) 388 U.S. 14, 22 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799].)

Although due process does not require absolute symmetry between the rights granted to the state and those afforded the defense, a "shift at just one stage [of trial] might so alter the total balance of advantages in favor of the prosecution as to deprive the defendant of the right to a fair trial." (*Tyson v. Trigg* (7th Cir. 1995) 50 F.3d 436, 441 citing *Warduis v. Oregon*, *supra*.)

In *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, 541, the Court of Appeal addressed the constitutional ramifications of jury selection procedures that favored the prosecution over the defendant. In *Harbin*, the trial court informed the parties that they would be permitted to exercise their peremptory challenges after challenges for cause. The court cautioned the parties that the jurors remaining seated after the parties exercised their peremptory challenges could not be later challenged except for cause. When the parties accepted the jury, the prosecution still had remaining peremptory challenges while the defense had exhausted theirs. On the sixth day of the eight day trial,

new information came to light that a seated juror was a Narcotics Anonymous participant. Because, upon voir dire, the juror stated his history as a narcotics user would not cause him any bias or prejudice in the case, the trial court declined to dismiss the juror for cause. Nevertheless, the trial court permitted, over defense objection, the prosecution to exercise one of its remaining peremptory challenges to remove the juror mid-trial.

In finding error of constitutional dimension, the Court of Appeal noted that although a defendant has no constitutional right to peremptory challenges, due process may be violated by a system of challenges that is skewed towards the prosecution if it "destroys the balance needed for a fair trial." (*Id.* at p. 540.)

Since the enactment of Proposition 115, voir dire has been limited to questions in aid of challenges for cause. "Examination of prospective jurors shall be conducted only in the aid of the exercise of challenges for cause." (*Code of Civ. Proc.* § 223.) In the instant case, although repeatedly requested by defense counsel throughout jury selection, the trial court refused to allow expanded voir dire by the defense. (RT 1251-1262.) Following the hearing on the joint defense

motion for expanded, Hovey-type voir dire, the trial court ruled that voir dire would be conducted by the trial court in the presence of the jurors and that questions would be limited to cause. (RT 1262.) This admonition was repeated by the trial court during jury selection. (RT 1922-1923, 1969-1973.) During the voir dire of prospective juror Phillip Quinn, defense counsel submitted additional questions to be asked of this juror in aid of a challenge for cause. The trial court declined to ask these questions, stating the juror was sufficiently questioned for cause. The court went on to explain that it would not ask the remaining defense questions because they related to the defense exercise of peremptory challenges. The court stated: "It has not and does not intend to ask follow-up questions which might tend to help counsel exercise peremptory challenges." (RT 1923.)

Additionally, the court informed counsel that no further peremptory challenges would be allowed once both sides accepted the jury. (RT 1887-88.)

Despite these pretrial rulings, the state was permitted the exclusive opportunity not only for the expanded voir dire of a juror, but the ability to exploit this voir dire in aid of the exercise of a

peremptory challenge. Neither of these benefits were afforded the defense. Moreover, in light of the trial court's stated intention to deny these benefits to both sides, the defense had no notice that the state would be given these advantages when jury selection was complete. (See e.g., *United States v. Harbin*, *supra*, 250 F.3d, at p. 540 [defendants due process rights violated when notice given to the defense regarding the procedures for peremptory challenges was inadequate and misleading].)

Beck's due process rights were violated by the reopening of jury selection. The trial court's voir dire of Mr. Lopez was contrary to its earlier decision to disallow expanded voir dire, and it gave the state the unfair advantage of being permitted to use this expanded voir dire to belatedly exercise a peremptory challenge already waived by the state upon acceptance of Mr. Lopez. Because the trial court's actions resulted in a jury selection process that skewed the balance towards the prosecution by improperly depriving Beck of a favorable juror, Beck's due process rights were violated, and his conviction and sentence of death must be reversed.

III.

THE TRIAL COURT VIOLATED BECK'S DUE PROCESS RIGHTS BY EMPLOYING JURY SELECTION PROCEDURES THAT FAVORED THE PROSECUTION

Throughout the jury selection process the trial court demonstrated a clear bias in favor of the prosecution. For example, although the trial court informed both sides that it would allow counsel to submit written questions to be asked of the jurors (RT 1262), the court, with rare exception, refused to ask defense counsel's proposed questions.[40] (RT 1967-1973.) Additionally, although the trial court stated it would not allow either side to use voir dire to aid in the exercise of peremptory challenges, as explained above, it allowed the prosecution this advantage to improperly exclude Juror Lopez. The trial court also gave the prosecution the exclusive benefit of expanded

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[40]Indeed, so restricted was the trial court's voir dire that after the trial court finished with questioning the first panel and inquired whether counsel passes for cause, defense counsel objected to the request on the ground that Beck did not have sufficient information from the jurors to make such a determination. (RT 1922.) The trial court overruled the objection stating that it had asked sufficient questions to permit challenges for cause and it would not ask questions that might assist counsel in exercise peremptory challenges. (RT 1923.)

voir dire to rehabilitate Juror Navarro, a pro death juror, while denying this opportunity to the defense.[41]

Juror Navarro indicated in his juror questionnaire and in voir dire that he was unsympathetic to mitigation evidence and that "once the deed is done the punishment should follow." (RT 1906.) Mr. Navarro also stated unequivocally that if he found the defendant guilty and found the existence of special circumstances, he would say, "that's it, death penalty. I don't believe in life without parole . . . ." (RT 1908.) At this point, the prosecutor was permitted by the trial court to pose several hypothetical questions to Mr. Navarro in order to rehabilitate this juror. (RT 1909-1912.) Indeed, the court went so far as to makes its own attempt to rehabilitate this juror *after* the prosecutor failed. (RT 1911-1912.)

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[41]The trial court also favored the prosecution by allowing the re-opening of jury selection so that the prosecution could exercise an overlooked peremptory challenge. This issue was addressed separately in Argument II, *supra*, but is an additional example of the trial court's skewed treatment of the parties.

Yet, in every instance where a prospective juror[42] stated that he or she was opposed to the death penalty, the trial court not only denied the additional *written* questions posed by defense counsel, but refused to allow defense any opportunity to question the juror or to pose hypothetical questions or otherwise rehabilitate these jurors.

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[42]Although these questions were asked of each juror in the juror questionnaire, during voir dire the trial court re-asked each juror in the presence of the other jurors the following questions:

1. Do you have any feelings about the death penalty which are so strong that you would never vote for first degree murder?
2. Do you have any feelings about the death penalty which are so strong that you would never find a special circumstance to be true?
3. Do you have any feelings about the death penalty which are so strong that you would never impose aq death penalty in any case whatsoever?
4. Do you have any feelings about the death penalty which are so strong that you would always impose a death penalty in every case in which you had an opportunity to do so?
5. Do you have feelings about the death penalty which you believe would interfere with your ability to function as a juror in this case?
6. Do you believe that a person convicted of planning or murdering multiple victims should automatically receive the death penalty?

(See RT 1231-1232, 1494-1495, 1978-1980.)

(See, e.g., RT 2427-2428.) Moreover, unlike the instance with Juror Navarro, the trial court itself typically made no attempt to rehabilitate or inquire into these jurors' opinions. In almost every instance, it merely re-asked the *Witherspoon – Witt* questions and then excused the jurors for cause.[43]

Because the trial court's jury selection procedures were biased in favor of the prosecution, and these procedures gave an unfair advantage to the state, Beck's due process rights were violated, and reversal of the death sentence is required. (See e.g. *United States v. Harbin*, *supra*, 250 F.3d 532.)

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[43]See RT 2069-2076 [Juror Dorenzo], 2157-2160 [Juror Sherburne], 2276-2283 [Juror Davis], 2295-2300 [Juror Denson], 2332-2340 [Juror Flores], 2374-2379 [Juror Mann], 2405-2418 [Juror Guesdon], 2526-2530 [Juror Jeppson], 2599 [Juror Murphy].

IV.

THE TRIAL COURT VIOLATED BECK'S DUE PROCESS RIGHTS BY EXCLUDING CERTAIN JURORS FOR CAUSE

A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law and may not be excluded for cause unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict. (*Witherspoon*, *supra*, 391 U.S. 510; *Wainwright v. Witt*, *supra*, 469 U.S. 412.)

In *People v. Stewart* (2004) 33 Cal.3d 425 [15 Cal.Rptr. 656, 93 P.3d 271], this Court held that it was error for the trial court to exclude prospective jurors solely on the basis of their questionnaire responses without voir dire. Five prospective jurors in *Stewart* were excluded for cause solely on their responses in their juror questionnaires when they stated they had conscientious objections about the death penalty.[44] In finding error, the Court explained,

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[44]For example, one juror checked "No" in response to a question which asked if the juror had "a conscientious opinion or belief about the death penalty which would prevent or make it very difficult" to find the defendant guilty of first degree murder, or to find

> [The questionnaire] asked each prospective juror whether his or her conscientious opinions or beliefs concerning the death penalty would *either* "prevent *or* make it very difficult" for the prospective juror "to ever vote to impose the death penalty." (Italic added.) In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" to ever vote to impose the death penalty. As explained below, however, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.
>
> Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person form jury service in a capital case under *Witt*, *supra*, 469 U.S. 412.

Stewart, *supra*, 33 Cal.3d at p. 446.

The Court went on to explain,

> It follows that a qualified juror might well answer "Yes" to the inquiry posed [about personal conscientious objection to the death penalty], and yet, in response to

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a special circumstance to be true, "regardless of what the evidence might prove." The same juror checked "yes" when asked if she had "a conscientious opinion or belief about he death penalty which would prevent or make it very difficult" to "ever vote or impose the death penalty." In addition, the juror wrote, "I do not believe a person should take a person's life. I do believe in life without parole." (*Stewart*, *supra*, 33 Cal.3d at p. 444.)

> brief follow-up questioning, persuasively demonstrate an ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence. Such a juror would not be substantially impaired in performing his or her duties as a juror.

Stewart, *supra*, 33 Cal.3d at p. 447.

"[A] prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt*." (*Ibid.*) "Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror to ever impose the death penalty is not equivalent to a determination that such beliefs will substantially impair the performance of his duties as a juror." (*Ibid.*)

In *People v. Heard* (2003) 31 Cal.4th 946, 966-977 [4 Cal. Rptr. 3d 13, 75 P.3d 53], this Court noted that voir dire in a capital case requires "special care and clarity" and condemned the trial

court's failure to fully investigate whether the views of prospective juror would impair his ability to follow the law or to otherwise perform his duties as a juror. Here, the trial court failed to conduct voir dire in a manner that met the requirements of *Witherspoon-Witt*, *Stewart* or *Heard*.

A. Wrongful Exclusion of Juror Dobel

In the instant case the trial court improperly excluded prospective juror Dobel in violation of *Stewart* and *Witherspoon* and its progeny.

During voir dire, in response to the question of whether she would be able to vote for the death penalty, Ms. Dobel stated, "If I felt it was appropriate, yes. I guess the thing is whether or not I would believe it was appropriate." (RT 2421.) She further stated that there were circumstances where the death penalty could be appropriate. (*Ibid.*) Although she stated, "possibly," when asked whether her feelings about the death penalty were so strong that she would never find a special circumstance to be true, she stated that her feelings were not so strong that she would never impose a death penalty in any case. (RT 2421-22.) Ms. Dobel went on to state that "it would take a lot – it

would take really a serious leap of some sort – and I'm not sure I'd be able to make it – to impose the death penalty." (RT 2422.) She explained that she believed it was not right to have a part in the death of someone else, but stated that she could "possibly" participate in a decision that would result in the taking of a person's life. (RT 2424.)

Although the reviewing court must generally defer to the trial court's assessment of a prospective juror's state of mind, because the trial judge has the ability to observe the juror's demeanor and credibility (*Witt*, *supra*, 469 U.S., at pp. 425-26, 428, n. omitted), this deference is not absolute.

In *Uttecht v. Brown* (2007) 127 S.Ct. 2218, the Supreme Court upheld the trial court's exclusion of a juror who expressed reservations regarding the proper application of the death penalty. The voir dire in *Brown* took more than two weeks. Eleven days of that process were devoted to determining whether the potential jurors were death qualified. During that phase, the defense challenged 18 venire members for cause and 11 of those 18 were excused despite objections from the state. The state made 12 challenges for cause; the defense objected to seven of those challenges and only twice was a

juror excused following an objection by the defense. Before deciding a contested challenge, the trial court gave each side a chance to explain its position and recall the potential juror for additional questioning. On at least one occasion after the trial court excluded a juror over defense objection defense counsel filed a written motion to have the juror returned for further questioning. That motion was denied after hearing argument from both parties. (*Id.* at pp. 1023-1024.)

With regard to Juror Z, when questioned first by the defense and then by the state, Juror Z demonstrated an unshakable confusion about the conditions under which death could be imposed despite being educated about the law several times by the trial court, counsel and by a juror handbook. Following exhaustive questioning by both the defense and the state, it appeared that Juror Z held fast to his belief that parole was a possibility and death was appropriate only if parole was a possible sentence. Although Juror Z stated six times that he could consider the death penalty and follow the law, his responses were interspersed with more equivocal statements. Following this exhaustive voir dire, the state moved to challenge Juror Z. Before the

trial court could make a ruling, the defense volunteered, "We have no objection." *Id* at pp. 1025-1026.

In upholding the trial court's exclusion of Juror Z, the Supreme Court relied heavily on the specific voir dire process that took place in that case. In particular, the Court placed great emphasis on extensive opportunity given to parties to question Juror Z, the vigorousness of persuasiveness defense counsel's representation during the voir dire process, and the fact that defense counsel conceded to the removal.

> We do not know anything about [Juror z's] demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal. Nevertheless, the State's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z support the conclusion that the interested parties present in the courtroom all felt that removing Juror Z was appropriate under the *Witherspoon-Witt* rule. [¶] The defense's volunteered comment that there was no objection is especially significant because of frequent defense objections to the excusal of other jurors. [¶] But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire, the trial court has broad discretion. The record here does not show the trial court exceeded this discretion in excusing Juror Z; . . .

(*Uttecht,* 127 S.Ct at p. 2229.)

In contrast to *Uttecht*, the trial court in Beck exceeded its discretion in excusing Ms. Dobel. First, as explained above in Argument IV, defense counsel was denied the ability to question Ms. Dobel and therefore had no opportunity to explore her opinions or to rehabilitate her as a juror. Indeed, due to the trial court's stringent restriction of questioning by defense counsel, and the trial court's sparse questioning regarding death qualification, there was no "diligent and thoughtful" voir dire. Nor did defense counsel here pursue a vigorous and persuasive voir dire. Finally, defense counsel did not concede in Ms. Dobel's removal.

In challenging Ms. Dobel for cause, the prosecutor cited Ms. Dobel's answers to Question Nos. 88, 108, 114, 116, 118, 122, 123, 127, 128, 129 and 130, and argued that she had indicated both in her written responses and orally that "her verdict would be affected [by her views] if she was asked to vote on the death penalty." (RT 2424.) Defense counsel objected, stating that although Ms. Dobel had said it would be difficult for her to impose the death penalty, she had passed the *Witherspoon – Witt* threshold. (RT 2426.)

The trial court reviewed Ms. Dobel's juror questionnaire responses and found, based almost exclusively on her response to question no. 130, that Ms. Dobel's "current state of mind is such that her feelings against the death penalty would substantially interfere with her ability to perform as a juror in a case in which the death penalty was a possible penalty." (RT 2428-2430.)

The court cited Ms. Dobel's responses to question nos. 75, 88, 108, 114, 115, 116, 118, 123, 127, 128 and 130:

> THE COURT: All right. The Court will not ask the additional follow-up questions [proposed by the defendants].
>
> Miss Dobel in her questionnaire has stated that – the [sic] Question No. 75, she felt she could be fair to both parties, she was an unbiased person. This obviously – this questionnaire was obviously answered after Miss Dobel knew the nature of this case.
>
> She has set forth in the questionnaire, Question 127, a situation where the death penalty could be appropriate, multiple murders, if no remorse or promise of rehabilitation. She has set forth in there she could follow the law, although it would not be easy for her to sentence someone to death.
>
> Those answers would suggest that she is not challangeable for cause.
>
> She has further answered that, in Question No. 108 – that she does not believe in the death penalty except in extreme Dahmer-type cases, where a death penalty should not be ruled out.
>
> 115 she strongly opposes the death penalty.

And 116 you answer that the death penalty as a punishment – the purpose of the death penalty is punishment, but it hurts more than it helps. What did you mean by that, "it hurts more than it helps"?

MS. DOBEL: Well, I believe in rehabilitation. I think that it's possible for individuals to be rehabilitated. I think that's the purpose of prison. I think some good things come from going to prison. Some people deserve to go to jail. But taking away someone's life is not rehabilitative. You know, it's shutting off all possibilities for the person saying "there's no reason for you to be here," serve – I don't believe that that is a positive thing.

And I also believe the death penalty has shown in various examples in different states in this country that it is not a deterrent, which is why I did not say – I don't think it's a deterrent.

THE COURT: Okay. Even further, Miss Dobel has answered Question No. 118, a death penalty should rarely be imposed when there is absolutely no help of rehabilitation – no hope of rehabilitation, she would vote against the death penalty were it on a ballot. Those answers don't particularly suggest whether she should or should not be excused for cause.

Question No. 88, Miss Dobel has answered that she does not believe in the death penalty.

Question No. 114, she has answered that life without possibility of parole is okay for the most heinous crimes imaginable.

123, Miss Dobel acknowledges that the death penalty may be appropriate for only repeat offenders.

128, the death penalty is never appropriate for first-time offenders.

Miss Dobel has answered questions in court. She does have some concern about the ability to perform as a juror because of her feelings about the death penalty. The Court feels that perhaps the most – and that the Court is most seriously going to take into consideration

> an answer that Miss Dobel put down without the Court or counsel suggesting anything to Miss Dobel, that's to No. 130, "Is there anything about your present state of mind that you feel any of the attorneys would like to know? If so, please explain."
>
> The answer: "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as opposed to guilty with life imprisonment."
>
> I would find that answer, coupled with the remaining answers that she has given – the Court finds that Miss Dobel's current state of mind is such that her feelings against the death penalty would substantially interfere with her ability to perform as a juror in a case in which the death penalty was a possible penalty.
>
> Thank you, ma'am. You are excused.

(RT 2428-2430.)

Because Ms. Dobel's questionnaire has been lost by the trial court, the only evidence of her responses is found in the trial court's recitation of it's rationale for disqualifying Ms. Dobel. Consequently, there is no way to determine whether the trial court fully or accurately recounted Ms. Dobel's responses. Nor is there anyway to determine her responses to questions that were *not* relied on by the court to exclude Ms. Dobel.

Ms. Dobel's responses to the questions cited by the court do not disqualify her under *Whitherspoon – Witt.*

First, as the trial court noted in its analysis prior to disqualifying Ms. Dobel, Ms. Dobel's responses to question nos. 75, 118 and 127 do not support a challenge for cause. Although the trial court made no reference question nos. 88, 114 and 123 as being either pro or anti-death penalty, Ms. Dobel's responses are similarly not dispositive.

Second, contrary to the trial court's ruling however, even Ms. Dobel's response to question 130 fails to render her ineligible to sit on the jury. Ms. Dobel's declaration, "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as opposed to guilty with life imprisonment," is nothing more than an expression of the difficulty she would face when deciding whether to impose the irrevocable sanction of death.

As explained in *Stewart,* because the California

> death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror to ever impose the death penalty is not equivalent to a determination that

> such beliefs will substantially impair the performance of his duties as a juror.

(*Stewart, supra*, 33 Cal.3d at p. 447.)

This Court has recognized that a prospective juror many not be excluded for cause simply because her conscientious view relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror to ever impose the death penalty. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [276 Cal.Rptr. 788, 802 P.2d 278.)

Here, although opposed to capital punishment, Ms. Dobel indicated during voir dire that in spite of her belief that it was not right to have a part in the death of someone she could impose the death penalty if she found it warranted. (RT 2424-24.) She demonstrated that she understood the law, stated her ability to consider the appropriateness of a sentence of death despite her reservation about the morality of the death penalty, and stated that she could be impartial and could weigh and consider the aggravating and mitigating evidence. Accordingly, the fact that she also stated that it would be very difficult

to impose a sentence of death does not meet the finding that Ms. Dobel was substantially impaired in performing her duties as a juror. Therefore, the trial court's "for cause" exclusion of Ms. Dobel violated Beck's Due Process rights. (*Witt*, *supra*, 469 U.S., at p. 424.)

This error requires the automatic reversal of Beck's death sentence, without inquiry into prejudice. (*Davis v. Georgia*, (1976) 429 U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339]; *Gray v. Mississippi*, *supra,* 481 U.S. at pp. 659-667; *Stewart*, *supra*, 33 Cal.3d at p. 425.)

B. Wrongful Exclusion of Jurors Without Allowing Follow-up Questions or Rehabilitation

In addition to Juror Dobel, the trial court wrongfully excused 9 other jurors for cause based on their antipathy towards the death penalty.

Jurors Dorenzo (RT 2069-2076), Sherburne (2157-2160), Davis (2276-2283), Denson (2295-2300), Flores (2332-2340), Mann (2374-2379) Guesdon (2405-2418), Jeppson (RT 2526-2530), and Murphy (2599) were excluded for cause based on the views of capital

punishment. These for-cause excusals were based, in almost every instance on the jurors written answers in the juror questionnaires. More often than not, where a prospective juror stated that he or she was opposed to the death penalty, the trial court not only denied the additional *written* questions posed by defense counsel, but refused to allow defense any opportunity to question the juror or to pose hypothetical questions or otherwise rehabilitate these jurors. (See Argument III, *supra*, RT 2069-2076, 2157-2160, 2276-2283, 2295-2300, 2332-2340, 2374-2379, 2405-2418, 2526-2530, 2599.) Moreover, the trial court itself typically made no little or no attempt to rehabilitate or inquire into these jurors' opinions. It merely re-asked the settled-on *Witherspoon – Witt* questions and then excused the jurors for cause. (*Ibid.*)

By refusing to allow defense counsel to conduct voir dire and declining to the ask the additional questions posed by defense counsel, the trial court essentially excluded these jurors for cause without a proper finding that they were unable to fulfill their obligations as jurors. Had trial counsel been afforded an opportunity to voir dire or otherwise voir dire these jurors, or had the trial court asked

additional follow-up questions, these jurors may well have been passed for cause.

In *People v. Heard*, this Court explained why death penalty voir dire requires more than merely asking the type perfunctory questions that are at issue in this case:

> [W]e note our dismay regarding the adequacy of the trial court's efforts to fulfill its responsibilities in selecting the jury in this case. Unlike other duties imposed by law upon a trail court that may call for the rendition of quick and difficult decisions under unexpected circumstances in the midst of trial, the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion , , , , In view of the extremely serious consequence – an automatic reversal of any ensuing death penalty judgment – that results from a trial court's error in improperly excluding a prospective juror for cause during the death-qualification stage of jury selection, we expect a trial court to make a special effort to be apprised of and to follow the well-established principles and protocols pertaining to the death-qualification of a capital jury . . . . The error that occurred in this case – introducing a fatal flaw that tainted the outcome of the penalty phase even before th jury was sworn – underscored the need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials.

(*Id.* at pp. 966-967.)

In light of the trial court's incomplete voir dire, the exclusion of these jurors was error under *Witherspoon-Witt*, *Stewart*, and *Heard*. Beck's sentence of death should be reversed.

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V.

THE EXCLUSION OF JURORS BASED ON THEIR MISSING JUROR QUESTIONNAIRE RESPONSES VIOLATES DUE PROCESS

The trial court improperly excused several prospective jurors based almost exclusively on their responses in their juror questionnaire, however, because these jurors' questionnaires are missing, there is an inadequate record to properly review the trial court's removal of these jurors, and Beck's due process rights have been violated.

Juror questionnaires for Jurors Guesdon, Dobel, Murphy, Flores and Mann are absent from the record. During the Settlement of the Record on Appeal, the trial court issued an order stating, "As to any missing questionnaires, no finding as to the content of these questionnaires is possible." (CT 10710 [8/5/04 order, p. 18].)

Although the trial court did briefly voir dire these jurors, the trial court relied almost entirely on their responses in their juror questionnaires to exclude these jurors.

During voir dire, each of these jurors stated "Yes" when they were asked, "Do you have feelings about the death penalty which you

believe would substantially interfere with your ability to function as a juror in this case?" (RT 2405-2417, 2418-2431, 2599-2603, 2332-2341, 2374-2379.) Defense counsel was not given the opportunity to rehabilitate these jurors.[45] (Ibid.)

