IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **ORLANDO ROMERO and CHRISTOPHER SELF,** Defendants and Appellants.	**CAPITAL CASE** **No. SO55856**

APPELLANT'S OPENING BRIEF (CHRISTOPHER SELF)

Automatic Appeal from the Superior Court
County of Riverside
Superior Court No. CR46579

THE HONORABLE RONALD L. TAYLOR, JUDGE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	
vs.	)	**S055856** Riverside Sup. Ct. No. CR46579
ORLANDO ROMERO AND CHRISTOPHER SELF, Defendants and Appellants.	)	

STATEMENT OF THE CASE

By a 23-count, amended information filed in the Superior Court of California, Riverside County, on April 26, 1995, appellant Christopher Self and his older brother, Orlando Gene Romero, were charged with various crimes, including three first degree murders in violation of Penal Code section 187[1] with special circumstances. The circumstances that led to the charges were alleged to have occurred in 12 separate incidents in Riverside County between October 8, 1992 and December 7, 1992. Appellant was charged with crimes involving 10 of those incidents. Daniel Chavez was also charged as a codefendant in the amended information.[2] Although not named in the amended information, Jose Munoz was also charged as a fourth codefendant in various felony complaints involving three of the murders and attempted murders, as well as charges of robbery, kidnapping,

[1]/ Subsequent undesignated references are to the Penal Code.
[2]/ Daniel Chavez was named as a party defendant on counts 1, 2, 13, 14, 15, and 16.

and multiple special circumstances.[3]

Codefendant Chavez's case was severed before trial,[4] and he was tried separately and convicted after a trial by jury of two counts of first degree murder with special circumstances. Chavez was sentenced to life imprisonment without possibility of parole.

In a plea bargain in which he agreed to testify against appellant and codefendant Romero, Munoz pled guilty