"[I]f a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." (*Evitts v. Lucey* (1985) 469 U.S. 387, 393 [105 S.Ct. 830, 83 L.Ed.2d 821].)

In *Boyd v. Newland* (2006) 467 F.3d 1139, the Ninth Circuit reiterated the long-standing rule that the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed. (See *Britt v. North Carolina* (1971) 404 U.S. 226, 227 [92

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[45]The trial court allowed only one question submitted by defense counsel, this was to Juror Mann. (RT 2377.) No other questions were permitted by defense counsel to Mann or the remaining jurors. Moreover, all the questions submitted by defense counsel to be asked by the trial court during voir dire are also missing. (CT 10710.) Consequently, there is no way to the extent of the harm, if any exists, caused by the trial court's rejection of these additional questions.

S.Ct. 431, 30 L.Ed.2d 400]; *Williams v. Oklahoma City* (1969) 395 U.S. 458 [89 S.Ct. 1818, 23 L.Ed.2d 240] (per curiam) [finding constitutional error where the state provided no trial transcript to an indigent defendant on appeal); *Gardner v. California* (1969) 393 U.S. 367, 370-71 [89 S.Ct. 580, 21 L.Ed.2d 601] (an indigent defendant must be provided with a transcript of an evidentiary hearing from his original trial for habeas purposes); *Long v. Dist. Court of Iowa* (1966) 385 U.S. 192 [87 S.Ct. 362, 17 L.Ed.2d 290] (per curiam) (a court's failure to provide a defendant with any portion of a habeas transcript is error).) "[D]efendants . . . . have a right to have access to the tools which would enable them to develop their plausible . . . claims . . ." (*Boyd, supra*, 467 F.3d, at pp. 1150-1151.)

When an adequate record is essential to resolve the contentions on appeal and the reviewing court is unable to give the full consideration to the appeal as required by the Constitution because such a record is absent, reversal is required.

> As this Court has noted, reversal is required where
>
> court reporters' notes of significant portions of the proceedings were lost or destroyed and none of the original participants could sufficiently reconstruct

> pertinent events to formulate an accurate and complete settled statement to address the claims presented on appeal. (See, e.g., *In re Steven B.* (1979) 25 Cal.3d 1, 7 [157 Cal.Rptr. 510, 598 P.2d 480]; *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973 [147 Cal.Rptr. 473]; see also *People v. Serrato* (1965) 238 Cal.App.2d 112, 118-119 [47 Cal.Rptr. 543]; *Bergerco, U.S.A. v. Shipping Corp. of India, Inc.* (9th Cir. 1990) 896 F.2d 1210, 1213.) Under such circumstances, the appellant was deprived of "'"an adequate record to enable the court to pass upon the questions sought to be raised.' [Citation.]" (*In re Steven B., supra*, 25 Cal.3d at p. 7; see *People v. Jones* (1981) 125 Cal.App.3d 298, 301 [178 Cal.Rptr. 44].)

(*People v. Hawthorne* (1992) 4 Cal. 4th 43, 64 [14 Cal.Rptr.2d 133, 841 P.2d 118]; See also, *People v. Chessman* (1950) 35 Cal.2d 455, 460 [218 P.2d 769]; *People v. Barton* (1978) 21 Cal.3d 513 [146 Cal.Rptr. 727, 579 P.2d 1043]; *In re Andrew M.* (1977) 74 Cal.App.3d 295 [141 Cal.Rptr. 350]; *In re David T.* (1976) 55 Cal.App.3d 798 [127 Cal.Rptr. 729]; and, *Pen. Code* § 1181, sub. 9.)

As the court stated in *Serrato*, this error cannot be attributed to the defendant:

> Here, we have a case in which the defendant without any fault of his own was deprived of the right to an effective presentation of his appeal due entirely to a failure on the part of an official of the trial court to comply with the law. It would be a violation of the fundamental rights of the defendant to hold that an effective possibility of

> appealing the convictions was properly taken away by the omission of a court official to perform the duties prescribed by our system of justice.

(*People v. Serrato*, *supra*, 238 Cal. App. 2d at p. 119.)

Because the trial court relied on the questionnaires to exclude these jurors for cause, the questionnaires must be provided to Beck if the trial court's exclusion is to be upheld by this Court. The court's failure to provide Beck with access to these questionnaires requires the reversal of Beck's death sentence.

The fact that each of the jurors stated "yes" when they were asked if they held a belief that would substantially interfere with their ability to function as a juror does not mitigate this error. First, defense counsel was denied the opportunity to inquire into these jurors' responses. Second, the trial court conducted only a cursory questioning of each of these jurors, seeming to have predetermined from the jurors' questionnaires that these jurors would be excluded for cause. Consequently, the absence of the questionnaires which were relied upon to exclude these jurors is prejudicial. Indeed, the exclusion of Ms. Dobel, in particular, requires reversal.

In *Britt, supra*, 404 U.S., at p. 228, the Supreme Court held that a defendant cannot be denied access to a transcript that is essential to his appeal. The Court found no error however because an alternative to the transcript existed. In this case no alternative to the juror questionnaire is available. Although the trial court did briefly coduct voir dire for one of these jurors, Ms. Dobel, about some of her juror questionnaire responses, as explained above, that voir dire was insufficient to establish cause under *Witherspoon–Witt*. Because Ms. Dobel's in court explanations of her juror questionnaire responses do not support the trial court's exclusion for cause and because no adequate record of the contents of the questionnaires for her and the other jurors is available, the missing juror questionnaires require the automatic reversal of Beck's death sentence.

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VI.

HEIGHTENED COURTROOM SECURITY INCLUDING ADDITIONAL UNIFORMED BAILIFFS IN THE COURTROOM VIOLATED BECK'S DUE PROCESS RIGHTS TO A FAIR AND IMPARTIAL JURY, A FAIR TRIAL, AND RELIABLE GUILT AND PENALTY DETERMINATIONS

Throughout the guilt and penalty phase, all spectators and witnesses attending Beck's trial were required to pass through "more than one security entrance" to enter the courtroom. The entrance to the courtroom could be locked preventing both entrance and exit. Three additional uniformed bailiffs, amounting to one per defendant, were stationed in the courtroom, and the courtroom was referred to as a "high security courtroom." (CT 10695.)

When the courtroom lights went off unexpectedly, during jury selection, one or more defense counsel loudly told their clients not to move. Similarly, when the lights were turned off during trial for the presentation of slide evidence bailiffs continually shined flashlights on the defendants. (Ibid.)

Defense counsel sat at the table to the right; the defendants sat behind their attorneys and the bailiffs sat behind the defendants. (CT 10696, Trial Exhibit 182.)

Defense counsel objected to the increased security measures, but the objection was overruled. (RT 1309-1314, 1322.)

On the first day of trial defense counsel noted that Beck wore a jail arm band that was visible to the jury. Trial counsel asked that the arm band be removed or placed on Beck's ankle so the jury could not see it. (CT 1631, RT 1464-1465.) The trial court stated it would instruct the jury that the defendants were in custody which was customary because of the nature of the proceedings and the jury should not hold this against the defendants. (Ibid.)

At the conclusion of the evidence, the court instructed the jury not to consider the heightened security measures as evidence of guilt. (RT 6470, CT 1843.)

A. The Trial Court Erred by Failing to Hold an Evidentiary Hearing and by Failing to Make the Requisite Record Before Ordering the Use of Such Security Measures

The trial court violated Beck's Fifth, Sixth, Eighth and Fourteenth Amendment rights, and the state equivalents to these rights as guaranteed by article I, section 13 of the California Constitution, by ordering heightened security measures without conducting an evidentiary hearing and without making a proper showing on the record of a manifest need for such measures. This error violated Beck's rights to a fair trial, a public trial, an impartial jury, the presumption of innocence, equal protection, effective assistance of counsel and fair, reliable and accurate determinations of guilt and penalty.

Additionally, the failure to conduct an evidentiary hearing in this case when other capital defendants were afforded such a hearing wrongfully deprived Beck of (1) a protected liberty interest, in violation of the Due Process Clause of the Fourteenth Amendment, (See, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343 [100 S.Ct. 2227, 65 L.Ed.2d 175] [individuals have the right to have state-created

procedures followed consistently and fairly]) and (2) equal protection of the laws as guaranteed by both the state and federal constitution. (See, e.g, *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 [state violated the equal protection clause where there is no principled reason for its disparate treatment of similarly situated defendants]; *La Rue v. McCarthy* (9th Cir. 1987) 833 F.2d 140, 142 ["Once a state has established a rule it must be applied evenhandedly."].)

The rights to a fair trial and a fair and impartial jury are fundamental constitutional liberties. (*Estelle v. Williams* (1976) 425 US. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].) Similarly, the "presumption of innocence, although not articulated in the constitution, is a basic component of a fair trial . . . ." (*Ibid.*) To implement these fundamental rights, "courts must be alert to factors that may undermine the fairness of the fact-finding process. . . . [and] must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." (*Ibid.*) Security measures which single out a defendant as a particularly dangerous or guilty person threaten a defendant's constitutional rights to a fair and impartial jury and a fair trial by

improperly influencing the jury. (See, e.g., *Illinois v. Allen* (1955) 397 U.S. 337 [90 S.Ct. 1057, 5 L.Ed.2d 353].)

Recognizing this danger, this Court made clear in *People v. Duran* (1976) 16 Cal.3d 282 [127 Cal.Rptr. 618, 545 P.2d 1322], California's principal case on shackling, that before a trial court takes steps to heighten courtroom security by physically restraining a defendant, due process requires that there be a showing, on the record, of a "manifest need" for the use of such restraints:

> We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon the defendant's decision to take the stand all support our continued adherence to the rule . . . that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints.

(*Id.* at p. 290.)

The Court further held that "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

(*Id.* at p. 292, n. 11) and that under no circumstances can the court adopt a "general policy" of imposing restraints on certain types of defendants or in certain types of cases. (*Id.* at p. 291.) Rather, the trial court has the discretion to order, on a case by case basis, "the physical restraint most suitable for a particular defendant in view of the attendant circumstances."[46] (*Id.* at p. 292.)

The showing of manifest need must be based on concrete evidence, such as a defendant making *specific threats* of violence or escape from court, or demonstrating unruly conduct in the courtroom. (See, e.g., *People v. Valenzuela* (1984) 151 Cal.App.3d 180, 192 [198 Cal.Rptr. 469] ["Courts of Appeal have generally read *Duran* as requiring that a defendant make specific threats of violence or escape from court or demonstrate unruly conduct in court before restraints are justified."] Thus, in *People v. Cox* (1991) 53 Cal.3d 618 [280 Cal.Rptr. 692, 809 P.2d 351], a case wherein the defendant's own counsel informed the trial court in an in camera hearing that the

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[46]Federal case authorities are in accord. (See, e.g., *Allen, supra*, 397 U.S., at pp. 343-344; *Tyars v. Finner* (9th Cir. 1983) 709 F.2d 1274, 184; *Scurr v. Moore* (8th Cir. 1981) 647 F.2d 854, 858; and *United States v. Ives* (9th Cir. 1974) 504 F.2d 935.)

defendant was planning to attempt an escape from the courtroom, and requested that the defendant be shackled during trial, the Court made clear that the assertion of manifest need must be substantiated by actual evidence:[47]

> While no formal hearing as such is necessary to fulfill the mandate of *Duran*, the court is obligated to base its determination on facts, not rumor and innuendo even if supplied by the defendant's own attorney. While the

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[47]The decision to shackle Cox was based on the following discussion at an in camera hearing requested by defense counsel:

> DEFENSE COUNSEL: "In our investigation of the case there -- we think that there is some possibility that there may be an escape attempt in this case."
>
> COURT: "Yes."
>
> DEFENSE COUNSEL: "We would-- we're against full shackles but I think there should be some -- like a handcuff to a chair I think would be sufficient so the jury can't see."
>
> COURT: "For the safety of everyone, then?"
>
> DEFENSE COUNSEL: "For the safety of everyone. [¶] As an officer of the court, I feel that it's my duty to -- in fact, we originally were going to ask for the 134 courtroom. But I don't really think that's necessary if you have adequate bailiff support, searching."
>
> COURT: "Okay."
>
> DEFENSE COUNSEL: "It's something, though, that should not be looked at lightly. "
>
> COURT: "Okay. All right. [¶] I will take that measure...."

(*Cox, supra*, 53 Cal.3d at p. 650.)

> instant record may be rife with an undercurrent of tension and charged emotion on all sides, it does not contain a single substantiation of violence or the threat of violence on the part of the accused. Although the shackling decision was not based on a "general policy" to restrain all persons charged with capital offenses, neither did it follow "a showing of necessity" for such measures. [Citation omitted.] Accordingly, the trial court abused its discretion in ordering defendant physically restrained in any manner. [Citation omitted.]

(*Id.* at pp. 651-652.)

When the trial court fails to make a particularized showing on the record of violence or a threat of violence or other nonconforming conduct, its order to impose physical restrains will be deemed an abuse of discretion. (*Duran*, *supra*, at p. 219.) An abuse of discretion error is subject to harmless error analysis. (See, e.g., *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584 [15 Cal.Rptr.2d 382, 842 P.2d 1142].)

In *People v. Jenkins* (2000) 22 Cal.4th 900 [997 P.2d 1044, 95 Cal. Rptr. 2d 377], relying on *Holbrook v. Flynn* (1986) 475 U.S. 560, 567-568 [106 S. Ct. 1340, 89 L. Ed. 2d 525]), this Court held that the use of a metal detector and additional bailiffs in the courtroom are not generally the type of increased security measures "that is inherently

prejudicial," thus, the *Duran* "particularized showing on the record" for the enhanced security measures is not required. (*Jenkins*, 22 Cal.4th at p. 997.) However, the facts in this case are distinguishable from *Jenkins* and that holding should not apply.

In *Jenkins*, a metal detector was installed through which the public was required to pass while entering the courtroom and three additional armed bailiffs were present in the courtroom during the testimony of one witness state witness. In finding no error in the trial court's failure to make a particularized showing on the record to justify these heightened security measures, this Court stated:

> We believe that the use of a metal detector outside a courtroom, like the use of additional security forces within the courtroom, is not a measure that is inherently prejudicial. Just as in *Holbrook*, in which the high court held that the presence of four additional uniformed police officers at trial was not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial" (*Holbrook v. Flynn*, *supra*, 475 U.S. at pp. 568-569 [106 S. Ct. at pp. 1345-1346]), the use of a metal detector at the entrance to the courtroom in which the case is to be tried is not inherently prejudicial. Unlike shackling and the display of the defendant in jail garb, the use of a metal detector does not identify the defendant as a person apart or as worthy of fear and suspicion. In addition, the jury in the present case did not pass through the metal detector and may not have been aware of it.

> Even if the jury was aware of the metal detector, the jury may well have considered it a routine security device, as the trial court predicted, or at most a device necessary to maintain order among the spectators. The public is inured to the use of metal detectors in public places such as courthouses, and many reviewing courts have found their use nonprejudicial. [Citations omitted.] No reflection upon defendant's guilt or innocence need be inferred from the use of a metal detector.
> [¶] We have explained that pursuant to United States Supreme Court authority, "the use of identifiable security guards in the courtroom during a criminal trial is not inherently prejudicial," in large part because such a presence is seen by jurors as ordinary and expected and because of the many nonprejudicial inferences to be drawn from the presence of such security personnel. (*People v. Miranda*, *supra*, 44 Cal. 3d at pp. 114-115.) We examine on a case-by-case basis the question whether a defendant actually has been prejudiced by the presence of security officers. (Id. at p. 115.)

(*Id.* at pp. 996-998.)

Unlike *Holbrook* and *Jenkins*, the circumstances of the trial and the security measures imposed here did in fact "identify the defendant as a person apart or as worthy of fear and suspicion" and it was evident from the record that the jury was aware of the heightened security measurements. On the first day of trial Beck was brought before the jury wearing an easily identifiable jail arm band. This display of the defendant in jail garb, which was acknowledged by the

trial court in its admonishments to the jury (RT 6470, CT 1843) readily identified Beck as "a person apart or as worthy of fear and suspicion." The fact that Beck and his co-defendants were tried in a "high security courtroom" and closely guarded by their own individual bailiffs who sat directly behind them for the duration of the trial made clear to the jury that the additional security measures were installed to guard against violence from the defendants, and were not merely "ordinary and expected." This was confirmed by the bailiff's use of flashlights to keep tabs on the defendants when the courtroom lights were dimmed, and defense counsels' own admonishments to their clients on the occasion when the lights suddenly went out.

In *People v. Gibson* (1982) 135 Cal.App.3d 774 [185 Cal.Rptr. 741], the First District extended the *Duran* rule to the heightened security measures imposed to the public. In that case: all persons attending the trial, with the exception of jurors, were required to (1) pass through a metal detector at the entrance of the courtroom; (2) present proof of identity; (3) submit to a full body "pat" search; and (4) be photographed by a uniformed officer. (*Id.* at p. 776.) The issue addressed by the appellate court was not whether these security

measures were constitutional under the particular circumstances of Gibson's case, but whether the trial court met procedural due process requirements before ordering the measures imposed.

Gibson and his co-defendant were prison inmates charged with crimes of violence, murder of a correctional officer and assault on a fellow inmate. During pre-trial proceedings, after receiving an ex parte communication warning of a future in-court disturbance, the judge ordered a metal detector be placed at the courtroom entrance. The metal detector stayed in place throughout the pre-trial proceedings until the beginning of the trial. The three additional security measures were initiated when the defendants were assigned to the trial court. Defense counsels' written objections to all four measures were overruled without any evidence supporting the need for the security measures. After further proceedings, the trial court again overruled the defense objections, finding that based on the representations of the Court Security Officer, the measures were "reasonable and necessary" to preserve courtroom security and would "not prejudice the defendants." (*Id.* at p. 777.) Sealed transcripts of the information

the trial court had received from the Court Security Officer were submitted to the appellate court.

In relying on *Duran* as the standard for the procedural due process requirements for the imposition of heightened security measures aimed at the public, the First District implicitly accepted the defendant's assertion that the distinction between physical restraint of the defendant and measures aimed at controlling the conduct of spectators and witnesses was not material, as the use of either type of security measure would "influence the jury by suggesting to the jurors that the defendants are dangerous and violent people and that only extraordinary security measures can ensure public safety." (*Id.* at p. 779.) Moreover, the court noted that the security measures contemplated by the trial court would create "a courtroom environment that would not only distinguish the defendants' trial from those of other defendants," but "possibly deter some members of the public from attending." (*Id.* at p. 781.) The court then found that

> at no time did the petitioners hear any testimony concerning the nature of the information received or the nature of the threat perceived. . . . While petitioners were permitted to argue against the security measures, they were unable to present any focused arguments because

> they lacked any knowledge of the kind of threat the court was attempting to meet. The result is that the record to support the security measures is inadequate for our review. *Although there is evidence of a serious threat to the security of the courtroom and participants in the trial, there is no testimony about why the particular security measures selected were required and why alternative measures were not feasible*

(*Id.* at p. 783 [emphasis added].)

Accordingly, the court then held that

> after announcing the extraordinary security measures and receiving a challenge from the defendants, the [trial] court should have conducted an open hearing at which the Court Security Officer could have presented evidence about the security threat and the need for each of the extraordinary procedures proposed. . . . [¶] At such an open hearing, petitioners would have been permitted to question the Security Officer about the procedures he had chosen, to suggest alternatives, and to generally provide input for the decisional process.

(*Id.* at p. 784.)

The heightened security measures in the instant case harbored the same due process pitfalls as those employed in *Gibson*. Although not as extreme as photographing and body searching the public, the use of multiple security entrances and three uniformed bailiffs, in plain view of the jury, certainly risked improperly conveying to the jury that Beck and his co-defendants were violent people disposed to commit

crimes of the type of which they had been accused, especially considering that the courtroom itself was deemed "high security" and other judges in the courthouse did not utilize such devices. (See *Duran*, *supra*, at p. 290.) This suggestion that the defendants were extremely dangerous was enhanced by the bailiffs use of flashlights to keep tabs on the defendants when the lights were out in the courtroom. In light of the risk of prejudicially influencing the jury, the trial court had a duty, under *Duran* and *Gibson*, to conduct an open hearing at which the prosecution could have presented evidence about the specific security threats and the need for heightened security measures and where defense counsel could cross-examine the prosecution's witnesses. Although in *People v. Cox*, *supra*, 53 Ca.3d at pp. 651-652, this Court seems to suggest that a full evidentiary hearing is not required, federal case authority indicates otherwise. (See, e.g., *Hamilton v. Vasquez* (9th Cir. 1989) 882 F.2d 1469, 1472 [In light of serious danger of prejudice, decision to shackle should only be made after affording defendant right to challenge the use of restraints]; *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1451, opinion withdrawn in part on other grounds 833 F.2d 250 [petitioner was

wrongfully denied required procedure when the trial court refused him an adequate opportunity to challenge the untested information that served as a basis for shackling]; *Zygadlo v. Wainwright* (11th Cir. 1983) 720 F.2d 1221, 1223-1224 [noting that due process may require an evidentiary hearing if the factual basis for security procedures is disputed]; *United States v. Theriault* (5th Cir. 1976) 531 F.2d 281, 285 [trial court must conduct an evidentiary hearing if factual basis for security procedures is disputed].)

Additionally, the court failed to make a proper showing, on the record, of the need for heightened courtroom security -- e.g., the threat of escape, violence or the unruliness of Beck -- before ordering the heightened security measures. The court erred by failing to take these procedural steps before imposing heightened security measures. The trial court not only failed to articulate *specific facts* to support its ruling, but seemingly based its decision on reasons that do not constitute a manifest need under *Duran*.

First, the record reveals that in direct violation of *Duran*, rather than focusing solely on the particular circumstances attending the case, the trial court created a "general policy," to use heightened security

measures for multiple defendants. Indeed, the court stated as much in overruling defense counsel's objections to the uniformed bailiffs. (RT 1322 ["If there was one defendant and three deputies, I think your point might be well taken. But I don't think there's, you know, anything unusual or the jury's going to take any special note of the fact that there's one security personnel for each defendant."].) The presence of four co-defendants does not necessarily demonstrate a manifest need. Indeed, this court has found no manifest need even with a defendant, who was charged with murder, had prior convictions for violent crimes, and had a record of prior disciplinary violations while incarcerated. (*People v. Hawkins* (1995) 10 Cal.4th 920 [42 Cal.Rptr.2d 636, 897 P.2d 574] [defendant's record of violence or fact that he is a capital defendant cannot alone justify shackling]; *Duran*, *supra*, 16 Cal.3d, at p. 293 [fact that defendant was a state prison inmate who had been convicted of robbery and was charged with murder and assault did not justify use of physical restraints]; *Valenzuela*, *supra*, 151 Cal.App., at p. 193 [witnesses' extensive history of violent conduct and incarceration in SHU unit of maximum security prison insufficient to justify use of physical restraints in

court].) Nor does Beck's alleged status as a cult member constitute a showing of manifest need. There is no evidence in the record substantiating *any threat of violence or disruption* because of his membership. Nowhere in the record is there evidence of unruliness, an announced intention to escape, or evidence of any other nonconforming conduct threatening to disrupt the judicial process. (See *Cox*, *supra*, 53 Cal.3d at pp. 651-652 [rumor and innuendo insufficient to justify heightened security measures].) There was never any hint of a planned escape attempt. As previously explained, "rumor and innuendo" is not enough. (*Id.* at pp. 651-652.)

In sum, since the trial court (1) failed to hold an evidentiary hearing on the issue of heightened security measures; (2) based its decision to impose such measures as a general policy; and (3) failed to support its decision by a showing that Beck or any co-defendant, witnesses, or any audience member would attempt to effectuate an escape, commit violence, or otherwise disrupt the judicial proceedings; the trial court erred in ordering heightened security measures at trial.

B. The Trial Court's Error Was Not Harmless

An individual "accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485 [98 S.Ct. 1930, 56 L.Ed.2d 468].) In keeping with this basic principle, the rule in *Duran*, *supra*, "seeks to avoid the pernicious effect of the 'possible prejudice in the minds of the jurors, the affront to human dignity the disrespect for the entire judicial system . . ., as well as the effect such restraints have upon a defendant's decision to take the stand. . . .'" (*Cox*, *supra*, 53 Cal.3d at p. 652, quoting *Duran*, *supra*, 16 Cal.3d, at p. 293.) Although all of the above factors are to be considered, "[i]n assessing the impact on the right to a fair trial, the first and last of these considerations predominate." (*Ibid.*) The greatest emphasis, however, is on "the possible prejudice in the minds of the jurors . . . ." (*People v. Givan* (1992) 4 Cal.App.4th 1107, 1117 [6 Cal.Rptr.2d 339].) Appellant need not establish all four criteria to obtain relief. (See, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 219-220 [3

Cal.Rptr.2d 426, 821 P.2d 1302] [despite absence of jury, shackling should not be employed at preliminary hearing absent showing of necessity]; *Duran*, *supra*, 16 Cal.3d, at p. 218 [rules respecting shackling of defendants also apply to the shackling of defense witnesses, although prejudicial effects thereof are less consequential].)

In shackling cases where courts have found the trial courts' abuse of discretion to be harmless error, great weight is placed on the extent of the jury's awareness of the physical restraints in reaching this conclusion. (See, e.g., *People v. Tuilaepa*, *supra*, 4 Cal.4th at pp. 583-584; [Court "has consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury."]; *People v. Livaditis* (1992) 2 Cal.4th 759, 775 [831 P.2d 297, 9 Cal. Rptr. 2d 72] [no error where handcuff was invisible to the jury and worn only for a short duration]; *Cox*, *supra*, 53 Cal.3d at p. 652 [error in imposing physical restraints is harmless because lack of evidence that restraints influenced either guilt or penalty phase as jurors were never aware of the restraints]; *Valenzuela*, *supra*, 151 Cal.App.3d, at p. 196 [trial court's abuse of discretion harmless by any standard as record fails to show jury ever saw restraints imposed

on witnesses and witnesses were otherwise impeached].) Similarly, courts are reluctant to find prejudice where the restraints are visible only for a short period. (See, e.g., *People v. Rich* (1988) 45 Cal.3d 1036 [248 Cal.Rptr. 510, 755 P.2d 960] [unwarranted shackling harmless because view of defendant in restraints was brief and not in the courtroom]; see also, *People v. Medina* (1990) 51 Cal.3d 870 [274 Cal.Rptr. 849, 799 P.2d 1282].

In the instant case, the fact that Beck was tried in a high security courtroom and guarded by multiple uniformed bailiffs was known to the jury throughout the trial. This is evident from the fact that from the first day of testimony until the jury rendered its verdicts, the heightened security measures were in plain view. Moreover, the court informed the jury it should not consider these measures as evidence of guilt. (RT The impact of this knowledge on the jury simply cannot be measured. (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 569 [Even when a practice is inherently prejudicial, "jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will especially be true at the very beginning of proceedings; at that point, they can only speculate how they will feel

after being exposed to a practice daily over the course of a long trial."].)

The heightened security measures imposed against Beck were more obvious, and potentially more troublesome, than those involved with shackling. The presence of security entrances and armed guards in the courtroom not only implied that Beck was, at minimum, an escape risk, but that he also posed a more dangerous security problem in that outside allies (cult members) were waiting to ambush the courtroom for the purpose of some sort of retaliation. This court-created atmosphere of danger and intimidation improperly bolstered the testimony of certain witnesses, such as Rosemary McLaughlin and Jennifer Starn, whose fear of the defendants was exploited by the prosecutor. (RT 7721-7724.) In addition to creating an atmosphere of fear and intimidation that implicitly and prejudicially lent credibility and corroboration to these witnesses, the heightened security measures reinforced the prosecution theory at the penalty phase that Beck was deserving of death because of his future dangerousness.

The trial court's attempt to cure this prejudice by instructing the jury to disregard the obvious does not, in any way, mitigate the harm

caused by the presence of the heightened security measures. (See e.g., *People v. Ozuna* (1963) 213 Cal.App.2d 338 [28 Cal.Rptr. 663] ["The human mind is not so constructed as to permit a registered fact to be unregistered at will."]) Nor does the fact that defense counsel requested this instruction lessen or negate the prejudice. (*People v. Calio* (1986) 4 Cal.3d 639 [230 Cal.Rptr. 137, 724 P.2d 1162] [attorney who submits to the authority of an erroneous, adverse ruling after making the appropriate objection or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."].)

The record makes clear that the heightened security measures impaired Beck's right to a fair trial, to a public trial, to the presumption of innocence, the right to an impartial jury, and to reliable guilt and penalty determinations, as well as that the court's ruling was prejudicial. Accordingly, Beck's conviction and death sentence must be reversed.

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VII.

THE TRIAL COURT'S DENIAL OF BECK'S MOTIONS FOR MISTRIAL FOLLOWING CO-DEFENDANT WILLEY'S IMPROPER CROSS-EXAMINATION OF CRUZ AND BECK VIOLATED BECK'S STATE AND FEDERAL DUE PROCESS CONSTITUTIONAL RIGHTS

Because the trial court denied the motion to sever the guilt phase of the trial, whenever a witness testified, he or she was subjected to cross-examination not only from the prosecutor but from each of the attorneys for the other three defendants as well. As argued above, this created numerous errors in the conduct of the trial. (See, Argument I, *supra*.)

One instance of error occurred during the examination of Gerald Cruz by William Miller, the attorney for Ronald Willey. (RT 5220-5225.) Mr. Miller began to ask Cruz whether he had been incarcerated since his arrest. (RT 5220.) This prompted an objection from Cruz's attorney, who was concerned about the jury hearing that Cruz had been arrested on an unrelated bomb charge. (RT 5224.) The following colloquy between counsel occurred in front of the jury:

> MR. MILLER: Q. Mr. – Mr. Cruz, at any time – let me ask you this: You've been incarcerated on this matter since –

MR. AMSTER: Objection.
MR. MILLER: Gee, I haven't asked a question yet.
MR. AMSTER: Yeah. Well, I think that first statement's wrong. I mean, improper.
MR. MILLER: I believe the jury was informed that all defendants are incarcerated on this matter without bail.
THE COURT: All right. The jurors have been so advised. You may ask the question.
MR. MILLER: Q. You've been incarcerated on this matter since May 23rd of 1990 – 1990; is that correct?
A. I don't believe so.
Q. Have you been out any time since that?
MR. AMSTER: Your Honor, it's a trick question. It's a trick question. And I don't want to explain why it's a trick question.
MR. MAGANA: Is that an objection?
MR. AMSTER: Yes, it is. It's a trick question. It's assuming facts.
THE COURT: All right. Wanda, read the last question, please.
(Record read by the reporter.)
MR. AMSTER: If he wants to ask the question if he's been in custody with the police shortly after he found them, they found them at the Camp, that's fine, and we can go on with this. But the way the question's being posed, I object strongly and I – I'd like a sidebar on this.
THE COURT: Mr. Miller, what are you –
MR. MILLER: Well, it was a foundational question, Your Honor. What I was – wanted to ask him, has he been in custody continuously since his arrest on this matter.
MR. AMSTER: Fine. That's different.
THE COURT: Okay. Mr. Cruz, you may answer that question.
THE WITNESS: Can you please repeat that question?

(RT 5219-5220.)

Thereafter, Mr. Amster renewed his objection to this question. In response, Mr. Miller, again with the jury present, stated, "If Mr. Amster didn't want his client questioned, he shouldn't have put him on the stand." Mr. Amster responded: "Well, let's knock it off." Immediately, Mr. Faulkner requested a sidebar because of Mr. Miller's remark. The request for a sidebar was denied at first. (RT 5220.)

In front of the jury, Mr. Amster moved for a mistrial, which was denied without argument permitted. (RT 5220-5221.) After some further questions and objections, the Court held a sidebar out of the presence of the jury. (RT 5221.) At that hearing, Mr. Faulkner moved for a mistrial based upon the remarks made by Mr. Miller regarding a defendant's testifying. (RT 5222-5223.)[48]

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[48]The mistrial motion was made after brief argument regarding a discussion of allegations that Cruz had threatened Willey and whether an Evidence Code section 402 hearing about those threats should be held. This argument referred to a contentious argument which had occurred only moments before concerning whether Mr. Miller could cross-examine Cruz about threats he and Beck had made against Rosemary McLaughlin, a witness who had not testified in the prosecution's case-in-chief. (RT 5207-5218.) That argument again highlighted the obvious error in denying the defendant's motion for severance in this case. Beck was not only being prosecuted by the state; he was also being improperly prosecuted by Willey and LaMarsh.

Mr. Faulkner argued:

> MR. FAULKNER: Your Honor, I have one more motion to make again outside of the presence of the jury. I want to move for mistrial on the basis of that Mr. Miller has contaminated the jury by his gratuitous comments regarding if Mr. Amster didn't want his client examined, he shouldn't have put him on the stand. And the reason I'm going to ask for a mistrial is because it seriously affects the way I handle my case.
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> If I decide not to put my client on the stand, implicit in Mr. Miller's remarks in the hearing of the jury is the assumption that I don't want my client questioned and he has something to hide. I think that's extremely prejudicial and contaminating statement, and I think that a mistrial is appropriate.
>
> I don't think I can run my case at this point because I think the jury has been – has been instructed by Mr. Miller that if you don't want your client to – if you're afraid of what your client's going to say, you don't put him on the stand.

(RT 5222-5223.)

Interestingly, it was Mr. Magana and Mr. Miller, not the prosecutor, who initially responded to the motion for mistrial. (RT 5223.) It was only after the trial court began to issue its denial of the motion, that the prosecutor chimed in, "I believe that the error, if any, of Mr. Miller's question can be cured by the jury instruction." (RT 5224.) The trial court then denied the motion outside the presence of the jury. When the trial court next appeared in front of the jury, no

instruction or admonishment was given to the jury, and the trial court only stated that the last objection was sustained.[49]

A defendant in a criminal case has the absolute right to remain silent at trial, guaranteed by the state and federal constitutions, and no inference can be made about the exercise of his right to remain silent. Once a defendant has been told of his right to remain silent, his subsequent silence cannot be used against him at trial under the Fifth and Fourteenth Amendments to the United States Constitution. *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91]. Nor is it permissible for the prosecutor to comment on a defendant's failure to testify at trial. *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229]. In this matter, while the official prosecutor did not make the improper comment, Mr. Miller must be considered in the same shoes as a prosecutor, both as an officer of the court and as an attorney who was actively arguing against the interests of Beck.

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[49]This objection was made by Mr. Amster to the question, "Were you [Cruz] housed in an area of the Stanislaus County jail for a period of time commonly known as the X tier?" (RT 5221.) The jury was not informed at that time to disregard the comments of Mr. Miller nor were the constitutional rights of a defendant explained regarding his decision whether or not to testify.

Because of this improper argument made in front of the jury, Beck was placed in the untenable position of either taking the stand or having the jury believe that the reason he did not testify was his fear of being questioned, not only by the state but also by the state's surrogate prosecutor, Mr. Miller. Moreover, no curative instruction was provided to the jury in proximity to the improper remark, which would inform the jury that this remark was improper, should be stricken, and should not be considered by the jury.[50]

Therefore, because Mr. Miller's remark violated Beck's right to remain silent as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as the California analogs, reversal of his conviction is required on this ground.

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[50]Even though the jury was elsewhere instructed that statements of counsel are not evidence, the contentious and prejudicial comments of the co-defendants' counsel required the trial court to take immediate curative action, assuming the error could be cured in a manner other than the declaration of a mistrial.

VIII.

THE TRIAL COURT'S RE-OPENING OF WILLEY'S CASE-IN-CHIEF TO ALLOW EVIDENCE PREVIOUSLY EXCLUDED IF INTRODUCED BY THE STATE VIOLATED BECK'S STATE AND FEDERAL RIGHTS TO DUE PROCESS

Near the conclusion of the trial, the trial court, over objection, permitted Mr. Miller to reopen his case for Willey to introduce additional testimony from Dr. Ernoehazy to lay the foundation for admission of an autopsy photo of Colwell which previously had not been introduced by the prosecutor or any defendant. (RT 6335.) Mr. Faulkner objected on the grounds that it was improper to permit the re-opening of Willey's case, that the evidence was irrelevant to Willey's case, that the evidence was more prejudicial than probative at this juncture, and that it was improper rebuttal evidence. (RT 6334-6336.) After argument, Dr. Ernoehazy was permitted to identify the photograph which was admitted over objection. (RT 6368-6368.)[51]

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[51]Dr. Ernoehazy was then called as the prosecution's last rebuttal witness, addressed only the injuries sustained by Raper, and did not refer to the autopsy photo of Colwell. (RT 6370-6393.) This testimony is not related to the improper re-opening permitted by the trial court in response to Mr. Miller's oral motion.

While a trial court has discretion to permit a party to re-open the case (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 792) [118 Cal.Rptr.2d 668], the granting of Mr. Miller's motion in this instance was an abuse of discretion and violated Beck's right to a fundamentally fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by the California analogs. "Among the factors to be considered are (1) the stage of the proceedings when the motion is made, (2) the moving party's diligence in presenting the new evidence, (3) the risk that the jury might accord the new evidence undue emphasis, and (4) the significance of the evidence." (*People v. Jones* (2003) 30 Cal.4th 1084, 1110 [135 Cal.Rptr.2d 370, 70 P.3d 359].)

In this case, none of these enumerated factors justify the trial court's decision. First, the motion was made after the parties had finished presenting evidence, except for minor rebuttal which had no impact on the area of the evidence being raised by Mr. Miller's motion to reopen. Second, there was no diligence on Mr. Miller's part in previously obtaining and presenting the use of the evidence, and there was no allegation that it was new evidence recently discovered. In

fact, Mr. Miller argued that he had possibly overlooked the significance of the evidence during his own case-in-chief, which occurred after Beck had testified. Third, there was a substantial risk that the jury would place too large an emphasis on this evidence, which was precisely the reason Mr. Miller sought its introduction. Finally, the evidence was prejudicial and had previously been excluded by the court at a hearing in which Mr. Miller had the full opportunity to participate.[52]

This motion is yet another instance of the prejudice to Beck continuing from the time of the denial of his motion to sever the defendants for trial. Here, the autopsy photograph was the subject of a prior motion in limine, and the trial court excluded the use of the photograph during the trial. The prosecution did not seek to introduce the photograph in its case-in-chief or at any time during the examination of Dr. Ernoehazy. Moreover, Willey's attorney did not

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[52]Thus, without any basis or motion to reconsider its prior ruling, the trial court changed the rules of the trial near the conclusion of the case, thereby prejudicing Beck and preventing his counsel from confronting this additional evidence not previously introduced by the prosecution.

seek to question Dr. Ernoehazy or move to introduce this photograph during his cross-examination of the doctor. Finally, Beck's testimony that he did not inflict any injury on Colwell did not warrant the introduction of the doctor's testimony or the photograph in rebuttal. Instead, the trial court permitted the evidence solely under the guise of the re-opening of Willey's case.

Indeed, the sole relevance of the photograph was an attempt to bolster Willey's version of the Colwell killing, and if admissible at all should have been raised in Mr. Miller's case. When Mr. Miller intentionally chose not to do so, but only later changed his mind, after the conclusion of all of the defendants' cases and when the matter was to be submitted to the jury, the trial court erred in permitting the testimony. Perhaps, the trial judge was solely concerned about the possibility that Mr. Miller had committed error for his own client and was trying to compensate for that error; however, the trial court did not fully consider the impact upon Beck whose case had been fully submitted to the jury, absent some minor rebuttal that did not directly affect his case.

IX.

THE TRIAL COURT'S DENIAL OF BECK'S REQUEST FOR REBUTTAL ARGUMENT VIOLATED BECK'S STATE AND FEDERAL RIGHTS TO DUE PROCESS, RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE AND TO RELIABLE VERDICTS

Given the decision of the trial court to reject the severance motion made on behalf of Beck, the trial court compounded the prejudice from that decision by denying Beck's request for rebuttal argument to the closing argument of the other co-defendants. (RT 6454-6457.) Mr. Amster made the initial motion on behalf of his client Cruz, and Mr. Faulkner immediately joined the motion. The motion asked for "short rebuttal argument after the other defendants' counsels argue." (RT 6456.) The motion asked only for rebuttal concerning the conspiracy allegation and what other counsel might say about that allegation. Mr. Amster likened the possible closing by other counsel to "Prosecution-like argument" and raised a constitutional challenge under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (RT 6456.)

Interestingly, and true to the notion that Beck was being prosecuted by three attorneys, Mr. Magana, on behalf of LaMarsh, and Mr. Miller, on behalf of Willey, objected. (RT 6456-6457.) Finally, the prosecutor objected, noting "We could end up being here all month doing rebuttal arguments. It's rather obvious that it's a tag team match here, two versus two, and that can go on forever." (RT 6457.) Without explanation, the trial court denied the motion. (RT (6457.)

> California has long recognized that the defendant has a constitutional right to closing argument in a criminal trial, either jury or non-jury (*In re William F.* (1974) 11 Cal.3d 249, 255, fn. 5 [113 Cal.Rptr. 170, 520 P.2d 986]), and the United States Supreme Court has recently held that such a right of argument is part of the right to counsel guaranteed by the Sixth and Fourteenth Amendments (*Herring v. New York* (1975) 422 U.S. 853 [45 L.Ed.2d 593, 95 S.Ct. 2550]). But these federal and California authorities equally recognize that along with the right of argument there exists discretion fairly to govern its scope. (*Id.* at p. 862; In re William F., *supra*, 11 Cal.3d, at p. 255, n. 5.)

(*People v. Cory* (1984) 157 Cal.App.3d 1094, 1105 [204 Cal.Rptr. 117].)

The trial court enjoys broad discretion in this area:

> 'The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He [or she] may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He [or she] may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.' [Citation.]

(*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [52 Cal.Rptr.2d 422].)

Defense counsel was not asking to rebut the argument of the prosecutor which is prohibited by Penal Code section 1093, subdivision 5, and has been upheld against a due process challenge. (*People v. Croy, supra*, 157 Cal.App.4th at p. 1105.) Counsel only requested the opportunity to rebut the arguments of the other "prosecutors" after counsel had an opportunity to hear the claims of the other attorneys. The request was narrowly drawn in an unusual situation in a capital case. In these circumstances, the denial of the request denied Beck his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

X.

THE EVIDENCE SUPPORTING THE CONSPIRACY TO COMMIT MURDER CHARGE WAS CONSTITUTIONALLY INSUFFICIENT

In the instant case, Beck was found guilty of conspiracy to commit murder. The evidentiary foundation for this charge was the accomplice testimony of Michelle Evans. Because Evans' testimony was inherently unreliable and not sufficiently corroborated as required by law, the state's evidence on this count was constitutionally insufficient, and the resulting conviction on this count must be reversed.

A conspiracy conviction requires "proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante* (1999) 20 Cal. 4th 403, 416 [84 Cal. Rptr. 2d 665, 975 P.2d 1071] [citation omitted].)

Conspiracy is an inchoate crime, thus, the point of legal intervention is fixed at the time of the agreement to commit the crime;

thus conspiracy to commit murder requires an intent to kill and cannot be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) Without an agreement a person is not liable for conspiracy. (*People v. Samarjian* (1966) 240 Cal.App.2d 13, 17 n.2 [49 Cal.Rptr. 180].)

Where proof of guilt of the crime charged rests primarily and solely upon the testimony of an accomplice, the law requires corroboration of the testimony of such an accomplice as an essential prerequisite to the conviction of the accused. (*People v. Reingold* (1948) 87 Cal.App.2d 382 [197 P.2d 175].) Thus, Penal Code section 1111 holds that "[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 . . . ." (*Cal. Pen. Code* § 1111.)

"Corroborating evidence 'must tend to implicate the defendant and therefore must relate to some act or fact which is an *element of the crime* but it is not necessary that the corroborative evidence be

sufficient in itself to establish every element of the offense charged.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 982 [17 Cal.Rptr.2d 122, 846 P.2d 704], quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1228 [283 Cal.Rptr. 144, 812 P.2d 163].) Corroborating evidence "may be slight and entitled to little consideration when standing alone," (*Zapien, supra*, 4 Cal.4th at p. 982, quoting *People v. Miranda* (1987) 44 Cal.3d 57, 100 [241 Cal.Rptr. 594, 744 P.2d 1127]), however, the prosecution must "produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged." (*People v. Perry* (1972) 7 Cal.3d 756, 769 [103 Cal.Rptr. 161, 499 P.2d 129].)

A defendant's due process rights are violated when there is insufficient evidence to reasonably support a finding of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560], *People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738].) A claim of insufficient evidence requires the court to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Frye* (1996) 18 Cal.4th 894, 953 [77 Cal. Rptr.2d

25, 959 P.2d 183].) The court must examine the record as a whole in the light most favorable to the judgment to determine whether it "'discloses substantial evidence – that is evidence which is reasonably credible, and of solid value – such that the trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*Johnson*, *supra*, 26 Cal.3d, at p. 576, quoting *Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].)

In the instant case, the only evidence available to the jury to support the state's conspiracy theory was the testimony of Michelle Evans. She told the jury on direct examination that Cruz asked her to draw the floor plan of her sister's house, and later she, Cruz, Beck, Vieira, LaMarsh and Willey gathered together and planned to attack Raper and leave "no witnesses"; that the plan was to go into the house and "do" everyone in the living room. This was the only evidence introduced about the agreement among the co-defendants to kill. The prosecution introduced no evidence to corroborate this essential element of the conspiracy charge.

The defect in Evans' testimony is two-fold. First, the testimony about the conspiracy was so contradictory and inherently unreliable as

to violate due process. (See e.g., *People v. Carvalho* (1952) 112 Cal. App.2d 482 [246 P.2d 950] [when a victim's testimony is so improbable that it is unbelievable, the conviction cannot stand].)

Evans was an inherently unreliable witness because she possessed a monumental motivation to lie to save her own life. (RT 4700-4701, 4916-4955.) She was charged with a capital crime and threatened with the gas chamber. (RT 4915-4951, 4955.) She was also threatened with losing her children. (RT 4431-4432.) There was ample evidence that Evans participated in the killings. By her own admission, she used and sold drugs and committed theft. (RT 4265-4266.) She repeatedly lied to police, including violating her first plea agreement by denying that she was armed on the night of the killings when she in fact possessed a survival knife. (RT 4700-4701, 4916-4955.) Additionally, on at least one occasion she lied on the witness stand.[53]

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[53]Evans denied threatening Michelle Mercer or admitting to participating in the killings. She also a having a relationship with Paris, claiming she only knew Paris for about a week before the killings. (RT 4432-4434.) Michelle Mercer testified that Evans was a "habitual liar" and a violent person. (RT 4532, 4552). Mercer also impeached Evans' testimony that she did not know Paris very well; Mercer

Moreover, when testifying about the meeting where the defendants allegedly planned the killings, Evans contradicted herself several times when explaining what "do" meant. In support of the state's theory she testified on direct that during the planning, no one asked what "do" meant, but Evans thought at the time it meant "kill." (RT 4338.)

However, on cross-examination, Evans testified that when they were talking about "doing" people Evans did not intend to kill anyone, and her understanding of "do 'em and leave no witnesses" was to beat them up. Evans was not planning on killing anyone or helping to kill anyone when she left the Camp for her sister's house, and she had no intention of using the knife Cruz gave her. She not believe at that time that anyone was going to be killed. (RT 4375-4376.)

Evans also testified that she doubted, on the way to the house, that the men would kill anyone, even though they had knives, because she had seen them with knives before; although she stated they

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testified that Evans and Paris had a sexual relationship just prior to the killings. (RT 5434.)

typically carried guns. They also often wore camouflage clothing. (RT 4414.)

In *People v. Casillas* (1943) 60 Cal.App.2d 785 [141 P.2d 768], the court of appeal noted that although credibility is for the trier of fact to determine, a court of appeal may reverse a conviction where the trial evidence is so unbelievable or improbable that the verdict of guilt is unreliable. In *Casillas*, the defendant was accused of rape by his fifteen-year-old daughter. At trial she was the only witness to testify about the alleged rape. She gave three contradictory accounts of what happened. The appellate court reversed the conviction stating:

> Conceding, as urged by respondent, that the trial judge has a wide discretion as the sole trier of facts in determining the credibility of witnesses and the intrinsic value of evidence, nevertheless that discretion is a legal one, and the proper exercise thereof presents a question of law.
>
> Before we could affirm the judgments of conviction under the state of the record before us in this case, we would be compelled to emasculate completely the doctrine of reasonable doubt, reference to which was at no time made by the trial court in arriving at his decision or in passing upon the motion for a new trial. In whatever light the testimony of the prosecutrix is viewed, it must be conceded that her testimony was, in one part or another, perjurious. She gave three separate, distinct and contradictory versions as to who ravished her and the circumstances surrounding the commission of the

> offenses. Without being unmindful of the rule that where the evidence, viewed in one light, creates a hypothesis inconsistent with guilt, and when viewed in another light such evidence is reasonably consistent with guilt, and where the jury, or in this case, the trial judge, adopts the hypothesis pointing to innocence, and there is legal evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the trial court or jury; *nevertheless it is axiomatic as well that an appellate court may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support them or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible. When a case presents any of these features, this court deals with it as a matter of law.*
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> That such a situation only presents itself in extreme cases we may concede, but we are convinced that the case at bar does not present the usual and ordinary situation where the evidence was in conflict as to the main or only issue, but on the contrary, tenders to us a case wherein the evidence is so lacking in substantiality as to truth or credibility that it falls far short of that quantum of verity, reasonableness and substantiality required by law in criminal cases to satisfy the reason and judgment of those bound to act conscientiously upon it as to the existence of guilt beyond a reasonable doubt and to a moral certainty. It must, therefore, be regarded as amounting to no evidence at all, as a matter of law, sufficient to overcome the presumption of innocence and to meet the burden resting upon the prosecution to establish guilt beyond a reasonable doubt.

(*Casillas*, *supra*, at pp. 793-794 [emphasis added]. See also, *People v. Carvalho*, *supra*, 112 Cal.App.2d 482 [conviction reversed where

prosecutrix's testimony was inherently improbable].)

Due process is violated where a conviction is based on inherently unreliable evidence. (*See e.g., United States v. Gonzales* (10th Cir. 1999) 164 F.3d 1285, 1289; *Clanton v. Cooper* (10th Cir. 1997) 129 F.3d 1147, 1157-58 [a defendant's due process rights are violated where a witness is coerced into making false statements and those statements are admitted at the defendant's trial, because coerced statements are inherently unreliable]; *Buckley v. Fitzsimmons* (7th Cir. 1994) 20 F.3d 789, 795 [coerced confessions are less reliable than voluntary ones, making their use at trial a violation of defendant's due process rights]; *People v. Douglas* (1990) 50 Cal. 3d 468, [268 Cal. Rptr. 126, 788 P.2d 640] [coerced testimony is inherently unreliable its admission therefore violates defendant's right to a fair trial].)

Second, at the time of her testimony Evans was charged as an accomplice and as such was as liable as her co-defendants for the deaths of Paris, Colwell, Raper and Ritchey. Thus, Penal Code section 1111 required that Evans' testimony be corroborated by independent evidence that, "without aid or assistance from the

testimony of the accomplice, tend[ed] to connect the defendant with the crime charged." (*Perry*, *supra*, 7 Cal.3d at p. 769.)

In *People v. Reingold*, the court of appeal explained the following about the corroborating evidence:

> As to what constitutes sufficient corroboration of the testimony of an accomplice, we have the following rule enunciated by our Supreme Court in the case of *People v. Morton*, 139 Cal. 719, 724 [73 P. 609], wherein the following language taken from *Weldon v. State*, 10 Tex.App. 400, is quoted with approval:
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> > ". . . eliminate from the case the testimony of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence -- evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him."
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> And in the Morton case, *supra*, the Supreme Court places its imprimatur upon the rule announced in *Simms v. State*, 8 Tex.App. 230, as follows: "The evidence must tend directly and immediately to connect the defendant with the commission of the offense." In other words, to be of any avail, the corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime.
>
> While it is true that the corroborative evidence is sufficient if it, of itself, tends to connect the defendant

with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration, nevertheless, the rule is firmly established in our law that more is required by way of corroboration than mere suspicion or even grave suspicion (*People v. Braun*, 31 Cal.App.2d 593, 600, 601 [88 P.2d 728], and cases therein cited; *People v. Shaw*, 17 Cal.2d 778, 803, 809 [112 P.2d 241]; *People v. Lima*, 25 Cal.2d 573, 579, 580 [154 P.2d 698]).

We may, therefore, epitomize the requirements of section 1111 of the Penal Code by saying, first, that the corroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value; second, that the corroborative evidence to be sufficient and of the required *substantial* value *must tend directly and immediately* to connect the defendant with the offense charged against him; and, third, that the corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused.

We use advisedly the word "substantial" with reference to the value to which the corroborative evidence must rise, for, as said in *People v. Janssen*, 74 Cal.App. 402, 410 [240 P. 799]: "The legislature, acting within the scope of its authority, has provided that, to justify the conviction of a defendant, there must be *substantial* corroboration of the testimony of an accomplice. The lawmaking body doubtless had a good reason for this rule of evidence, and based it upon what it conceived to be a *sound public policy*. The judicial department may not ignore the rule without unwarrantably invading the rights of the accused." (Emphasis added.) See also *People v. Sciaroni*, 4 Cal.App. 698, 700 [89 P. 133]; *People v. Dail*, 22 Cal.2d 642, 655 [140 P.2d 828].

While the law in its anxiety to prevent the guilty from escaping punishment for their crimes permits an accomplice who confesses his own infamy to be a witness, it also recognizes the strong motive that

> undoubtedly actuate such a witness to prove the defendant on trial to be guilty of the offense, and to palliate as much as possible his own guilt. And with equal solicitude for the protection of the citizen, the law watches with jealous scrutiny the testimony of an accomplice, and will not permit any person to be convicted solely by the testimony of an accomplice, but requires substantial corroboration of his statements from independent sources.

(*Reingold, supra*, 87 Cal.App.2d at pp. 392-394.)

To establish Beck's guilt of conspiracy charge the prosecution was required to prove the following: (1) Beck and another person had the specific intent to agree or conspire to commit murder, (2) Beck had the specific intent to commit the elements of that offense, and (3) the commission of an overt act by one or more of the parties to such agreement in furtherance of the conspiracy. (*Morante, supra*, at p. 416.)

The essential component of conspiracy is the agreement, for without this element there can be no crime of conspiracy. (*Samarjian, supra*, 240 Cal.App.2d at p. 49.) Thus, to properly corroborate Evans' testimony as required under Penal Code section 1111, logic and fairness dictate that the prosecution was required to produce independent evidence of the agreement between Beck and

some other person. To hold otherwise would eviscerate the law requiring corroboration. Indeed, it cannot be enough for the prosecution simply to present corroborating evidence of an overt act, because that would not corroborate the criminal offense. For example, in this case Beck was charged with five overt acts: (1) arming themselves with weapons, (2) driving to the scene of the killings, (3) hiding their identities, (4) entering the victims' residence, and 5) killing the victims. If the prosecution were permitted to satisfy the corroboration requirement with independent evidence pertaining only to one or more of the enumerated overt acts, Penal Code section 1111 would be rendered vacuous. If the prosecution were permitted to produce independent evidence relating only to the overt acts, such corroboration would "merely show the commission of the offense or the circumstances thereof." (*Cal. Pen. Code* § 1111.) Accordingly, the prosecution was required to corroborate independently Beck's agreement with another to commit the criminal offense of murder.

A review of the record reveals that in its case-in-chief the state failed to corroborate Evans' testimony on the conspiracy count. For example, the prosecution produced no independent evidence of any

agreement between Beck and another to commit murder. No drawing was produced to corroborate Evans' testimony about making a map for Cruz. No witnesses for the prosecution testified that they witnessed the defendants agree to attack the victims. Nor was any independent evidence produced about a pre-attack plan to kill the victims.

In his closing argument, the prosecutor argued that Evans' conspiracy testimony was corroborated by the following: (1) Alvarez's identification of LaMarsh as the man holding the gun, (2) the neighbors' observation of two men attacking Ritchey in the street and four men running away from the house, (3) Patricia Badgett's testimony about the defendants arriving at Willey's house after the killings, (4) Rosemary McLaughlin's testimony that Cruz called her and asked her and her boyfriend to come over because they were going to even a score, (5) Beck's admission that he slit some throats, (6) a Camp resident's testimony that Vieira wanted to borrow some spray paint for a bat on the night of the killings, and (7) the fact that Cruz and Beck bought masks, police batons and Ka-Bar knifes. (RT 6540-6545.)

The prosecutor's argument was legally flawed. First, the evidence enumerated by the prosecution in closing does not corroborate the *conspiracy* to commit murder theory; rather it merely corroborates the enumerated overt acts which, as explained above, do not in and of themselves prove a conspiracy. Accordingly, such evidence is insufficient corroboration.

Second, many of the prosecution's arguments simply are not supported by the evidence. For example, Rosemary McLaughlin testified that Cruz called her on the night of the killings and said he wanted McLaughlin to "go to his house and stay with Jenny and the guys were going to go even a score, *get in a fight.*" (RT 5547 [emphasis added].) On it's face, this statement does not reveal a conspiracy to commit murder. Indeed, the emphasized language which was left out by the prosecutor in his closing argument plainly states an intent only to "get into a fight," and nothing else.

Similarly, the prosecutor's argument about the intended use of the spray paint distorted the actual testimony. Both Messigner and Brausell testified that Vieira came to their house asking for spray paint. Neither Messinger nor Brausell testified that Vieira wanted the paint for

his bat, and neither witness testified about the color of the paint Vieira requested. (RT 3548-3549, 3591-3592.)

Additionally, it was undisputed that Vieira, Cruz, Beck and Willey had a fascination with weapons and frequently bought such items to add to their weapons collection. (See, e.g., RT 6048.) Thus the prosecutor's argument that Cruz and Beck bought the type of items found at the crime scene corroborates nothing more than their fascination with and possession of these kinds of items. It does not tend to prove an agreement between the men to kill the victims. (*McKinney v. Rees* (1993 9thCir.) 993 F.3d 1378, 1383, n. 6 [evidence of a defendant's fascination with knives is impermissible propensity evidence].) This is particularly so given the testimony of numerous witnesses that the men frequently purchased military-type weapons, clothing and gear long *before* the alleged hostilities between Raper and the Camp residents came to a head. Prosecution testimony established that Cruz purchased the masks, baton and knife in February and March 1990 (RT 3662-3666), and Beck purchased the gun in 1989 (RT 3695). The Camp residents evicted Raper in April 1990. (RT 3397-3399.)

Because evidence of arming oneself and going to a victim's home does not independently tend to prove an *agreement* to kill, or even a *specific* intent to kill,[54] the fact that the police found weapons at the crime scene and other physical evidence connecting the defendants to the victims' deaths does not corroborate the charge of conspiracy (agreement to murder). Indeed, the need for corroboration is even greater in this case given Evans' inconsistent and inherently unreliable testimony tainted by her motivation to escape punishment by supplying the evidence the prosecution wanted in order to establish a conspiracy.

Finally, although Beck's alleged post-killing statement to McLaughlin that they "had to do them" (RT 5553-5554) may be an

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[54]For example, a person can arm oneself for protection or to commit assault without an intent to kill. Thus, this type of independent evidence relating to the overt acts is not sufficient because "it requires interpretation and direction to be furnished by the accomplice's testimony to give it value; second, that the corroborative evidence to be sufficient and of the required *substantial* value *must tend directly and immediately* to connect the defendant with the offense charged against him; and, third, that the corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused." (*Reingold*, *supra*, 87 Cal.App.2d at p. 393.)

admission of participation in the deaths of the victims, it does not corroborate a *prior agreement* to kill the victims.

Moreover, even if the points enumerated in the prosecutor's closing arguments tend to prove that Beck was involved with the homicides, at best they do nothing more than create a suspicion of a conspiracy. However, the law requires more by way of corroboration "than mere suspicion or even grave suspicion" (*Reingold*, *supra*, 87 Cal.App.2d at p. 392-393.)

Because the prosecution's evidence does not "*tend directly and immediately* to connect" Beck to the conspiracy offense, it is insufficient. (*Ibid.*) Beck's due process rights were violated because there was insufficient evidence to support a guilt finding beyond a reasonable doubt on the charge of conspiracy. (*Jackson*, *supra*, 443 U.S. 307; *Johnson*, *supra*, 26 Cal.3d, at pp. 576-578.) Examining the record as a whole in the light most favorable to the judgment, the evidence supporting the conspiracy charge is not "reasonable, credible and of solid value – such that the trier of fact could find the defendant guilty beyond a reasonable doubt." (See *Johnson*, *supra*, 26 Cal.3d, at p. 578.)

Not only was Evans' testimony about the conspiracy charge inconsistent and inherently unreliable, it was not properly corroborated as required by law. Accordingly, because "a rational trier of fact" could not have found the essential elements of conspiracy beyond a reasonable doubt, Beck's conviction on this conspiracy count must be reversed. (*People v. Frye, supra*, 18 Cal.4th, at p. 953.)

Furthermore, since the jury was instructed on co-conspirator liability, the jury may well have convicted Beck of the murders solely on the basis of vicarious liability. If there was insufficient evidence of the conspiracy to murder, the substantive murder counts must also be reversed. While Beck was near Colwell, there is not sufficient evidence that he personally killed Colwell. As to Paris, Ritchey and Raper, there is no credible evidence that Beck personally killed them; indeed, the main prosecution theory was that the defendants conspired and were thus liable for all of the murders. (RT 6532.)

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XI.

REVERSAL OF THE DEATH SENTENCE ON THE CONSPIRACY TO COMMIT MURDER CHARGE IS REQUIRED

The Court imposed a separate death sentence upon Beck for his conviction in Count 5 of conspiring to commit murder. (CT 2650, RT 8426.) This is error. Conspiracy to commit murder alone cannot make a defendant death eligible. (*People v. Vieira*, *supra*, 35 Cal.3d, at p. 294.) This Court has held that conspiracy to commit murder is not a death-eligible crime. (*People v. Lawley* (2002) 27 Cal.4th 102, 171-172 [115 Cal.Rptr.2d 614, 38 P.3d 461].) Reversal of the death sentence of the conspiracy to commit murder charge is required.

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XII.

THE TRIAL COURT COMMITTED ERRORS IN THE GUILT PHASE INSTRUCTIONS WHICH DENIED BECK HIS CONSTITUTIONAL RIGHTS

Beck's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by the use of several unconstitutional jury instructions, as well as the denial of necessary defense requested instructions. This reduced the state's burden of proof to a level below the standard of proof beyond a reasonable doubt as required by the Fifth and Fourteenth Amendments, deprived Beck of his Sixth Amendment and due process rights to have every material element of guilt decided by a properly instructed jury, prejudiced the jury's consideration of any possible defense, and deprived Beck of his due process right to a fair trial. These instructional errors further deprived Beck of the reliable factfinding at guilt phase required for a reliable sentencing determination under the Eighth and Fourteenth Amendments. The effect of these instructional errors shifted to Beck the burden of proof on the issues of his intent and his mental state, and denied him any opportunity to meet that burden by showing that he lacked the requisite specific intent required for his convictions.

A. The Failure to Instruct That Defendant Was Required to Have a Specific Intent to Kill to Be Guilty of Conspiracy to Murder Violated Beck's Constitutional Rights to Have the Jury Instructed on the Elements of the Crime Charged and His Right to a Reliable Verdict in the Guilt and Penalty Phases

Beck was charged in Count V with a conspiracy to murder; however, the trial court failed to inform the jury that they could not convict him of that offense unless they found that he had a specific intent to kill. Such error violates the federal and state constitutions and requires reversal of the conspiracy charge and the four separate first degree murder convictions.

1. The Instructions Given

The jury was instructed about the elements of the conspiracy charge as follows:

> A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of Murder and with the further specific intent to commit such offense followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.
>
> In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof

of the commission of at least one of the overt acts alleged in the information. It is not necessary to the guilt of any particular defendant that that defendant personally committed the overt act, if he was one of the conspirators when such an act was committed.

The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a public offense and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.

To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that such step or act, in and of itself, be a criminal or an unlawful act.
CALJIC 6.10 with adaptations.

(CT 1914-15.)

The jury was instructed regarding the union of act and specific intent as follows:

In each of the crimes charged in the information, namely murder and conspiracy and the lesser charges of manslaughter and conspiracy to commit manslaughter, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless such specific intent exists the crime to which it relates is not committed.

The specific intent required is included in the definitions of the crimes given.

(CT 1937.)

> In the crimes of first degree murder and conspiracy to commit first degree murder, the necessary mental states are malice aforethought, premeditation and deliberation.
>
> In the crime of second degree murder and conspiracy to commit second degree murder, the necessary mental state is malice aforethought.

(RT 6508.)

Furthermore, the jury was instructed that malice could be express or implied pursuant to CALJIC 8.11. (CT 1896.)

2. The Instructions are Erroneous

"A conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice." (*People v. Swain* (1996) 12 Cal.4th 593, 607 [49 Cal.Rptr.2d 390, 909 P.2d 994].) Pursuant to fundamental rule, a trial court errs when it fails to instruct a jury that proof of intent to kill is an element of conspiracy to commit murder, especially when it instructs the jury on the theory of implied malice murder as support for a finding of guilt on the conspiracy charge. (*Id.* at p. 599; *People v. Miller* (1996) 46 Cal.App.4th 412, 426 [53 Cal.Rptr.2d 773].)

Conspiracy to murder is analogous to attempted murder and assault with intent to murder: in each situation, the requisite mental

state is a specific intent to kill. It is not the intent to commit murder, because that concept is much broader than an intent to kill. (See, *People v. Ramos* (1982) 30 Cal.3d 553 [180 Cal.Rptr. 266, 639 P.2d 908] and *People v. Murtishaw* (1981) 29 Cal.3d 773 [175 Cal.Rptr. 738, 631 P.2d 446].)

In *Ramos*, this Court held it was error to instruct that attempted murder requires specific intent to commit murder, where the jury was instructed on both implied malice murder and felony murder. These instructions would erroneously allow a jury to convict on the attempted murder charge even in the absence of an intent to kill, as the jury could conclude that the defendant committed an act with a mental state amounting to implied malice. In *Murtishaw*, the trial court similarly erred by instructing that an attempted murder only required an "intent to murder" rather than an "intent to kill."

The distinction between murder and conspiracy to murder upon which the *Swain* decision is based has its roots in the definition of conspiracy as an "inchoate crime that does not require the commission of the substantive target offense that is the object of the conspiracy." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1229 [77

Cal.Rptr.2d 733, 960 P.2d 537].) Thus, the time for "legal intervention" is the point of the actual agreement, and the crime of conspiracy "reaches further back into preparatory conduct than attempt. . . ." (*Ibid.*, citing *Swain.*) "[W]here the conspirators agree or conspire with specific intent to kill and commit an overt act in furtherance of such agreement, they are guilty of conspiracy to commit express malice murder." (*Swain*, 12 Cal.4th at p. 602.)

Because implied malice only "requires instead an intent to do some act, the natural consequences of which are dangerous to human life" (CALJIC 8.31) and as a result of that act a person is killed, a conspiracy to commit an implied malice murder is a logical impossibility under the law. (*Id.* at p. 603.) Therefore, a jury must be instructed that there be a specific intent to kill in order to find a conspiracy to murder.[55]

Here, the conspiracy instruction failed to inform the jury that Beck had to have the specific intent to kill in order to be guilty of

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[55]In *Cortez*, this Court held that there was no such crime as a conspiracy to commit second degree murder, an issue not presented in this case.

conspiracy to commit murder. Instead, the trial court instructed only that Beck had to have "the specific intent to agree to commit the public offense of murder" and "the further specific intent to commit such offense." (CT 1914.)

The trial court elsewhere instructed on the crime of murder as an unlawful killing of a human being with malice aforethought. (CT 1895.) The court then instructed on malice as either express or implied.[56] (CT 1896.) In giving these instructions, the court limited

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[56]"Malice" may be either express or implied.

Malice is express when there is manifested an intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,

2. The natural consequences of the act are dangerous to human life, and

3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

(CT 1896-97.)

the instructions to the charges contained in Counts I-IV; the jury could have found these instructions to have no direct applicability to the conspiracy charge in Count V. Thus, the jury may not even have been given a definition of the elements of murder as guidance for the consideration of the conspiracy charge, and the jury was certainly confused about this instruction as indicated by the questions they posed during deliberations, as discussed more fully below.

Finally, the court instructed that there had to be a union of act and intent and informed the jury that the required intent was defined in the definition of each crime. (CT 1937.) In this instruction, the trial judge specifically referred to the conspiracy charge, thus informing the jury to look only to the conspiracy instruction for the requisite specific intent needed to convict.

3. The Error was Prejudicial

A failure to provide legally correct instructions on an essential element of the crime charged is a violation of the federal and state constitutions. (See, *Cabana v. Bullock* (1986) 474 U.S. 376, 384 [106 S.Ct. 689, 88 L.Ed.2d 704]; *People v. Harris* (1994) 9 Cal.4th 407, 424-425 [37 Cal.Rptr.2d 200, 886 P.2d 1193].) Because the

Sixth Amendment requires that all the elements of a crime be found true by a jury, an instruction which omits an element of the offense is necessarily prejudicial if there is any possibility that it contributed to the verdict. (*Carella v. California* (1988) 491 U.S. 263, 269 [109 S.Ct. 2419, 105 L.Ed.2d 218], Scalia, J., concurring.)

The failure to so instruct on all the elements of the offense also violated Beck's right to the due process of law under the Fifth and Fourteenth Amendments. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510 [115 S.Ct. 2310, 132 L.Ed.2d 444].)

The test for prejudice under both the federal and state constitutions is whether it appears beyond a reasonable doubt that the error did not contribute to the verdict returned. (See, *Neder v United States* (1999) 527 U.S. 1, 8-11 [119 S.Ct. 1827, 144 L.Ed.2d 35] and *Swain, supra*, 12 Cal.4th, at p. 607.) This Court's review must focus on the following question: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder, supra*, 527 U.S. at p. 18.) This is not a standard *Chapman* harmless error test, but is a more stringent test. For example, "where a defendant contested the omitted element and raised sufficient

evidence to support a contrary finding, [the court] should not find the error harmless." (*Id.* at p. 19.)

In this case, not only did the trial court fail to include an instruction regarding the proper elements in the conspiracy to commit murder charge, it instructed the jury that if it found the existence of a conspiracy then each co-conspirator would be liable for the murders.

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if such act or such declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.
>
> A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy even though such crime or act was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of such crime or act.
>
> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the crime alleged in Counts I, II, III, and IV was perpetrated by co-conspirators in furtherance of such conspiracy and was a natural and probable consequence of the agreed upon criminal objective of such conspiracy.

(CT 1916-17.)

But the jury was never instructed that Beck had to have a specific intent to kill at the time of the alleged agreement to commit the murder, and the sole witness to testify about this alleged agreement was Michelle Evans. Her testimony was riddled with contradictions, and she even said that there was an agreement to "do" the people at Raper's house and that she was not certain what that term even meant. Because the jury was not informed of the specific intent to kill element of the conspiracy charge and the evidence about Beck's intent at the time of the alleged meeting at the camp was conflicting, the error was prejudicial. The prosecution cannot meet its burden of proving beyond a reasonable doubt that the error was harmless.

Moreover, the jurors obviously were confused about the relationship between the conspiracy instruction and the substantive murder charges. During deliberations, the jurors sent the following questions to the trial judge:

"If we find a defendant guilty of conspiracy to commit murder and proceed to completing the individual murder counts, does the finding of first, second degree murder need or have to be the same for

all four counts?" (RT 6833.) The judge told the jury "no." (RT 6835.)

A few days later, the jury again indicated confusion on the relation between the conspiracy instructions and the substantive charge instructions:

"If we cannot reach an agreement on a conspiracy charge and begin to consider the individual charges of murder, should a [juror] who feels that a defendant is guilty of conspiracy put that feeling aside and only consider the direct evidence linking the defendant and a specific victim or hold their feeling that if the defendant is guilty of conspiracy, the defendant is guilty of the crimes against all defendants." (RT 6863.)

In response, the trial judge told the jury:

> If the jury does not find a particular defendant guilty of conspiracy, neither the jury, nor any individual juror, can find a defendant guilty of a crime based on the theory that it was an act done in the furtherance of the alleged conspiracy. However, the failure to find a defendant guilty of conspiracy does not preclude the jury or any individual juror from determining whether that defendant is guilty of any crime on any individual victim as an aider and abettor. I refer you back to CALJIC 3.00 and 3.01 defining aiding and abetting which you have with you in the jury room. Any juror who believes an individual

> defendant did not aid and abet a particular crime, can only consider that defendant's guilt as to that crime based on that defendant's own commission of that crime, which can be based on direct or circumstantial evidence.

(CT 1967; RT 6878.)[57]

Thus, it appears that the jurors were first considering the conspiracy charge as to each defendant, and if they were able to reach agreement on the conspiracy charge, they then would determine Beck's liability for the substantive charges. This question illustrates the bootstrapping process the jurors followed in reaching verdicts in this case. Why else would the jury ask whether, in the case of inability

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[57]While this instruction was given to the jury on June 3 and the verdict for Beck was dated May 29 but returned on June 4, this instruction still could have affected the verdict as the trial judge had previously informed the jury that until a verdict as to one defendant or charge was received in open court, it was still subject to being changed. "Let me caution you, though, if you do come out and announce verdicts for one or more defendants, those verdicts stand and you cannot change those verdicts, even if in deliberating another defendant's guilt or innocence you've had second thoughts on these verdicts you had already announced; and that is something you should take into consideration in deciding whether or not you wish to announce your verdicts piecemeal." (RT 6847-48.) Thus, the jury still could have been considering the verdicts for Beck at the time this instruction was given. In any event, both of the questions posed by the jurors evidence their confusion regarding the relationship between the conspiracy charge and the substantive murder charges.

to unanimously agree on the conspiracy charge, a juror who felt the defendant was guilty of conspiracy should put his or her conspiracy finding aside and consider only direct evidence linking the defendant and a specific victim?

Under the court's instructions, once the jury concluded that Beck was guilty of conspiracy to murder, the instructions allowed the jury to erroneously conclude that he would be liable for all of the murders committed that night even in the absence of a finding that he had the requisite specific intent to kill at the time of the agreement. The improper instruction combined with the trial judge's response to the jury questions created great harm to Beck in that the jury convicted him of all the murders even those for which there was absolutely no evidence that he had actually participated.

Indeed, the prosecution argued only that Beck was personally connected to the Colwell killing in that at least one witness saw Beck stab Colwell once in the stomach. Yet, the state's pathologist testified that this wound alone was not the cause of Colwell's death. In regard to Ritchey, the prosecution argued that Cruz, not Beck, committed that murder: "I would submit to you that it was Gerald Cruz that cut

Mr. Ritchey's throat after Mr. Willey had stabbed him a bunch of times." (RT 6739.)

The prosecutor in closing argument relied on the conspiracy charge as the means to convict Beck of all four murders:

> Now, see, they're back agreeing Michelle Evans on things that don't really matter as far as the conspiracy goes. They're scared to death of that conspiracy, see. Why? Because I don't have to tell you, prove to you, or care less about who killed who. They're all liable together equally for all of the murders, regardless of who put a knife in who or who crushed whose skull, as co-conspirators or as aiders and abettors, under either one of those theories.
>
> Mr. Cruz is liable for the murder of Mr. Ritchey, he's liable for the murder of Mr. Raper, Miss Paris, Mr. Colwell. Mr. Beck is liable for the murder of Mr. Ritchey, Mr. Raper, Mr. Colwell, and Miss Paris. Mr. LaMarsh is liable for the murder of Colwell, Raper, Ritchey, and Paris. Mr. Willey's liable for the murder of Mr. Ritchey, Mr. Raper, Miss Paris, and Mr. Colwell. Each and every one of them singly and jointly. That's why they're scared to death of that conspiracy charge. And that's why they want you to believe that Michelle Evans told the truth about everything else but lied about that.

(RT 6729-30.)

At most, as the prosecutor argued, Beck was directly connected to only one of the victims, and in that instance his actions could not have been the cause of death. Thus, it is very likely that he was

convicted on all counts solely on the basis of the erroneous conspiracy instruction and the prosecutor's reliance on that instruction. Because the jury was using this bootstrapping method and deciding the conspiracy charge first, the erroneous instruction on the conspiracy charge likely had a significant impact on all the verdicts. Thus, the prosecution cannot sustain its burden of proving that the error in the instruction was harmless beyond a reasonable doubt. Therefore, reversal on all counts is required.

B. The Trial Court Erred in Failing to Instruct the Jury Pursuant to Caljic 8.40 That There Is No Malice Aforethought If a Defendant Acts with Imperfect Self-defense

Beck requested that the jury be instructed pursuant to CALJIC 8.40 that "[t]here is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." (RT 6259.) After argument, the trial court instructed the jury as to the sudden quarrel or heat of passion voluntary manslaughter but refused to give the imperfect self-defense part of the instruction. (RT 6267-6273, CT 1906, 2077-2079; 2982.)

Imperfect self-defense applies when the defendant actually believes he or she is facing an imminent and unlawful threat of death or great bodily injury, and actually believes the acts which cause the victim's death are necessary to avert the threat, but these beliefs are objectively unreasonable. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [56 Cal.Rptr.2d 142, 921 P.2d 1]; *In re Christian S.* (1994) 7 Cal.4th 768, 773-774, 783 [30 Cal.Rptr.2d 33, 872 P.2d 574]; *People v. Flannel* (1979) 25 Cal.3d 668 [160 Cal.Rptr. 84, 603 P.2d 1].) While not a complete defense to a murder charge, imperfect self-defense negates malice aforethought and thereby reduces a homicide, which would otherwise be murder, to voluntary manslaughter. (*People v. Humphrey*, *supra*, 13 Cal.4th at p. 1082; *People v. Flannel*, *supra*, 25 Cal.3d at p. 674.)

There was sufficient evidence at trial that Beck believed he was facing an imminent and unlawful threat of death or great bodily injury to support the giving of an imperfect self defense instruction.

A review of the record reveals ample evidence from both the prosecution and the defense of the ongoing hostilities between Raper and his followers and the defendants. Numerous witnesses testified

about several angry and sometimes violent encounters between members of the two groups. For example, Lisa Messinger testified about signing a petition circulated by Cruz and Starn to have Raper removed from the Camp because of his drug use. (RT 3553-3559.) Kevin Brusell testified about the day Raper's trailer and car were towed from the Camp when Raper refused to leave. (3585-3591.) David Jarmin also testified about the removal of Raper from the Camp. (RT 4069-4083.) James Smith, a friend of Raper's, testified about LaMarsh's violent confrontation with Raper, Smith and Fat Cat at the Camp. (RT 4036-4040.) LaMarsh corroborated this encounter. (RT 5618-5624, 5682-5691.) Evans, LaMarsh and Willey testified about the fight between LaMarsh and Raper at the Elm Street house that occurred when the defendants accompanied Evans on May 18th to help her move her sister's possessions. (RT 4185-4198, 4319-4321, 5624-5629, 5682-5691, 5967-5975.) Cruz, LaMarsh and Willey also testified about the defendants' confrontation with Colwell on May 18th when they suspected Colwell of spying. (RT 5054-5059, 5707-5718, 5971-5974.)

Cruz and LaMarsh testified about Cruz calling the police to inform them of the death threats Raper made against him and his family and reporting that Raper had broken his fence. Raper was arrested as a result. (RT 5033, 5624-5629.) LaMarsh testified about death threats Raper made to LaMarsh and Evans. (RT 5707-5719.) All four defendants also testified that they armed themselves before going to the Elm Street house on the night of the killings because they were concerned for their safety as a result of their history with Raper and the threats he had made against them. (RT 5059-5116, 5287-5296, 5635-5644, 5978-5986, 5691-5705.) Beck testified that he went to the aid of Vieira, who was being attacked Colwell. (RT 5296-5311). LaMarsh testified that he struck Raper in self defense after Raper threatened to kill him and attacked him with a knife. (RT 5644-5661, 5725-5726). A stipulation was entered that police found a knife on the floor near the chair where Raper's body was found. (RT 5591.) Willey testified that he and Ritchey were engaged in mutual combat in the street. (RT 5986-6002.)

Beck's defense theory was that there was no conspiracy to kill the Elm Street residents; rather, he accompanied the other defendants

to the house in response to Evans' request for protection. The killings resulted not from a premeditated plan to commit murder, but because fighting erupted between Colwell and Vieira, Ritchey and Willey, and LaMarsh and Raper. In light of the evidence of animosity and mutual fear that existed between the two groups prior to the homicides, it is not unreasonable that the defendants would arm themselves before accompanying Evans to the house; nor it is unreasonable that once the fighting started, the victims' deaths were the result of an actual belief among the defendants that the acts which caused the victims' deaths were necessary to avert their own deaths or physical injury.

Even if the trial judge did not believe the defendants' testimony, as long as there was evidence to support the instruction, if believed by the jury, it was error not to give the requested imperfect self-defense instruction. (See, *People v Burnham* (1986) 176 Cal.App.3d 1134, 1143 [222 Cal.Rptr. 630] [Even if evidence in support of a requested defense instruction is "incredible," the reviewing court must proceed on the hypothesis that it is entirely true.]; *People v Lemus* (1988) 203 Cal.App.3d 470, 478 [249 Cal.Rptr. 897] [Regardless of how incredible the defendant's self-defense testimony may have appeared,

it was error for the trial court to determine unilaterally that the jury not be allowed to weigh and assess the credibility of the defendant's testimony].)

Here, it is clear that the trial court unilaterally determined early on that it just was not going to give any kind of self-defense instruction. (RT 6257.) This was error.

The failure to instruct on imperfect self-defense violated Beck's due process and Sixth Amendment rights to have the jury instructed on all the elements of the offense. (See, *United States v. Gaudin*, *supra*, 515 U.S. at pp. 509-510; cf., *People v. Breverman* (1998) 19 Cal.4th 142, 163-164 [77 Cal.Rptr.2d 870, 960 P.2d 1094], Kennard, J. dissenting.) In addition, the error denied Beck his right to instructions on the defense theory of the case. (*Mathews v. United States* (1988) 485 U.S. 58 [108 S.Ct. 883, 99 L.Ed.2d 54]; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091.) Moreover, the failure to instruct relieved the prosecution of its burden of proving beyond a reasonable doubt that Beck did not kill in imperfect self-defense. (*Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508].) Finally, the instructional error was a due process denial of a

state created liberty interest. (*Hicks v. Oklahoma, supra,* 447 U.S. 343.

The prosecution cannot sustain its burden of demonstrating that the error was harmless. Here, the facts of the case warranted the instruction which would have negated the element of malice even if the jury believed that Beck had an intent to kill.

C. The Trial Court Erred in Denying Beck's Request for Special Instructions on the Definition of Sudden Quarrel and Heat of Passion, Thus Depriving Beck of His Sixth, Eighth and Fourteenth Amendment Rights to Present a Defense and to Reliable Guilt and Penalty Verdicts

The trial court instructed the jury that there would be no malice aforethought if a killing is committed upon a sudden quarrel or in the heat of passion. Beck requested the following special instructions regarding the definition of sudden quarrel and heat of passion sufficient to reduce the murder to a manslaughter.

> The right of self-defense is available to a person engaged in a sudden quarrel. The mere fact that the parties are engaged in a sudden quarrel, which may be a mere altercation of words, cannot deprive one of the right to defend himself against real or apparent danger.

(CT 2080.)

> The passion necessary to constitute heat of passion need not mean rage or anger but may be any violent, intense, overwrought or enthusiastic emotion which causes a person to act rashly and without deliberation and reflection.

(CT 2101.)

> Any type of provocation is sufficient if it is of such character and degree as naturally would excite and arouse such heat of passion, and verbal provocation may be sufficient.

(CT 2102.)

> A defendant may act in the heat of passion at the time of the killing as a result of a series of events which occur over a considerable period of time. Where the provocation extends for a long period of time, you must take such period of time into account in determining whether there was a sufficient cooling period for the passion to subside. The burden is on the prosecution to establish beyond a reasonable doubt that the defendant did not act in the hear (sic) of passion.

(CT 2103.)

The trial court denied these requested instructions solely on the ground that they were covered in other instructions already given. (CT 2101-2103.) The trial court erred because the definitions set out in the requested instructions are correct statements of law, were not covered in the other instructions provided to the jury, and were necessary for

the jury's consideration of Beck's manslaughter defense. As discussed below, the given instructions narrowly defined the scope of both the heat of passion and provocation sufficient to reduce murder to manslaughter, thereby limiting consideration of Beck's defense in violation of his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

1. Requested Instruction Number FFF was Necessary to Inform the Jury that the Period of Provocation Might Occur over a "Considerable Period of Time"

> We agree with defendant's initial point that provocation sufficient to reduce murder to manslaughter need not occur instantaneously, but may occur over a period of time. *People v. Berry* (1976) 18 Cal.3d 509 [134 Cal.Rptr. 415, 556 P.2d 777], is illustrative. In Berry, the defendant's wife Rachel traveled alone to Israel three days after their wedding. When she returned, she announced that she loved another man, they had been sexually intimate, and she now wanted a divorce. For a period of 13 days, "Rachel continually provoked defendant with sexual taunts and incitements, alternating acceptance and rejection of him." (*Id.* at p. 514.) The defendant killed Rachel.
>
> Citing *People v. Borchers* (1958) 50 Cal.2d 321 [325 P.2d 97], we concluded that the "two-week period of provocatory conduct" by the defendant's wife was sufficient to justify an instruction on voluntary manslaughter based on heat of passion. (*Berry*, *supra*, 18 Cal.3d, at p. 515; see also *Borchers*, *supra*, at p. 329 [the victim's "long continued provocatory conduct"];

> *People v. Bridgehouse* (1956) 47 Cal.2d 406 [303 P.2d 1018] [same].) The key element is not the duration of the source of provocation but "'whether or not defendant's reason was, at the time of his act, so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [248 Cal.Rptr. 510, 755 P.2d 960], quoting *People v. Logan* (1917) 175 Cal. 45, 49 [164 P. 1121], italics omitted.) Indeed, we note that a jury instruction indistinguishable from defendant's proposed instruction was approved, albeit in dictum, by the Fourth District Court of Appeal. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 256-257 & fn. 7 [240 Cal.Rptr. 516].)

People v. Wharton (1991) 53 Cal.3d 522, 569-570 [280 Cal.Rptr. 631, 809 P.2d 290].)

Here, trial counsel relied on both *Borchers* and *Thompkins* to support the giving of the instruction regarding the duration of the provocation. None of the instructions given informs the jury that the period of provocation might occur over "a considerable period of time" and that this fact must be taken into account in the jury's deliberations. As such, the trial court committed error.

2. Requested Instruction Number DDD was Necessary to Inform the Jury that Heat of Passion is Not Limited Just to Rage or Anger

Additionally, the trial court rejected the requested instruction which defined the nature of heat of passion to encompass and require more than just rage or anger to reduce the murder charge. (See, *People v. Breverman*, *supra*, 19 Cal.4th at pp. 163-164 [heat of passion does not require anger or rage. It can be "any violent, intense, high-wrought or enthusiastic emotion"]; *People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1] and *People v. Lee* (199) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001].)

Indeed, the new CalCrim instructions contain almost the exact language requested by Beck. "Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act w/out due deliberation and reflection." (CalCrim 570.)

Rejecting this argument, the trial court only provided the jury with CALJIC 8.44 which stated:

> Neither fear, revenge, nor the emotion induced by and accompanying or following an intent to commit a felony, nor any or all of these emotional states, in and of

> themselves, constitute the heat of passion referred to in the law of manslaughter. Any or all of such emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness. Also any one or more of them may exist in the mind of a person who acts deliberately and from choice, whether such choice is reasonable or unreasonable.

(CT 1905.)

This instruction, which does little to define heat of passion, fails to properly inform the jury of the full nature and scope of heat of passion, thereby limiting the jury's ability to consider fully the lesser crime of voluntary manslaughter.

3. Requested Instruction Number EEE was Necessary to Inform the Jury that Verbal Provocation May Be Sufficient to Reduce Murder to Manslaughter

Finally, the trial court rejected the instruction which informed the jury that the provocation sufficient to reduce the crime alleged from murder to manslaughter need only be verbal provocation. (CT 2103.) The court's rejection was based again on the notion that this element was covered in the other instructions. However, the jury was only informed that "[t]o reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character and

degree as naturally would excite and arouse such passion, and the assailant must act under the influence of that sudden quarrel or heat of passion." (CT 1903.)

Nowhere was the jury told that the provocation need only be verbal in order to reduce the seriousness of the crime. This is clear error.

Had the jury been given the correct definition of the provocation required to reduce the homicide to manslaughter there is a reasonable likelihood that a different verdict would have resulted inasmuch as there was sufficient evidence presented to support the manslaughter verdict. First, as explained above, there was ample evidence of provocation over a considerable period of time. Several witnesses testified about Raper's drug use and disruptive behavior while residing at the Camp. (RT 3553-3559, 3585-3591, 4069-4083, 4036-4040, 5618-5624, 5682-5691.) Evans and the defendants testified that Raper continually provoked the defendants when they crossed paths. (RT 4185-4198, 4319-4321, 5624-5629, 5682-5691, 5967-5975, 5033-5039, 5707-5718, 5971-5974.) A police officer testified that he responded to Cruz's report to police about Raper's threats and destructive

behavior. (RT 2974-4981.) Jarmin, Smith and LaMarsh testified about LaMarsh's belief that Raper stole LaMarsh's gun. (RT 4036-4044, 4083-4086, 5618-5624, 5682-5691.)

There was also evidence that the defendants took Raper's death threats seriously and took measures to protect themselves against his violence. (RT 5065-5067.) Cruz testified that he and the other defendants took turns patrolling the Camp at night. (RT 5065.) And all the defendants testified that they armed themselves to accompany Evans because they were afraid of Raper and his followers. (RT 5059-5116, 5287-5296, 5635-5644, 5978-5986, 5691-5705.)

Without the proper definition of provocation, the jury was effectively prevented from considering Beck's manslaughter defense. By requiring that the provocation immediately precede the homicidal act, and by limiting provocation to physical provocation by the victim, the trial court prevented the jury from considering Raper's death threats and the ongoing conflict between the two groups in a light other than that urged by the prosecution – that because of the conflict with Raper, the defendants conspired to seek revenge on Raper's group by killing them.

The denial of Beck's requested instructions on the proper scope of heat of passion and provocation, under the circumstances of this case, effectively deprived Beck of jury consideration of his defense. This denial violated Beck's right to adequate instructions on the defense theory of the case, thereby violating his due process right to present a full defense under the Sixth and Fourteenth Amendment to the United States Constitution.

"As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Matthews v. United States*, *supra*, 485 U.S. at p. 63.) The failure to instruct on a defense deprives a defendant of due process as guaranteed by the Fourteenth Amendment. (See, e.g. *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 875-76 [habeas relief granted where erroneous self-defense instruction deprived the defendant of a meaningful opportunity to present a defense], cited with approval in *Bradley v. Duncan*, *supra*, 315 F.3d at p. 1099; *Tyson v. Trigg* (7th Cir. 1995) 50 F.3d 436, 448 [the right to present a defense "would be

empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.")

This error was prejudicial as the prosecution cannot show that the error was harmless beyond a reasonable doubt. A review of the record reveals that the evidence enumerated by the prosecution in closing argument to prove Beck's premeditated intent to commit murder also could have supported Beck's defense of manslaughter had the jury been properly instructed.

For example, Rosemary McLaughlin's testimony that Cruz called her on the night of the killings saying he "and the guys were going to go even a score, get in a fight" (RT 5547) is evidence that Beck only intended to fight but that things got out of hand. Additionally, evidence that the defendants armed themselves before going to the Elm Street house can be explained by Beck's fear of Raper and his gang and Beck's desire for his own protection. Finally, Beck's alleged post-killing statement to McLaughlin that they "had to do them" (RT 5553-5554) also supports a manslaughter defense in that it conveys that Beck viewed the homicides as something that was

not planned or premeditated but became necessary as the fight progressed.[58]

Because there was evidence of ongoing provocation and verbal threats by Raper, Beck was constitutionally entitled to have the jury consider his manslaughter defense. The trial court's improperly narrow definition of provocation denied Beck his Sixth and Fourteenth Amendment rights to present a defense. A reversal of the guilt verdict is required.

D. The Trial Court Erred by Mis-instructing the Jury in the Middle of Deliberations Regarding the Order of Considering the Charges and the Jury's Ability to Consider Lesser Charges Before Acquitting on the Greater Offenses

After four days of deliberation, the jury presented the following written question to the trial judge: "CALJIC 17.10. Please clarify must be found unanimously not guilty of each applicable count before considering lesser charge." (RT 6827.)

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[58]For example, statements such as "We got them all," "We nailed them," or "We took them out" more tellingly conveys a sense of premeditation.

Instead of reading CALJIC 8.75, the trial court created his own response which was not objected to by counsel:

> In response to your question, "please clarify must be found unanimously not guilty of each applicable count before considering lesser charge," let me tell you there is a very lengthy CALJIC instruction dealing with lesser included offenses which has not been read to you. If you want that instruction read to you, I will read it to you tomorrow morning.
>
> However, in the meantime, I will attempt to respond to your specific question with the following instruction: For example, before you can find a defendant guilty of second degree murder as to a particular count, all 12 of you must find him not guilty of first degree murder as to that count.
>
> Before you can find him guilty of voluntary manslaughter as to that count, all 12 of you must find him not guilty of both first and second degree murder as to that count. Before you can find him guilty of one of the lesser non-homicide crimes, as to that count, all twelve of you must find him not guilty of first and second degree murder and voluntary manslaughter as to that count. Okay?
>
> If you will go back on in to the jury room and continue your deliberations, please.

(RT 6829-30.)

The trial court may not suggest a deliberation procedure that is specifically prohibited by well-established principles set forth by controlling case law. This Court has held that the trial judge should not tell the jury in what order to consider the issues or reach tentative

decisions. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329, 333 [250 Cal.Rptr. 244, 758 P.2d 572]; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 537 [71 Cal.Rptr.2d 680, 950 P.2d 1035].) Thus, a trial court cannot tell the jury it must first unanimously acquit the defendant of the greater offense before deliberating on or even considering a lesser offense. (*Kurtzman*, *supra*, 46 Cal.3d at pp. 328, 335.)

A trial court may "restrict[ ] a jury from returning a verdict on a lesser included offense before acquitting on a greater offense" but may not "preclude [it] from considering lesser offenses during its deliberations." This Court has rejected a "strict acquittal-first rule under which the jury must acquit of the greater offense before even considering lesser included offenses." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1073 [25 Cal.Rptr.2d 867, 864 P.2d 40].)

During the initial jury instructions, Beck's jury was properly instructed regarding their discretion to choose the order of evaluation of all crimes and lesser charges under CALJIC 17.10.[59] However, at

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[59]"[Y]ou are to determine whether the defendant is guilty or not guilty of the crime charged and the degree thereof or of any lesser crime as specified in this instruction. *In doing so, you have discretion to choose the order in which you evaluate each crime and consider*

the time the jury raised the question, it was obvious that they were confused and concerned about the issue of the order of considering the charges and lesser offenses and their ability to even consider lessers before acquitting on the greater offenses. Indeed, their question evidences an erroneous belief that they must "unanimously [find the defendant] not guilty of each applicable count before considering [the] lesser." (RT 6827.) Instead of repeating this instruction or simply responding "no, you are permitted to consider all offenses before reaching any verdict," the trial court set out a path for the jury to follow, which path is contrary to law.

The CALJIC instruction would appear to tell the jurors that they could consider the lessers before finding any defendant guilty of the charged offense. However, the jury's question indicates they did not understand this. The jurors were confused and thus asked the Court

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the evidence pertaining to it. You may find it productive to consider and reach tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the def not guilty of the crime charged. (CT 1928, emphasis added.)

specifically whether they must unanimously find defendants not guilty of each applicable count before considering any lesser charge.

By repeating only that portion of CALJIC 17.10 which instructs the jurors that they must acquit on the greater offenses before convicting of a lesser charge, and without repeating that portion of the instruction which assures the jurors that they can consider lesser charges before acquitting on the greater offenses, the judge reinforced the jurors' erroneous suggestion that they must unanimously find the defendants not guilty of each applicable count before considering any lesser charge. Although the trial court did not specifically state so, any reasonable person would so interpret the court's response. The court's failure to simply answer the jurors' question with the correct answer, "no," in combination with its emphasis that the jurors could not convict of any lessers without first acquitting of the greater charges, would leave any reasonable person with a misunderstanding.

This mis-instruction is particularly harmful as it came in the midst of jury deliberations and was a specific concern of the jury. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States*

(1946) 326 U.S. 607, 612-613 [66 S.Ct. 402, 90 L.Ed. 350].) "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (*Id.* at 612; see also *People v. Thompkins* (1987) 195 Cal.App.3d 244, 252-253 [240 Cal.Rptr. 516] [And if jury instructions are important in general, there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations."].)

Even though trial counsel acquiesced in the reading of this instruction, there was no invited error. The trial court has an obligation to reinstruct the jury if it is apparent the jury is confused on a point of law (*People v. Valenzuela* (1977) 76 Cal.App.3d 218, 221 [142 Cal.Rptr. 655]), as well as an obligation to answer the jury's questions. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 [279 Cal.Rptr. 276, 806 P.2d 1311]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212 [275 Cal.Rptr. 729, 800 P.2d 1159] [When a deliberating jury asks for additional guidance from the trial court, it is the court's "mandatory duty" to clear up an instructional confusion expressed by the jury]; see also *Bollenbach v. United States*, *supra,* 236 U.S. at pp. 612-13.) The instruction will be held to be error on appeal, unless

defense counsel has expressed a deliberate tactical purpose in requesting the instruction. (See, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 229 [207 Cal.Rptr. 549, 689 P.2d 121]; *People v. Valdez* (2004) 32 Cal.4th 73, 115 [8 Cal.Rptr.3d 271, 82 P.3d 296].)

> "In the absence of a clear tactical purpose, the courts and commentators eschew a finding of the 'invited error' that excuses a trial judge from rendering full and correct instructions on material questions of law. Witkin has stated that, when the trial court has the duty to instruct, sua sponte, on the rules of law necessarily involved in a case, erroneous instructions are reviewable 'though invited by the defendant's own neglect or mistake.' (Witkin, Cal. Criminal Procedure, §§ 746, pp. 719-720.) As the court forcefully stated in *People v. Keelin* (1955) 136 Cal.App.2d 860, 874 [289 P.2d 520], 'Nevertheless, error is nonetheless error and is no less operative on deliberations of the jury because the erroneous instruction may have been requested by counsel for the defense. After all, it is the life and liberty of the defendant in a case such as this that is at hazard in the trial and there is a continuing duty upon the part of the trial court to see to it that the jury are properly instructed upon all matters pertinent to their decision of the cause.' Accordingly, if defense counsel suggests or accedes to the erroneous instruction *because of neglect or mistake* we do not find 'invited error;' *only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause.*"" (*People v. Graham* (1969) 71 Cal.2d 303, 319 [78 Cal.Rptr. 217, 455 P.2d 153], italics added. See also *People v. Wickersham* (1982) 32 Cal.3d 307, 330 [185 Cal.Rptr. 436, 650 P.2d 311]; and *People v. Tapia*

(1994) 25 Cal.App.4th 984, 1030 [30 Cal.Rptr.2d 851], citing *People v. Graham, supra.*)

(*People v. Green* (1995) 34 Cal.App.4th 165, 177 [40 Cal.Rptr. 2d 239].)

While this Court has held that this error implicates state law issues alone (see, e.g. *Berryman, supra*, 6 Cal.4th at p. 1077, n. 7), this error constitutes a violation of Beck's federal constitution on three bases. First, in this capital case the error deprived Beck of his federal constitutional right to jury determination of lesser included offenses in a capital case. See, *Beck v. Alabama, supra*, 447 U.S. 625. Secondly, the error improperly deprived Beck of his Sixth and Fourteenth Amendment right to have a jury determine all charges against him. Thirdly, the error deprived Beck of his due process rights to a fair trial. The United States Supreme Court has written, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358,

364 [90 S.Ct. 1068, 25 L.Ed.2d 368]) Jury instructions which relieve the government of this burden violate a defendant's due process rights. (See *Francis v. Franklin* (1985) 471 U.S. 307 [105 S.Ct.1965, 85 L.Ed.2d 344]; *Sandstrom v. Montana* (1979) 442 U.S. 510, [99 S.Ct. 2450, 61 L.Ed.2d 39].)

Here, the error mandates reversal under either standard. First, the jury had deliberated for a number of days before asking for guidance on this instruction, thus evidencing their struggles. Secondly, the jury apparently reached at least an initial verdict on the charges against appellant a day after receiving this instruction. Finally, the cumulative mid-deliberation instructional error must be considered as well. Thus, the very day that the jury was mis-instructed on the law of conspiracy and the substantive murder charges, the jury reached its initial verdicts against appellant. (CT 2272-2278.)

For these reasons, this instructional error requires reversal of Beck's convictions on all counts.

E. The Trial Court Denied Beck His Constitutional Right to Present a Defense by Instructing the Jury That it Could Only Consider Certain Defenses as to Beck

The trial court predetermined wrongly that only LaMarsh would be entitled to present a self-defense case to the jury. This predetermination by the court of what is ultimately a question of fact for the jury when considered along with the denial of some lesser included offense instructions and the specificity with which the court instructed the jury requires reversal. By specifying in detail the nature of these charges and defenses, the trial court improperly invaded the province of jury in violation of the Sixth Amendment, denied Beck the right to present a defense in violation of the Sixth and Fourteenth Amendment, denied Beck his due process right to a fair trial in violation of the Fourteenth Amendment and denied Beck his Eighth Amendment right to a reliable guilt and penalty verdict in this capital case.

The trial court erred in directing the jury that it could only consider lesser charges against some of the defendants and that it

could only consider certain defenses for each defendant.[60] By specifying in detail the nature of these charges and defenses, the trial court improperly invaded the province of jury in violation of the Sixth Amendment, denied Beck the right to present a defense in violation of the Sixth and Fourteenth Amendment, and denied Beck his Eighth Amendment right to a reliable guilt and penalty verdict in this capital case.

Beck requested self-defense and lesser included offense instructions to the murder charges and requested an instruction on a conspiracy to commit an assault with a deadly weapon as a lesser charge to the conspiracy to commit murder charge. (CT 2077-78, 2082; RT 6294.) The court denied these requests (RT 6259, 6294); however, the court instructed the jury that it could only consider self

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[60]The trial court did give some lesser included offense instructions for each defendant as to some murder charges and the conspiracy to commit murder. On the murder charges, the trial court instructed on second degree murder and voluntary manslaughter as to each defendant. (CT 1928.) On the conspiracy charge, the trial court instructed on the crime of conspiracy to commit manslaughter (RT 6304; CT 1928); however, the court's limitation of these instructions and refusal to give instructions on other offenses was erroneous.

defense for LaMarsh and specifically limited that defense to the murder of Raper.[61] (CT 1940.)

Rejecting the argument that Beck was entitled to instructions on lesser charges to each murder count, the trial court instructed the jury as follows:

> As to the defendant Gerald Cruz, the crimes of assault with a deadly weapon and assault by means likely to do great bodily injury are lesser to that of murder of Franklin Raper as charged in Count II.
>
> As to the defendant James David Beck, the crime of assault with a deadly weapon is lesser to that of murder of Dennis Colwell as charged in Count III.
>
> As to the defendant Jason LaMarsh, the crimes of assault with a deadly weapon and assault by means of force likely to do great bodily injury are lesse to that of murder of Franklin Raper as charged in Count II.
>
> As to the defendant Ronald Willey, the crime of battery is a lesser to that of murder of Richard Ritchey as charged in Count I and the crime of accessory to a felony is lesser to all charges against him.

(CT 1928; RT 6304.)

By selecting each defendant and directing the jury to consider certain defenses and lesser charges only to particular defendants, the

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[61]"The following instructions on self-defense apply only to the defendant Jason LaMarsh as to Count II, murder of Franklin Raper." (CT 1940.)

trial court erred and invaded the province of the jury. Even if the jury accepted the testimony of Beck that he did not intend to kill anyone and only tried to break up the fight between Raper's group and Beck's friends, the jury was unable to consider this defense because the trial court refused to instruct on these defenses and lesser charges.

The court's limitation of the self-defense instructions to specific counts and defendants denied Beck his right to adequate instructions on the elements of the charged offense. These denied instructions could have negated the malice element of the murder charges, but the jury was instructed that these legal concepts were not applicable to Beck's defense to the murder of anyone but Colwell. (See, *Mullaney v. Wilbur*, *supra*, 421 U.S. 684.) Furthermore, the denial of these instructions prevented the jury from considering the defense presented at trial. (See, *Mathews v. United States*, *supra*.)

The prejudice resulting from this error is great. The defendants each testified and gave varying accounts of the incident, although each denied there was any plan to kill Raper and his friends. Because of this testimony and that of the prosecution's witnesses, no can say as a matter of law which defendant was most culpable here. No

independent eyewitness testified about which defendant committed what acts inside the house; Evans did not testify about the acts within the house; and the only independent eyewitness account of the Ritchey killing was contradicted by Willey's testimony that Beck killed Ritchey.

The error is compounded because the trial court gave extensive instructions on vicarious liability based upon membership in the conspiracy and on aiding and abetting a killing. By holding that LaMarsh and Willey were entitled to some theory of self-defense and some lesser charges, the trial court conveyed to the jury that these defendants were less culpable and that Beck was more responsible for the killings. Indeed, following the trial court's lead, the jury was eventually unable to reach verdicts as to LaMarsh and Willey. Thus, reversal is required.

F. The Denial of Self-defense Instructions Denied Beck His Right to Present a Defense

Beck requested, along with the other defendants, that the jury be instructed on self-defense and the applicable legal theories related to self-defense. (CT 2077-78, 2082.) Although Beck's defense

evidence, in combination with the prosecution's evidence, supported such instructions, the trial court refused to provide any self-defense instructions for Beck, looking only to Beck's testimony and his denial that he committed any violent act against the people who were killed.

> Your clients have defended that they didn't do anything so far as the murders is (sic) concerned. That's their defense. It's not – the jury's not going to have the perogative of, "Well, we don't believe your clients so maybe it was self-defense." It's either they did it or they didn't do it.

(RT 6257.)

Later, during the continued instructional conference, the trial court further commented on the denial of the self-defense instructions:

> However, the defendants' denial of entering into any conspiracy and denial of committing any murders deprives them of – excuse me, of any killings, deprives them of asserting any type of self-defense claim whatsoever, whether it be actual self-defense or of the unreasonable belief of the need to act in self-defense. If you don't kill anybody, you can't say that you did it in self-defense or the unreasonable belief that you needed to act in self-defense.

(RT 6280-6281.)

In *People v. Keel* (1928) 91 Cal.App. 599, 604-605 [267 P. 161], the Court of Appeal upheld the right of a defendant to seek inconsistent instructions regarding self-defense.

> The denial by defendant of the act [] did not deprive his counsel of the right to demand that instructions on the law of self-defense be given to the jury if the justification therefor appeared elsewhere in the evidence. This is conceded by the attorney-general, who, in the proper spirit, gives us the following quotation from 13 Ruling Case Law, 813: "Whether it is the duty of the court in a prosecution for homicide to instruct the jury on the question of self-defense when defendant denies the killing, seems to depend entirely upon the nature of the evidence introduced at the trial. If the defendant denies the killing and there is no evidence adduced by either party which tends to show that the killing might have been in self-defense, although other evidence shows quite conclusively that the defendant committed the crime, it is not the duty of the court to instruct as to self-defense; but if the evidence tends to raise the issue of self-defense although the defendant denies the killing, it seems that an instruction based on the theory of self-defense is proper and should be given. His denial of the act does not necessarily warrant the trial court in refusing to give an instruction based on the theory of self-defense." In *People v. Degnen*, 70 Cal. App. 567, 591 [234 P. 129, 139], the court said: "And we can conceive of no reason why such evidence is inadmissible in a case in which the defendant contends, as appellant here contended at the trial, that he committed no lascivious assault whatever upon the prosecutrix. The two principal elements of the rape are, first, the commission of the act, and, second, the lack of consent of the victim to its commission. The burden is upon the People to prove both these elements,

> of course, and it is inconceivable that the defendant may not offer proof to rebut the evidence introduced by the prosecution in support of each of the two branches of the case. In civil actions it is the well-established rule, expressed, in fact, in the statute (*Code Civ. Proc., sec. 441*), that a defendant 'may set forth by answer as many defenses . . . as he may have'; and it is well settled that the terms of the section permit the allegation of inconsistent defenses (*Calexico Lumber Co. v. Emerson*, 54 Cal. App. 239 [201 P. 612])

Here, counsel requested the instructions and the court should have instructed the jury on every material question upon which there was evidence substantial enough to merit consideration.[62] (*People v. Flannel*, *supra*, 25 Cal. 3d at pp. 684-685.) Even if the evidence may not be of a character to inspire belief, this fact does not justify refusal of a requested instruction; the question of the believability of the evidence is a question exclusively for the jury. (*Id.* at p. 684; *People v. Lemus*, *supra*, 203 Cal.App.3d at pp.470.) As long as the evidence allows reasonable jurors to conclude that the particular facts underlying the instruction existed, the instruction must be given.

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[62]This case does not involve the issue of the trial court's *sua sponte* responsibility and the stricter rules applicable in that situation do not apply here. (See, *People v. Sedeno* (1974) 10 Cal. 3d 703 [112 Cal. Rptr. 1, 518 P.2d 913].)

(*People v. Wickersham* (1982) 32 Cal. 3d 307, 324 [185 Cal. Rptr. 436, 650 P.2d 311].)

The rejection of the self-defense instructions denied Beck his right to present a defense in violation of the Sixth and Fourteenth Amendments (*Bradley v. Duncan*, *supra*), deprived Beck of a fair trial lin violation of the Due Process Clause of the federal constitution and denied Beck his right under the Eighth Amendment to a reliable guilt and penalty verdict.

Although Beck denied participation in any of the violent acts causing the victims' deaths, the jury could have found that he committed such acts based on other evidence presented at trial. For example, LaMarsh testified that Beck stabbed Colwell (RT 5657) and Willey testified that Beck slit Ritchey's throat (RT 5996-5999). Beck, as well as other witnesses, however, provided testimony tending to show that such acts (should the jury find Beck committed) might have been in self-defense. As pointed out in Argument XII(B), there was ample evidence that Raper was a violent, dangerous individual. The evidence demonstrated Raper's history of hostilities toward and violent confrontations with Beck and his friends. Thus, Beck and the

others could reasonably fear for their safety in any confrontation with Raper and his buddies.

Beck testified that there was no plan to kill the people in the house. He went over to the house to assist Evans in getting her belongings from the house and knowing about the prior behaviors of Raper, he was concerned for her safety. He entered the house after he heard screams from a woman and while inside, he saw Colwell on top of Vieira. Beck testified that he then hit Colwell several times and threw him against the kitchen cupboards to assist Vieira. (RT 5302-5308.)

Cruz testified that he went to the Elm Street house to help Evans obtain her wedding dress and that he asked the others to go in case she needed protection from Raper. (RT 5061-5062.) Evans and LaMarsh went into the house while the others remained outside; Cruz entered the house only after hearing someone say that "He's gone crazy." (RT 5090-5091.) While inside the house, he saw Colwell on top of Vieira and Beck then grab Colwell off Vieira. (RT 5100-01.)

Based upon this evidence, there was sufficient evidence to provide self-defense instructions, despite Beck's denial that he

inflicted any injuries to any of the alleged victims. Had such instructions been provided, the jury might well have found that Beck reasonably acted in self-defense, especially given the abundant evidence of Raper's violent history.[63]

The error requires reversal because the prosecution cannot prove beyond a reasonable doubt that the jury would have rejected the self-defense theory and convicted Beck had the proper instructions been given.

G. The Trial Court Erred in Instructing the Jury on Personal Use of a Dangerous Weapon Sentencing Enhancements in Counts II and IV; the Jury Finding of "True" on These Counts Is Not Supported by the Evidence; and the Trial Court Erred in Imposing Sentencing Enhancements on These Counts

The jury found Beck guilty of committing four murders (Counts I to IV). Before turning the case over to the jury, the trial court

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[63] Beck had requested an instruction about the victims' reputation for violence which was denied along with the other self-defense related instructions. (CT 2079.) However, it is well-settled that a person can have a heightened sense of fear if he is aware of the victim's propensity for violence and the jury should be so instructed. (See, e.g. *People v. Bush* (1978) 84 Cal.App.3d 294, 302-304 [148 Cal.Rptr. 430].

instructed on language of Penal Code section 12022(b), authorizing the jury to find whether or not Beck personally used a dangerous weapon in committing the murders. (CT 1955, RT 6515.) In rendering its verdict that Beck was guilty of murdering Raper (Count I) and Paris (Count IV), the jury found "true" that Beck "did personally use a deadly and dangerous weapon, to wit, baseball bats, knives, and baton, in violation of Section 12022(b) of the California Penal Code." (CT 2296, 2298.) Thereafter, based on the jury's verdict, the trial court enhanced Beck's sentence pursuant to section 12022(b) on these counts.[64] (RT 2650.) Because the jury finding of personal use was not supported by the evidence, the trial court erred in imposing sentencing enhancements on these counts.

Penal Code section 12022(b) states, "Any person who *personally uses* a deadly or dangerous weapon in the commission or attempted commission of a felony shall, upon conviction . . . , in addition and consecutive to the punishment prescribed for the felony

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[64]The trial court imposed an additional year on Count I pursuant to Penal Code section 12022(b), and stayed the enhancements on the remaining counts. (CT 2650.)

. . . for which he his convicted, be punished by an additional one year . . . ."

In *People v. Cole* (1982) 31 Cal.3d 568, 576 [183 Cal.Rptr. 350, 645 P.2d 1182], the Supreme Court determined that in construing whether sentence enhancements can apply vicariously, the Legislature's inclusion of the word "personally" is limited in its applicability to the defendant who performs the act directly inflicting the injury. (*Cole, supra*, 31 Cal.3d, at pp. 571-572.) In *Cole*, the defendant and others participated in the burglary and robbery of the owner of a gun shop. When the store owner was slow to react to an order to turn around, Cole ordered a co-defendant to kill the store owner. In response to the command, the co-defendant swung a rifle at the store owner, hitting him three times in the arm and once in the head, causing injuries that later required medical attention. Cole personally did not strike the store owner, but during the attack he pointed an unloaded rifle at the owner and blocked his escape. Cole was convicted of robbery, burglary, and grand theft, with sentence enhancements for the use of a firearm (*Pen. Code*, § 12022.5) and the

infliction of great bodily injury (*Pen. Code*, § 12022.7)[65] during the commission of the felonies.

With respect to the sentence enhancement for the infliction of great bodily injury, it was established that Cole blocked the victim's escape and directed his co-perpetrator to attack the victim, but did not himself physically strike the victim. The Supreme Court ordered the sentence enhancement pursuant to Penal Code section 12022.7 stricken, and remanded the case with instructions to re-sentence Cole in accordance with its decision. The court held that the statutory sentence enhancement for one who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony is applicable only to those who directly perform the act that causes the physical injury to the victim. It is not applicable to those who may have aided, abetted or directed the actor actually inflicting the injury.

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[65]Penal Code section 12022.7 allowed for a three-year additional term for "[any] person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony. . . ."

The ruling in *Cole* is in accord with the clear meaning of a statute's language specifically limiting its application to a defendant who personally engaged in the proscribed conduct. (See *People v. Gutierrez* (1996) 46 Cal.App.4th 804, 812-814 [54 Cal.Rptr.2d 149].) Because the statutory language of Penal Code section 12022(b) strictly limits its application to acts where Beck himself used a dangerous weapon, his sentence cannot be vicariously enhanced by a co-defendant's use of a dangerous weapon.

Construing the evidence in the light most favorable to the prosecution, there is insufficient evidence to support the giving of the dangerous weapon enhancement instruction on Counts I and IV. It inexorably follows that there is insufficient evidence to support the jury finding of this enhancement on these counts.

There was no testimony or evidence introduced at trial from any witness that Beck personally used a dangerous weapon against either Paris or Raper. All the evidence points to the contrary. Forensic evidence demonstrated that Raper died from crushing blows to his skull. (RT 3087-3099.) The state's key witness, Michelle Evans, testified that Cruz possessed the police baton and LaMarsh possessed

the baseball bat (RT 4248), the two weapons deemed responsible for inflicting Raper's injuries (RT 4218). According to Evans, Beck possessed only a knife. (RT 4218, 4247.) The state's evidence and testimony from co-defendants LaMarsh and Willey indicate that this was the dangerous weapon Beck personally used, and that he used it against Colwell and possibly Ritchey, not Raper or Paris. (RT 5656-5660.) LaMarsh testified that Cruz attacked Raper, and Vieira attacked Paris. (*Ibid.*) The conclusion that there was no evidence to support the jury finding that Beck personally used a dangerous weapon is supported by the trial court's statement in denying Beck's 190.4 motion to reduce the sentence. There, the court stated that the evidence "establishes that Mr. Beck personally murdered *at least one and perhaps two* of the victims." (RT 8413. [Emphasis added].)

Because no evidence was presented that Beck personally used a dangerous weapon against either Raper or Paris, the jury's finding of personal use under section 12022(b) on these counts was improper, and the trial court erred in enhancing Beck's sentence.

The failure to instruct the jury on all elements of a statute imposing a sentence enhancement is prejudicial "only where it is

reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error." (*People v. Wims* (1995) 10 Cal.4th 293, 298 [41 Cal.Rptr.2d 241, 895 P.2d 77].) On review, the appellate court examines the entire record, including the facts, instructions, arguments of counsel, communications from the jury during deliberations, and the entire verdict. (*Id.* at p. 315.) Because it is reasonably probable that a result more favorable to Beck would have been reached had the jury been instructed that vicarious liability is not a basis for a "true" finding under Penal Code section 12022(b), Beck's sentence enhancements on Counts I and IV must be vacated.

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XIII.

THE TRIAL COURT ERRED IN PERMITTING IMPROPER AND HIGHLY PREJUDICIAL REBUTTAL EVIDENCE IN THE PENALTY PHASE TRIAL THEREBY DENYING APPELLANT HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

As the last piece of evidence in the penalty phase trial, the prosecution over objection was permitted to play an audio tape in which appellant and Cruz can be heard screaming at an infant. (RT 8281.) Jennifer Starn testified that Cruz and Beck would regularly scream at her baby as the girl was dozing off to awaken her and have her scream. (RT 8279.)[66]

This tape and the incident was not listed in the Notice of Aggravation which had been filed in the case. It was first provided to the prosecution before the Cruz penalty phase but was not used at that trial. Trial counsel argued that the tape was not evidence in aggravation and was more prejudicial than probative.[67] (RT 8247-8248, 8267.)

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[66]During the offer of proof, it was alleged that this screaming was done to strengthen the baby's lungs. (RT 8246.)

[67]Apparently, trial counsel had been offered an opportunity to listen to the tape before the Beck penalty phase began but had not listened to the tape until the prosecution sought to introduce it. Trial

The trial court admitted this evidence on the basis that it was rebuttal evidence for the testimony by defense witnesses that appellant *before* his contact with Cruz had been a different person and was good with children. (RT 8268.)

Starn had testified as a prosecution witness in its penalty phase case-in-chief. In her testimony, she had talked at length on direct and cross examination about the relationship between Cruz, Beck and her young daughter. (RT 7754, 7766.) The prosecutor asked Starn to she had ever "seen anything done to your daughter Alexandra by Dave Beck that you considered to be out of line?" (RT 7766.) She responded that "I don't remember him ever actually abusing Alexandra, okay? He never actually hurt her; but like if Gerald wanted her, you know, he'd say, 'Hey, Dave, get me Alexandra,' and Dave would pick her up Alexandra and ... take her to him." (RT 7766.)

Starn described to the jury how Cruz punished the baby by putting her in a closet and informed the jury about the use of a wooden device, referred to as the "rack," in which the infant was placed to

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counsel first heard the tape in open court outside the presence of the jury. (RT 8269-70.)

strengthen her legs. Starn saw Dave put the baby in the device more than once. (RT 7766.)

On cross-examination, Starn testified in more detail about Cruz's bizarre beliefs about child rearing, including the taking of cold showers to clear the child's aura, blowing marijuana smoke in her face and putting the baby in the closet when she cried. (RT 7784, 7786-87, 7788.) On re-direct, Starn testified that she saw appellant blow marijuana smoke in the baby's face. (RT 7792.)

Even though the prosecution had the tape of the screaming incident at the time of Starn's testimony in its case-in-chief, the prosecution did not seek to introduce the tape at this time. Instead, it waited until the day the jury was scheduled to hear closing argument and then moved the court to permit the tape to be played to the jury.

In *People* v. *Carter* (1957) 48 Cal.2d 737 [312 P.2d 665], this Court held that even though the evidence might be relevant to an issue at trial, there must be a sufficient reason given for the failure to introduce that evidence in the prosecution's case-in-chief. In *Carter*, this Court held that the trial court should have excluded as rebuttal evidence testimony about defendant's hat which connected him

directly to the murder. This Court held that a trial court should properly exclude rebuttal evidence in order

> to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence.

(*Id.* at p. 753.)

Here, there was no reason for the failure of the prosecution to present this evidence at the time it was attempting to portray appellant as a participant and observer of acts of child abuse with Starn's infant daughter.

There is no question that the prosecution was aware of the tape and its contents: Starn testified that she had spoken directly with the prosecutor and a detective, Gary Deckard, prior to the beginning of the penalty phase of Cruz's trial. (RT 8264, 8266.) In fact, Starn played the tape for the prosecutor and provided him a copy of the tape at that time. (RT 8264, 8266.) Obviously, this was well before the start of appellant's penalty phase trial. Thus, the evidence was not newly discovered after the completion of the prosecution's case-in-

chief so that there would exist an excuse for not using this evidence during Starn's testimony as a prosecution witness nine days before the prosecution introduced the evidence in rebuttal.

Even if this evidence was proper rebuttal evidence, the trial erred by failing to exclude it under Evidence Code section 352 as more prejudicial than probative. Here, the trial failed to address this objection and did not enter into the proper weighing. Instead, the trial court stated only "It may not be aggravating, but it's rebuttal to Mr. Beck's mitigating evidence about his conduct with children, his or other people's, so the objection is overruled." (RT 8268.)

When this issue is before the trial court, the failure of the trial court to weigh the probative value against the prejudice is error. (*People v. Green* (1980) 27 Cal.3d 1, 24 [164 Cal.Rptr. 1, 609 P.2d 468]; *People v. Leonard* (1983) 34 Cal.3d 183, 188 [193 Cal.Rptr. 171 666 P.2d 28].)

Appellant was denied a fundamentally fair penalty trial under the Fourteenth Amendment as well as his right to due process and a reliable penalty determination in a capital case under the Eighth Amendment through the admission of this inflammatory evidence just

before the jury began its deliberations and after the jury had been instructed on the law. (RT 8235-8246; 8271.) Moreover, the prosecutor relied upon this evidence in his closing argument (RT 8290) and discussed *infra*, at Argument XV, the court failed to instruct the jury on the proper consideration the evidence could be given in the penalty deliberations. The sentence of death must therefore be reversed.

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XIV.

THE TRIAL COURT ERRED IN EXCLUDING THE TAPE OF THREATENING PHONE CALLS FROM STEVE PERKINS TO JENNIFER STARN

The day of closing argument, the prosecution disclosed a tape of threatening phone calls from Cruz and Steve Perkins to Jennifer Starn. The tape containing the calls was marked as Exhibit 245. (RT 8256.) Apparently, this tape was provided to the prosecution earlier that morning, and trial counsel had not had access to the tape prior to that. After listening to the tape in open court, outside the presence of the jury, appellant's counsel move for admission of the threatening calls. (RT 8271.)

The trial court admitted the threats from Cruz but excluded the call from Perkins, solely on the basis of Evidence Code section 352.

> Under 352 of the Evidence Code, I'm not going to all the part of Mr. Perkins. We are here ready to instruct the jury. Counsel should have been arguing. If that taped conversation is allowed to be in, that might well require the reappearance of Mr. Perkins. The Court feels that the relevance of this phone conversation between Miss Perkins – Miss Starn and Mr. Perkins – the time consumption outweighs any probative value.

(RT 8274-75.)

The decision to exclude the evidence on these grounds was error. The admission of the call would not have taken a significant amount of time. Jennifer Starn, who authenticated the calls from Cruz, was waiting to and actually did testify for the prosecution immediately after the trial court ruled on this issue. Moreover, neither party indicated any intention to recall Perkins if the threat was admitted at this time. Thus, the consumption of time reasoning by the trial court was completely unsupported by the arguments presented and the facts before the court at the time of the ruling.

Moreover, the trial court had just ignored appellant's objection to the part of the tape containing the baby screams on the ground that it was more prejudicial than probative. An impartial decision maker would have examined both matters in the same manner; but here the trial judge abused the discretion he had and allowed the introduction of evidence favorable to the prosecution and denied the evidence favorable to the defense.

The evidence of the threat was a critical component of trial counsel's argument to the penalty phase jury that appellant was under the control of Cruz. The fact that Perkins was making threats on

behalf of Cruz when appellant was not even present would have given significant support to that claim before the jury. Indeed, it would have shown Cruz's control over other members of the group, even after Cruz was incarcerated on this charge.

The court erred in excluding the threat and thus denied appellant his right to present a defense at a capital sentencing hearing (*Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297]) as well as his right to a reliable sentencing hearing in a capital case in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

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XV.

THE PROSECUTOR ENGAGED IN MISCONDUCT DURING THE PENALTY PHASE IN VIOLATION OF THE FOURTEENTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRING REVERSAL OF THE SENTENCE OF DEATH

The prosecutor engaged in numerous instances of prosecutorial misconduct during the penalty phase. The prosecutor's misconduct denied Beck his rights to due process, fundamental fairness, effective assistance of counsel, and fair and reliable determination of penalty. It violated Beck's right to not to be convicted or sentenced except on the basis of evidence adduced against him (*United States v. Schuler* (9th Cir. 1986) 813 F.2d 978, 981; *United States v. Carroll* (5th Cir. 1982) 678 F.2d 1208, 1210) and infected his sentencing hearing with such unfairness as to make his death sentence a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144].)

A. References to the Bible

1. Facts

The prosecutor, as was his usual practice in closing argument, relied on the Bible in seeking the imposition of the death penalty.[68]

> Very briefly, I want to touch on a subject that you've heard a lot of evidence on in this phase of the trial. It's not aggravating in any sense. The subject of religion. Mr. Beck had a very strong religious upbringing. It's very obvious. Mr. Beck preached the Bible to others, carried it with him all the time, knew it front to back. If any of you have any problem with the role that the death penalty plays in religion, I'd like to indicate to you that there are a number of passages in the Bible that deal with the subject. I'm sure that Mr. Beck is aware of it.
>
> One especially fitting is in Exodus where it indicates that – the Lord of the Christian religion speaking, "Whoever strikes another man and kills him shall be put to death, but if he did not act with intent, but they met by act of God, the slayer may flee to a place which I will appoint for you." This is an accidental, unintentional killing.
>
> The Lord says there's a sanctuary, "I will keep you safe." I suggest to you that it's like life without parole.

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[68]The prosecutor has used almost this identical argument in at least three other cases. (See, *People v. Slaughter* (2002) 27 Cal.4th 1187, 1208–1209 [120 Cal. Rptr. 2d 477, 47 P.3d 262]; *People v. Vieira*, *supra*, 35 Cal.4th at p. 309, Kennard, J., dissenting, and during the Cruz penalty phase closing argument. (RT 7530-7531.) Indeed, it appears this was a stock argument which has been built into the prosecutor's argument in every capital case.

> But the Lord goes on to say, "If a man has a presumption to kill another by treachery, you shall take him even from My altar to be put to death." "Taken from My altar." There is no haven, there is no sanctuary, for an intentional, treacherous killer. That's exactly what you have here.
>
> Again, it's not aggravation. It's just in case any of you have any problems with religion in the case.
>
> I'm going to conclude shortly. I would like to read a statement that was made many, many years ago by a Justice in a country other than ours, a Justice in England, that in spite of the fact that they didn't have a death penalty, made a very fitting statement. And it goes: "Punishment is the way in which society expresses it's denunciation of wrongdoing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crime should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the object of punishment as being a deterrent or reformative or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because the wrongdoer deserves it."

(RT 8310-8312.)

2. References to the Bible and a Higher Authority Constitute Prosecutorial Misconduct

It is well settled that arguments during the penalty phase of a capital trial claiming that the Bible and God sanction the imposition of the death penalty are prosecutorial misconduct. This Court has recognized the improper nature of such argument numerous times.

(See, *People v. Sandoval* (1992) 4 Cal.4th 155, 193–194 [14 Cal. Rptr. 2d 342, 841 P.2d 862]; *People v. Wrest* (1992) 3 Cal.4th 1088, 1107 [13 Cal. Rptr. 2d 511, 839 P.2d 1020]; *People v. Slaughter*, *supra*; and *People v. Vieira*, *supra*.)

The prosecutor's argument denied Beck a fundamentally fair trial on the penalty phase as guaranteed by the Eighth and Fourteenth Amendment to the United States Constitution. (*Sandoval v. Calderon* (2001 9th Cir.) 241 F.3d 765, 776 ["the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment."].)

> Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty. The Supreme Court has disapproved of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. See *Caldwell v. Mississippi*, 472 U.S. 320, 330-34, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) (holding that a prosecutor's argument that the jury's capital sentencing decision was not final because it would be reviewed by an appellate court unconstitutionally encouraged the jury to delegate its feeling of responsibility for the defendant's sentence to the appellate court). A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process.

> For these reasons, religious arguments have been condemned by virtually every federal and state court to consider their challenge. See *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996); *Cunningham*, 928 F.2d at 1019-20; *United States v. Giry*, 818 F.2d 120, 133 (1st Cir. 1987); *Chambers*, 599 A.2d at 644; *People v. Eckles*, 83 Ill. App. 3d 292, 404 N.E.2d 358, 365, 38 Ill. Dec. 934 (Ill. App. 1980); *State v. Wangberg*, 272 Minn. 204, 136 N.W.2d 853, 854-55 (Minn. 1965).
>
> Our nation's courts are not alone in rejecting religious argument. The Ontario Court of Appeal has as well. The Canadian Constitution does not recognize the separation of church and state. See e.g. Canadian Constitution Act of 1982, Part 1, Canadian Charter of Rights and Freedoms ("Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . . ."). Yet the Canadian court found counsel's references to Biblical stories to be "inappropriate in the extreme." *R. v. Finta*, [1992] 53 O.A.C. 1, 1992 Carswell Ont. 96 at P 250.

(*Sandoval, supra*, 241 F.3d, at p. 777.)

This error is so significant that at least one court has held this argument to warrant reversal per se. (*Commonwealth v. Chambers* (1991 Pa.) 528 Pa. 558 [599 A.2d 630].) In *Chambers*, the prosecutor argued that "As the Bible says, 'the murderer shall be put to death." (*Id.* at p. 596.) This comment is almost identical to the argument made against Beck where the prosecutor said several times that the

Bible mandated the death of the murdered unless the killing was accidental or unintentional.

In *Slaughter*, this Court described the error in this argument in the following terms:

> Here, the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. "The closing statements of counsel should relate to the law and the facts of the case as each side interprets them." (*People v. Hawthorne*, *ante*, 43, at p. 60 [14 Cal.Rptr.2d 133, 841 P.2d 118].) Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." (*People v. Love* (1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777, 366 P.2d 33].) He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. (*Jones v. Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; *Commonwealth v. Chambers* (1991) 528 Pa. 558 [599 A.2d 630, 644].) The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination. Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. We recognize that the defense must be allowed some latitude in its presentation of mitigating evidence. Nevertheless, we do not understand that latitude to

> include exhortation of religious canons as a factor weighing against the death penalty. If the defense were to present such argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. (See *United States v. Robinson*, *supra*, 485 U.S., at pp. 31-34 [99 L.Ed.2d at pp. 30-33].) What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. (*Jones v. Kemp*, *supra*, 706 F.Supp. 1534, 1559.)

(*Sandoval*, *supra*, 4 Cal.4th at p. 193.)

For these reasons, the prosecutor's argument that the Bible required the imposition of the death sentence was error.

3. Prejudice

Because of the highly improper nature of the argument and the impact on the jury of the argument that the Bible holds that a murderer "shall be put to death," this Court should apply a per se reversal rule as adopted by the Pennsylvania courts in *Chambers*.

Finding such an argument unacceptable, the Pennsylvania Supreme Court castigated the prosecutor and held that such comment required reversal per se in a capital case:

> More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent

> source of law exists for the conclusion that the death penalty is the appropriate punishment for Appellant. By arguing that the Bible dogmatically commands that "the murderer shall be put to death," the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

(*Id.* at p. 586.)

In *People v. Brown* (1988) 46 Cal. 3d 432, [250 Cal. Rptr. 604, 758 P.2d 1135], this Court adopted a more stringent test than the one established in *Watson* for errors of state law in the penalty phase of capital cases. "Instead, when faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Id.* at p. 449; accord, *People v. Michaels* (2003) 28 Cal. 4th 486, 538 [122 Cal. Rptr. 2d 285, 49 P.3d 1032].) Contrary to the conclusion of the Ninth Circuit in *Sandoval*, this Court has held that Biblical references in the penalty phase

arguments of the prosecutor are state law errors, although the *Chapman* harmless error standard has been applied in at least one case. (See, *Sandoval*, *supra*, 4 Cal.4th at p. 194 [finding no error under *Chapman* because the jury returned three verdicts of life without parole and one verdict of death].)

Even if this Court were to continue to conclude that the improper prosecutorial argument does not rise to a violation of the federal constitution, reversal would still be required because there is a reasonable probability that the jury would have rendered a different verdict.

Applying the "harmless error" rule of *Chapman* as used by this Court in *Sandoval*, reversal is required. Here, the use of the religious argument was clearly planned by the prosecutor. He had successfully employed this technique at least three previous times obtaining a sentence of death each time. (See, *Slaughter*, *Sandoval*, and the Cruz penalty phase.)

Moreover, the argument here was calculated and explicitly used to improperly undercut the mitigation evidence regarding Beck's religious upbringing and lawful life until his contact with Cruz. In

essence, the prosecutor was arguing that the very teachings that Beck had been raised with required the jury to return a verdict of death; indeed, the prosecutor told the jury, "I'm sure Mr. Beck is aware of [these passages]." Thus, the argument was highly prejudicial because it was used specifically against Beck's mitigation evidence and inferred that the jury should return a death verdict because Beck's religious background demanded it.

Moreover, at most, Beck was personally responsible for one killing and the multiple murder special circumstance was based solely on his alleged participation in the conspiracy count. Beck had no prior record and would likely not have even been involved but for the dominance of Cruz. Justice Kennard statements in dissent in *Vieira* discussing Vieira's culpability are equally applicable to Beck:

> In doing so, he did not act on his own initiative or for his own personal benefit, but as an obedient slave to cult leader Gerald Cruz.
>
> Moreover, here there is a statutory factor mitigating the crime that was not present in *Slaughter*, *supra*, 27 Cal.4th 1187. Acting "under extreme duress or under the substantial domination of another person" is a mitigating factor which the jury must take into account if relevant. (Pen. Code, § 190.3, factor (g).) In this case, the evidence shows that defendant acted under the substantial

> domination of cult leader Gerald Cruz, who controlled every aspect of defendant's life and threatened to kill anyone who did not follow his orders. Absent the pernicious influence of a satanic cult leader, it is doubtful that defendant would have committed murder.

(*People v. Vieira*, *supra*, 35 Cal.4th at p. 310, Kennard, J. dissenting.)

Under these circumstances, reversal is required.

B. Improper Comments re Role of Jury

During closing argument and immediately prior to the improper religious references, the prosecutor argued:

> We should be ashamed, and indeed alarmed, to live in a society that does not intelligently express through you, members of our jury, the public's proper sense of proportionate punishment for the like of people like James David Beck.

(RT 8310.)

This argument improperly attempts to shame the jury into imposing a sentence of death by suggesting that they individually should be ashamed of themselves if they don't impose death, that they would not act "intelligently" if they did not reach a death verdict, that their death verdict would reflect the public's interest in having Beck sentenced to death and that they should consider the proportionality of Beck's sentence. The combined effects of the argument denied Beck

his right to a fundamentally fair trial in violation of the Fourteenth Amendment and the argument lessened the jury's responsibility for determining the appropriateness of a sentence of death and denies Beck his right to a reliable sentence as guaranteed by the Eighth Amendment. (See, e.g. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329 [105 S.Ct. 2633, 86 L.Ed.2d 231] ["the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion."]; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

The prosecutor's argument here is similar to that found inflammatory and mandating reversal, even under the stricter requirements of federal habeas law, in *Weaver v. Bowersox* (8th Cir. 2006) 438 F.3d 832. There, the prosecutor argued that the jury "represent[s] the entire community. You represent society. You have to give a message here." (*Id.* at p. 836.) The court held that these comments and others, violated both the Eighth and Fourteenth Amendments holding that arguments "[u]sing the conscience of the community as a guiding principle for punishment put[] too significant of a burden on as single defendant. [Citation.]" (*Id.* at p. 841; see

also, *Viereck v. United States* (1943) 318 U.S. 236, 247 [63 S.Ct. 561, 87 L.Ed. 734] [argument telling jury that American people are relying upon them for protection from the defendant violated the right to a fair trial].)

C. Improper Comparison to Lesser Offenses

In argument, the prosecutor argued that this case "calls" for the death penalty and then listed other situations which would not "call" for the death penalty.

> There are murders that we can – we can understand, not condone but understand. A person comes home and catches his wife unfaithful, we can understand if he pulls a gun, shoots his wife and his neighbor, his best friend. We can say it's not right, but we understand it. And the death penalty is probably not appropriate in that particular case, depending on the individual, of course.
>
> And we can understand it if a guy is under so much pressure at work that he flips out, as we've seen time and again, flips out, kills the boss, kills a co-worker. We don't condone that at all. It's not right. And – but at least there's some underlying circumstances that help us appreciate what's happened and help us determine what's the appropriate punishment.

(RT 8307.)

The state has determined that the death penalty is not an option for these other types of homicides, and therefore it was an improper

argument to contrast these cases to the types of homicides that are eligible for the death penalty in California. This argument violated Beck's right to a fundamentally fair and reliable penalty trial as guaranteed by the Fifth, Eighth and Fourteenth Amendments.

D. Improper Reliance on Willey Testimony

In penalty argument, the prosecutor claimed that Beck was not a minor participant in the crime and thus factor (j) was not mitigating. To support this argument, the prosecutor relied on Willey's testimony from the guilt phase that Beck had stabbed Ritchie. "The testimony of Ron Willey that this is the man right here [Beck] that came out and knocked him off of Richard Ritchie and cut his throat while he lay in the street pleading for his life." (RT 8303.)[69] Yet, during the guilt phase argument, the prosecutor argued that Willey was lying and that the jury should so find. (RT 6739 ["In fact, I would submit to you that it was Gerald Cruz that cut Mr. Ritchey's throat after Mr. Willey stabbed him a bunch of times."].)

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[69]The prosecutor then commented that the jury could accept or reject this testimony (RT 8303-04), but the damage had already been done.

By arguing two theories of the same facts, especially at the penalty phase of a capital case, the prosecutor denied Beck a fundamentally fair penalty trial in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

> The [prosecutor] is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314].)

> In short, in the absence of a good faith justification, "[c]ausing two defendants to be sentenced to death by presenting inconsistent arguments in separate proceedings ... undermines the fairness of the judicial process and may precipitate inappropriate results." (Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) *89 Cal. L.Rev. 1423, 1425.*

(*In re Sakarias* (2005) 35 Cal. 4th 140, 156 [25 Cal. Rptr. 3d 265, 106 P.3d 931] [the use of such inconsistent arguments violates Fourteenth Amendment due process rights.)[70]

In *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [108 S.Ct. 1981, 100 L.Ed.2d 575], the Supreme Court vacated a death sentence where an of invalid prior conviction was used as a basis for a sentence of death. In so holding, the court noted that error extended beyond mere invalidation of an aggravating circumstance as the jury was allowed to consider evidence that was materially inaccurate and the prosecutor urged the jury to give weight to the invalid prior conviction in balancing aggravating and mitigating factors. In *Napue v. Illinois* (1959) 360 U.S. 267, 269 [79 S.Ct. 1173, 3 L.Ed.2d 1217], a State's knowing use false evidence violated Due Process and the State has an obligation to correct the false evidence even though it did not solicit it. See, also *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315 [prosecutor's false statements in response to defense argument that

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[70]This Court did not need to reach the Eighth Amendment argument as it reversed on the due process grounds alone. (*Id.* at p. 167, n. 9.)

witness ought to have been called constituted prejudicial prosecutorial misconduct which violated due process.]

Here, the prosecutor presented independent witnesses that Beck had not personally killed Ritchie and knew that Willey had lied about Beck's involvement in the Ritchie killing. Nevertheless, the prosecutor abandoned his responsibility to strike only fair blows during a most critical stage of a capital case.

Because the evidence shows at most that Beck was personally responsible for one of the killings, it was highly prejudicial to argue that Beck personally killed Ritchie and requires reversal of the death sentence.

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XVI.

THE TRIAL COURT'S ERRONEOUS ADAPTATION OF CALJIC 8.87 REQUIRES REVERSAL OF THE DEATH SENTENCE

Beck requested that the jury be instructed regarding uncharged criminal activity as follows:

> The criminal activity which I have set forth as an aggravating factor is limited solely to conduct of the defendant other than that for which he has been convicted in this case and for which the death penalty is a possible punishment.

(CT 2498.)

> Before you may consider any of the factors which I have listed for you as aggravating, you must find that the factor has been established by evidence presented in this case beyond a reasonable doubt. You may not consider any factor as a basis for imposing the punishment of death on the defendant unless you are first convinced beyond a reasonable doubt that it is true.

(CT 2500.)

The trial court rejected these proposed instructions (RT 8012, 8018-8019.) in favor of an adaptation on CALJIC 8.87 which read as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed criminal activity which involved the express or implied use of

> force or violence or the threat of force or violence. Before a juror may consider any of such criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal activity. A juror may not consider any evidence of 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 the activity as a fact in aggravation. If a juror is not so convinced, that juror must no consider that evidence for any purpose.

(CT 2483.)

The instruction given failed to limit the consideration of aggravation under Penal Code section 190.3, subd. (b) and thus permitted the jury to consider evidence which is not permitted by the statute and which violates Beck's right to a fair trial, to due process of law and to a reliable penalty determination in a capital case as guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments.

> The criminal activity contemplated by Penal Code section 190.3 is conduct that constitutes an offense proscribed by statute. " 'Evidence of prior criminal behavior is relevant under section 190.3, factor (b) if it shows "conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute ... ." ' (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1259 [278 Cal. Rptr. 640, 805 P.2d 899]; *People v. Anderson* (2001) 25 Cal.4th 543, 588 [106 Cal. Rptr. 2d 575, 22

> P.3d 347] [§ 190.3, factor (b) requires that conduct be 'criminal in fact' in order to constitute valid penalty evidence].)" (*People v. Hughes*, supra, 27 Cal.4th 287, 382; see also, e.g., *People v. Combs* (2004) 34 Cal.4th 821, 859 [22 Cal. Rptr. 3d 61, 101 P.3d 1007]; *People v. Clair* (1992) 2 Cal.4th 629, 672 [7 Cal. Rptr. 2d 564, 828 P.2d 705].)

(*People v. Lancaster* (2007) 41 Cal. 4th 50, 93 [58 Cal. Rptr. 3d 608, 158 P.3d 157].)

Moreover, this Court has held that the jury should be instructed as to the specific crimes being alleged by the prosecution in order to make certain that the jury will not improperly consider other acts. (See, e.g. *People v. Robertson* (1982) 33 Cal. 3d 21 [188 Cal. Rptr. 77, 655 P.2d 279].)

In this case, the jury was informed that it could consider the evidence presented at the guilt phase. (CT 2468.) The evidence at trial contained numerous instances of acts which under the broad sweep of the erroneous jury instruction would have improperly been considered evidence of aggravation.

In addition, over objection, the prosecution in rebuttal was permitted to introduce the testimony of Jennifer Starn and a tape of her young child being screamed at by Cruz and Beck. (See, Argument

XIII, *supra*.) While the trial court understood that such evidence could not properly be admitted as evidence in aggravation, the evidence was permitted as rebuttal evidence. (RT 8249 ["The proposed testimony would not be of the type the district attorney could present in this (sic) case in chief in that it is not per se criminal activity or violence.]."")

Nevertheless, because the instruction did not limit the type of evidence which the jury could consider under factor (b), the jury was not properly guided in their consideration of this evidence. Moreover, the highly inflammatory evidence contained on the tape was played to the jury immediately before it retired for deliberations and after the jury had been instructed by the trial court. Finally, the prosecutor further confused the jury by stating:

> But under factor (b) the prior felony convictions (sic), you heard a number of things that the defendant allegedly had done to Steve Perkins, to Rosemary McLauglin, to Jennifer Starn, Cynthia Starn, and the baby, of course, Alexandra. You just heard the tape. And that tape, by the way, I want to make clear to you is not in aggravation because that probably doesn't come under an act of violence per se.

(RT 8290.)

Because the jury had not proper guidance on how to interpret what is properly an act of violence, the jury could easily have been greatly impacted by the final testimony it heard and which even the prosecutor called aggravation at one point.

By failing to require the prosecutor to specify the acts upon which he was relying for findings under factor (b) and by failing to instruct the jury correctly about this type of evidence, Beck was prejudiced. While there was some evidence which might have been considered under factor (b), the prosecution cannot show that the error was harmless beyond a reasonable doubt and that the consideration of invalid aggravation did not deny Beck his right to a fair and reliable sentencing hearing. Thus, reversal of the death sentence is required.

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XVII.

BECK'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF HIS MOTION FOR NEW TRIAL

A. The Trial Court Denied Beck His Sixth Amendment Right to Present a Defense, His Fourteenth Amendment Right to a Fair Trial, and his Eighth Amendment Right to Reliable Guilt and Penalty Verdicts

Following the penalty verdict Beck moved for a new trial on two grounds: newly discovered evidence of innocence and state suppression of exculpatory evidence. (CT 2603-2608.)

The claim of newly discovered evidence was based on the written statement of Alfred McDonnell, a county jail inmate housed with the defendants in this case and who discussed the killings with co-defendant LaMarsh. According to McDonnell's statement, LaMarsh told McDonnell that he and Michelle Evans had drugs hidden in the Elm Street house which they could not access because of the presence Raper and the others. LaMarsh and Evans tricked Beck and Cruz into going to the Elm Street house in order to create a distraction so LaMarsh and Evans could retrieve their hidden drugs. McDonnell overheard LaMarsh encouraging co-defendant Willey to go along with

LaMarsh's attempt to pin the murders on Cruz and Beck. LaMarsh told Willey that Evans would not do anything to hurt LaMarsh or Willey and that they would "walk" if Willey agreed to go along with LaMarsh's plan. (CT 2600).

The claim of suppressed exculpatory evidence rested on statements made by Jennifer Starns to the prosecution that were favorable to Beck's and Cruz's defenses. Starns made these statements during her plea negotiations which took place during the guilt phase of the defendants' trial. Specifically, Starns told investigators that when she met Cruz at a hotel following the murders, Cruz told her that they had gone to Elm Street, that "something had gone wrong," and that a fight broke out which "just like took on a life of its own." (CT 2593.) Starns also stated that LaMarsh blamed Cruz for the incident and for ruining LaMarsh's life. She stated that she had heard Raper threaten to kill Cruz several times. (CT 2594.) The prosecution did not disclose these statements to the defense until the guilt phase was over and the jury had rendered its verdicts. (RT 8405.)

The trial court denied the motion for new trial on both grounds. (CT 2649.) On the claim of newly discovered evidence, the trial court found that the motion was improperly brought because the defense did not file a formal declaration in support of the motion. (RT 8402.) The court went on to conclude that even if McDonnell's handwritten letter was deemed a declaration, "in view of the evidence presented at the trial that no different result would have occurred had Mr. McDonald testified in accordance with his letter." (*Ibid.*)

On the claim of wrongfully suppressed exculpatory evidence, the trial court held that because Starns's statements were made during plea negotiations, they were inadmissible and therefore not discoverable. (RT 8411.) The court went on to conclude that even if the state wrongfully failed to disclose Starns's statement, the error "was harmless beyond a reasonable doubt." (RT 8412.)

B. Newly Discovered Evidence

A criminal defendant, especially one who is facing the death penalty, has the fundamental constitutional right to present evidence in his behalf. This right lies at the core of the Fifth and Fourteenth Amendment guarantees of due process. (*Boykin v. Wainwright* (11th

Cir. 1984) 737 F.2d 1539, 1544.) Further, the right to offer testimony is also grounded in the Sixth Amendment. (*Taylor v. Illinois* (1988) 484 U.S. 400, 409 [108 S.Ct. 64, 98 L.Ed.2d 798].) In addition, the right is also rooted in the Eighth Amendment right to a reliable guilt and penalty verdict in a capital case.

In this case the trial court denied the claim of newly discovered evidence essentially on a statutory rule of evidence. The trial court relied on dicta from *People v. Pic'l* (1981) 114 Cal.App.3d 824 [171 Cal.Rptr. 106] to deny Beck's motion. *Pic'l* involved a motion for new trial brought by a defendant convicted of conspiracy to commit extortion and to receive stolen property. Following trial the defendant moved for a new trial based on newly discovered evidence that was set forth in a declaration by a witness, made under penalty of perjury, which was presented during the hearing of his motion for a new trial and which tended to refute the testimony of a state witness regarding a telephone call implicating the defendant. The trial court refused an evidentiary hearing and denied the motion. On appeal the defendant asserted that the trial court erred in not holding, *sua sponte*, an evidentiary hearing on his motion for a new trial, insofar as it was

predicated on the ground of newly discovered evidence. The appellate court disagreed, holding that the statutory language of Penal Code section 1181[71] disallowed an evidentiary hearing and mandated that a new trial motion be based on affidavits alone.

> Accordingly, we hold that a motion for a new trial in a criminal case, made upon the ground of newly discovered evidence, must be decided solely upon affidavits because of the mandatory language of *Penal Code section 1181*, subdivision 8, and that the trial court is prohibited from conducting an evidentiary hearing at which witnesses would be permitted to testify

(*Id* at pp. 878-879.)

The mechanistic application of statutory rules of evidence, including those governing the admission of hearsay evidence, should not be permitted to prevent the exercise of those rights. The United States has recognized as much in several decisions, including

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[71]Penal Code section 1181, subdivision 8 provides in pertinent part that when a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial in the following cases: "When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant *must* produce at the hearing, in support thereof, the *affidavits of* the witnesses by whom such evidence is expected to be given. . . ." *Pic'l*, *supra*, 114 Cal.App.3d at pp. 878. (Italics added.)

Chambers v. Mississippi, *supra* 410 U.S. 284, where the Court held that blind adherence to state court rules can deprive a criminal defendant his constitutional rights to due process. In *Chambers*, the defendant was prevented from cross-examining a witness, who confessed to the murder for which defendant was on trial, about his alleged repudiation. The Supreme Court held that the defendant was denied a fair trial and required reversal.

Under the *Chambers* rationale, the circumstances of a particular case may require a state to recognize a particular hearsay exception, or to create a new exception to the hearsay rule in order to preserve a criminal defendant's right to present a defense. In light of the fact that Mr. McDonnell was unavailable to testify at trial, the court violated Beck's rights to due process and to present a defense by denying the new trial motion on the technical basis of failure to file a supporting declaration.

The trial court committed further error in its conclusion that "no different result would have occurred had Mr. McDonald testified in accordance with his letter." (RT 8420.) Beck's defense was that he

was guilty of assault with a deadly weapon,[72] voluntary manslaughter or second degree murder. He testified that he did not go to the residence intending harm or to kill anyone; rather he went there to provide protection for Evans, who insisted that she needed help and protection in retrieving property from the house because Raper had threatened her. The McDonnell evidence would have supported Beck's defense.

Evans was the state's key witness and the only witness to supply evidence of a conspiracy to commit murder. It was on the basis of her testimony that Beck and Cruz were convicted of capital murder. Had the McDonnell evidence been given to the jury, there is a reasonable likelihood that the jury would have doubted Evans and would have been more inclined to return convictions of lesser included second degree murder, voluntary manslaughter, or assault with a deadly weapon.[73]

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[72]The jury was instructed on this lesser-included offense only on Count III (Dennis Colwell).

[73]There was conflicting evidence about who killed Ritchey. Willey testified that Beck came out of the house, knocked Willey off of Ritchey and cut Ritchey's throat. (RT 5996-5999.) Evans testified that she observed Cruz go to Willey and Ritchey who were struggling

C. Suppression of Exculpatory Evidence

The trial court, relying on *People v. Tanner* (1975) 45 Cal.App. 3d 345 [119 Cal.Rptr. 407], held that the Starns statements were inadmissible under Evidence Code section 1153[74] and Penal Code Section 1192.4.[75] These statutes codify the public policy goal of encouraging settlement negotiations and plea bargaining. Tanner was charged with conspiracy to sell controlled substances. Prior to trial

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in the street and "bend over" Ritchey. (RT 4241-4242.) Beck denied having contact with Ricthey. (RT 5321.) Cruz also denied having contact with Ritchey, but testified that Beck left the house to assist Willey. (RT 5101.) LaMarsh offered no testimony on who killed Ritchey, but testified that Willey and Ritchey were fighting in the street. (RT 5759-5761.)

[74]Evidence Code section 1153 provides: "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

[75]Penal Code section 1192.4 states that if "the defendant's plea of guilty pursuant to Section 1192.1 or 1192.2 is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

Tanner contacted the prosecuting attorney seeking a settlement. As part of the negotiation process, Tanner wrote several letters to the prosecutor implicating himself. These letters were later introduced by the prosecutor at trial as evidence of Tanner's guilt. The question on appeal was whether admissions made by a defendant in the context of a bona fide offer to plead guilty come within the police of Evidence Code section 1153 and Penal Code section 1192.4. The court of appeal held that these statutes required the exclusion of "admissions made in the course of bona fide plea bargaining negotiations" and not just to offers to plead guilty. (*Id.* at pp. 351-352.)

Here, Starns made statements during her plea negotiations that were material to the defense of Beck. These statements, standing alone, did not implicate Starns in the criminal case being prosecuted. In the instant trial, Starns was not the defendant, nor were the statements at issue admissions being used against her interests. Because Penal Code section 1192.4 and Evidence Code section 1153 are designed to protect *the defendant* during plea negotiations by prohibiting the state from using the defendant's own statements to prove its case against the defendant, these statutes were inapplicable to

the issue raised in the new trial motion. Accordingly, the trial court erred in relying on Penal Code section 1192.4, Evidence Code section 1153, and *Tanner* to deny Beck's motion.

This erroneous denial of Beck's motion resulted in the exclusion of exculpatory evidence essential to Beck's defense. This exclusion violated Beck's state and federal constitutional rights to due process. (*Boykin v. Wainwright, supra,* 737 F.2d at p. 1544.) Further, the right to offer testimony is also grounded in the Sixth Amendment. (*Taylor v. Illinois*, *supra*, 484 U.S. at p. 409.)

Due process of law requires the prosecution to divulge all evidence to the defense which is both favorable to the accused and material either to guilt or to punishment. (*Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]), including all information that could impeach prosecution witnesses (*United States v. Bagley* (1985) 473 U.S. 667, 675-676 [105 S.Ct. 3375, 87 L.Ed.2d 481]; *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, n. 5 [37 Cal.Rptr.2d 446, 887 P.2d 527]); *In re Ferguson* (1971) 5 Cal.3d 525, 532-533 [96 Cal.Rptr. 594, 487 P.2d 1234].)

The duty to disclose evidence favorable to the accused extends to evidence which may reflect on the credibility of a material witness. (*People v. Ruthford* (1975) 14 Cal.3d 399, 406 [121 Cal.Rptr. 261, 534 P.2d 1341, A.L.R.4th 3132]; see also *Giglio v. United States* (1972) 405 U.S. 150, 153 [92 S.Ct. 763, 31 L.Ed.2d 104].)

The "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437 [115 S.Ct. 1555, 131 L.Ed.2d 490].) Thus "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" (*Id.*, at p. 438.) Moreover, the duty to disclose exists regardless of whether there has been a request by the accused; and the suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 [29 Cal.Rptr.3d 16, 112 P.3d 14]; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1381 [66 Cal.Rptr.2d 494].

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282 [119 S.Ct. 1936, 144 L.Ed.2d 286].) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citations.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 544 [37 Cal.Rptr.2d 446, 887 P.2d 527].)

Prejudice is demonstrated by a showing of materiality. (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.) Thus, "[e]vidence is 'material' only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different." (*Sassounian*, *supra*, 9 Cal.4th, at pp. 544-545, n. omitted; see *United States v. Bagley*, *supra*, 473 U.S., at pp. 678, 682 (lead opn. by Blackmun, J.), 685 (conc. opn. of White, J.).

There is no dispute that Starns's suppressed statements were favorable to Beck's defense or that they were willfully suppressed. The state conceded as much. (RT 8409-8410.) The trial court's

denial of this claim was based on a finding that the statements were not material and therefore no prejudice resulted. (RT 8412.) The trial court's ruling is error.

Here, the state and co-defendants LaMarsh and Willey argued to the jury that Beck and Cruz conspired to murder the Elm Street residents before going to the house. The state argued that all the defendants planned the attack with the intention of leaving "no witnesses." Willey and LaMarsh argued that Cruz and Beck secretly planned the murders and duped Willey and LaMarsh into becoming participants. Obviously, any evidence controverting the state's and the co-defendants' attempt to depict Cruz and Beck as masterminding the murders is material. Cruz's statement to Starns about things not going right and getting out of hand undermines the theory of first degree murder as well as the conspiracy to commit murder. Because the state and co-defendants LaMarsh and Willey argued that Cruz was the leader and Beck his follower, it follows that Starns's statements were material to Beck's defense as well as to Cruz's. If Cruz did not plan for the visit to the Elm Street house to turn out as it did, then it follows that neither did Beck. Put another way, it would be impossible

for Beck to conspire to commit murder all by himself. Starns's other statements about LaMarsh's motive to lie and Raper's threat to kill Cruz are not only independently material but also bolster the materiality of Cruz's statement about things going wrong. Together these statements give credibility to Beck's defense and undermine the state's theory of guilt.[76]

Cruz made these statements the same night as the killings, shortly after leaving Willey's house, at a time that he was still under the stress of the incident. Additionally, he made these statements to his wife, whom he believed to be his partner and confidant. The conditions under which Cruz made these statements gives them a reliability that enhances their materiality.

Given the unreliability of Evans' conspiracy testimony and the lack of other evidence supporting the first degree murder conspiracy

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[76]As noted by Cruz's counsel during oral argument, Starns's statement about Raper's threats to kill Cruz was material to Cruz's and Beck's request for the conspiracy to commit voluntary manslaughter instruction that was denied. (RT 8407.) Had they been able to introduce Starns's statements, there would have been evidence in the record to support the jury instruction. Without this evidence, the trial court denied the request for the instruction due to insufficient evidence in the record that the defendants acted with an unreasonable belief that their lives were threatened. (RT 6260-6267.)

theory,[77] there is a reasonable probability that, had Starns's statements been disclosed to the defense, the result in Beck's case would have been different. (See *Sassounian*, *supra*, 9 Cal.4th, at pp. 544-545.) Thus, the trial court's decision that the suppression of Starns's statements to police was not prejudicial is not supported by the record.

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[77]See Argument X, *supra*.

XVIII.

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

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

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in

context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, n. 6.)[78] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme 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 to be 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

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

mechanisms, may render California's scheme unconstitutional in that it may be the mechanism that otherwise might have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

In California there are no safeguards 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 from among the thousands of murderers in California a few victims for the ultimate sanction.

A. Beck's Death Penalty Is Invalid Because as Applied Penal Code Section 190.3(a) Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[79] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon a defendant's

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[79]*People v. Dyer* (1988) 45 Cal.3d 26, 78 [246 Cal.Rptr. 209, 753 P.2d 1]; *People v. Adcox* (1988) 47 Cal.3d 207, 270 [253 Cal.Rptr. 55, 763 P.2d 906]; see also CALJIC No. 8.88 (2006), par. 3.

having sought to conceal evidence three weeks after the crime,[80] having had a "hatred of religion,"[81] having threatened witnesses after arrest,[82] or having disposed of a victim's body in a manner that precluded its recovery.[83] It also is the basis for the admission of 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 [36 Cal.Rptr.3d 760, 124 P.3d 363].)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing an appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129

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[80]*People v. Walker* (1988) 47 Cal.3d 605, 639, n. 10 [253 Cal.Rptr. 863, 765 P.2d 70], *cert. den.*, 494 U.S. 1038 (1990).

[81]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [286 Cal.Rptr. 628, 817 P.2d 893], *cert. den.*, 112 S.Ct. 3040 (1992).

[82]*People v. Hardy* (1992) 2 Cal.4th 86, 204 [5 Cal.Rptr.2d 796, 825 P.2d 781], *cert. den.*, 113 S.Ct. 498.

[83]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, n. 35 [259 Cal.Rptr. 630, 774 P.2d 659], *cert. den.* 496 U.S. 931 (1990).

L.Ed.2d 750]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment to the United States Constitution.

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.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853,

100 L.Ed.2d 372] [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 398]].) Viewing section 190.3 in context of how it is actually used, one sees that without exception every fact that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

B. California's Death Penalty Statute Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and deprives defendants of the right to a jury determination of each factual prerequisite to a sentence of death. Therefore it violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

acceptable aggravating circumstance, even features that are mutually exclusive.

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

1. Beck's Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Violated

Beck's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors. Thus, his constitutional right to jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was violated.

Except as to prior convictions, Beck's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed any agreement regarding the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors, before determining whether or not to impose a death sentence.

This approach was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [69 Cal.Rptr.2d 784, 947 P.2d 1321], this Court

said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . . ." But this pronouncement has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *Cunningham v. California* (2007) 126 S.Ct. 856.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for

leniency. (*Id.* at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511]) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments to the United States Constitution require that such factual findings be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S., at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled

that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the high court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the

maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S., at p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence beyond the middle range spelled out by the legislature. *(Cunningham v. California, supra*, 126 S.Ct. at pp. 868-871.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context

the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[84] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177 [121 Cal.Rptr.2d 106, 47 P.3d 988]), which was read to appellant's jury (CT 2409), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious*

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[84]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448 [250 Cal.Rptr. 604, 758 P.2d 1135].)

consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[85] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[86]

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[85]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460)

[86]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277 [232

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41 [45 Cal.Rptr.3d 407, 137 P.3d 229]; *People v. Dickey* (2005) 35 Cal.4th 884, 930 [28 Cal.Rptr.3d 647, 111 P.3d 921]; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32 [132 Cal.Rptr.2d 271, 65 P.3d 749]; *People v. Prieto* (2003) 30 Cal.4th 226, 275 [133 Cal.Rptr.2d 18, 66 P.3d 1123].) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254 [29 Cal.Rptr.3d 740, 113 P.3d 534], this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally

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Cal.Rprt. 849, 729 P.2d 115]; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541 [230 Cal.Rptr 834, 726 P.2d 516].)

has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[87] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded, after a review of the relevant rules of court, that they were. (*Cunningham, supra*, 126 S.Ct. at pp. 861-863.) That was the end of the matter. *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Id.* at p. 868.)

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[87]*Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black, supra*, 35 Cal.4th at p. 1253; *Cunningham, supra,*126 S.Ct. at p. 868.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, at p. 870.)

> 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").

(*Id.* at p. 869.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589 [106 Cal.Rptr.2d 575, 22 P.3d 347].) 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)[88] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that

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[88]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 126 S.Ct. at p. 863.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring v. Arizona, supra*, 536 U.S. at p. 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*, 530 U.S. at p. 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of

which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 542 U.S. at p. 328 (emphasis in original).) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be made unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question that Must Be Resolved Beyond a Reasonable Doubt

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A

determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d at p. 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[89])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615] ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*, *supra*, 536 U.S. at pp. 589, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any

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[89]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

> fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. Beck's State and Federal Constitutional Rights to Due Process and the Prohibition Against Cruel and Unusual Punishment Were Violated by the Trial Court's Failure to Instruct the Jury that It Could Impose a Sentence of Death Only If It Was Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Exist and Outweigh the Mitigating Factors and that Death Is the Appropriate Penalty

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521 [78 S.Ct. 1332, 2 L.Ed.2d 1460].)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due

Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution. (*In re Winship*, *supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197, 51 L.Ed.2d 339]; see also *Presnell v. Georgia* (1978) 439 U.S. 14 [99 S.Ct. 235, 58 L.Ed.2d 207].) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323];

Santosky v. Kramer (1982) 455 U.S. 745, 755 [102 S.Ct. 1388, 71 L.Ed.2d 599].)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See, *In re Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 [121 Cal.Rptr. 509, 535 P.2d 373] (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 [121 Cal.Rptr. 488, 535 P.2d 352] (same); *People v. Thomas* (1977) 19 Cal.3d 630 [139 Cal.Rptr. 594, 566 P.2d 228] (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [152 Cal.Rptr. 425, 590 P.2d 1] (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky* the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the

> defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky, supra*, 455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings which were considered in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the

appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court, foreshadowing *Ring*, expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be

convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require the Jury to Base Its Death Sentence on Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, (1987) 479 U.S. 538, 543 [107 S.Ct. 837, 93 L.Ed.2d 934]; *Gregg v. Georgia* (1976) 428 U.S. 153, 195 [96 S.Ct. 2909, 49 L.Ed.2d 859].) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.Ct. 745, 9 L.Ed.2d 770].)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859 [9 Cal.Rptr.2d 24, 831 P.2d 249]; *People v. Rogers* (2006) 39 Cal.4th 826, 893 [48 Cal.Rptr.3d 1, 141 P.3d 135].) 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 [113 Cal.Rptr 361, 521 P.2d 97].) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor."

(*Id.* at p. 267.)[90] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836].) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, supra, 897 F.2d at p. 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383,

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[90]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, *California Code of Regulations*, section 2280 et seq.)

n. 15 [108 S.Ct. 1860, 100 L.Ed.2d 384].) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis 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 somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by

mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. at p. 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme

so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Id.* at p. 52, n. 14.) That number of special circumstances has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an

invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947 [269 Cal.Rptr. 269, 790 P.2d 676].) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The State May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible, to Serve as a Factor in Aggravation Unless Such Alleged Criminal Activity Must Be Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant Beck and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The United States Supreme Court's recent decisions in *U. S. v. Booker*, *supra*,; *Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*; and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury

acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra* and *Lockett v. Ohio, supra.*)

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

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701, 774 P.2d 720]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 [254 Cal.Rptr. 586, 766 P.2d 1].) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to any one of these questions, and

thus was left free 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 [21 Cal.Rptr.3d 682, 101 P.3d 568] (emphasis added).)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly

believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.* at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424 [63 Cal.Rptr.2d 1, 935 P.2d 708].)[91]

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 [215 Cal.Rptr. 1, 700 P.2d 782]) – and thereby violated appellant's Fourteenth Amendment right to due process. (See

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[91]There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. See *People v. Tomas Cruz*, No. S042224, Appellant's Supplemental Brief.

Hicks v. Oklahoma, supra; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. It is thus likely that appellant's jury aggravated his sentence upon the basis of what as a matter of state law were non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235 [112 S.Ct. 1130, 117 L.Ed.2d 367].)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern 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 v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S.Ct. 869, 71 L.Ed.2d 1].) 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.

C. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must

be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55, 551 P.2d 375].) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487].) A state may not create a classification scheme which affects a fundamental interest without showing that the state has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*;

Skinner v. Oklahoma (1942) 316 U.S. 535, 541 [62 S.Ct. 1110, 86 L.Ed. 1655].)

The State cannot meet this burden. In capital cases, equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling, because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[92] as in *Snow*,[93] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly

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[92]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275, emphasis added.)

[93]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, n. 3, emphasis added.)

fewer procedural protections than a person being sentenced to prison for receiving stolen property or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[94]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for

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[94]In light of the supreme court's decision in *Cunningham, supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[95] (*Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388].)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421; *Ring v. Arizona*, *supra*.)

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[95]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

D. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Any Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments to the United States Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306], dis. opn. of Brennan, J.; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, plur. opn. of Stevens, J. [108 S.Ct. 2687, 101 L.Ed.2d 702].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135], dis. opn. of Field, J.; *Hilton v. Guyot* (1895) 159 U.S.113, 227 [16 S.Ct. 139, 40 L.Ed. 95]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, n. 21 [122 S.Ct. 2242,

153 L.Ed.2d 335], citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, at p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders, other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the

International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[96] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335]; *Atkins v. Virginia, supra,* 536 U.S.)

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

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[96]See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

XIX.

CUMULATIVE ERRORS IN THE GUILT AND PENALTY PHASE REQUIRE REVERSAL OF THE CONVICTIONS AND SENTENCE OF DEATH

Assuming arguendo that this Court determines that none of the errors asserted individually warrant relief, this Court must look at the cumulative impact of the errors and the cumulative nature of the errors are so great as to warrant relief. (See, *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204.)

The effect of the numerous errors from the denial of the motion to sever, through the errors in jury selection and the errors during trial, especially the improper, antagonistic, and inflammatory actions of counsel for LaMarch and Willey, and the errors in instructions undermined the reliability of the guilt and penalty verdicts in this case and denied Beck his rights guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments and the California constitutional analogs.

At most, Beck was directly connected to one of the killings for which he would not have been death eligible. The inconsistent and unreliable testimony of Michelle Evans was the sole basis for the

conspiracy charge; the jury deliberated for at least four days before returning verdicts against Beck.

Given the numerous errors at guilt and penalty phases, the cumulative impact of these errors requires reversal of the convictions and sentence of death.

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XX.

BECK'S JOINDER IN CLAIMS OF APPELLANT CRUZ

Pursuant to California Rules of Court, Rules 8.630(a) and 8.200(a)(5), Beck hereby joins in the following claims raised in Appellant Cruz's Brief filed in this matter on July 20, 2007, to the extent that such claims are not specifically addressed here: Arguments I, II, III, IV, V, VII, VIII, IX, X, XI, and XIV.

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CONCLUSION

For the foregoing reasons, this Court should reverse the convictions and sentences of death in this matter.

Dated this 30th day of July, 2007.

Andrew Parnes
Attorney for Appellant
James David Beck

CERTIFICATION PURSUANT TO RULE 8.360(b)(1)

I hereby certify that the foregoing brief contains 77,454 words, based upon the computer word count.

Dated this 30th day of July, 2007.

Andrew Parnes
Attorney for Appellant
James David Beck

CERTIFICATE OF SERVICE

I, Rebecca B. Dittmer, hereby certify that I am employed in the County of Blaine, Idaho; I am over the age of eighteen years and not a party to this action; my business address is 160 Second Street East, Ketchum, Idaho 83340; on July 31, 2007, I served a true and correct copy of **Appellant Beck's Opening Brief** to the following persons by depositing copies of the same in the United States mail, postage prepaid, at the post office in Ketchum, Idaho, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 31, 2007, at Ketchum, Idaho.

Rebecca B. Dittmer

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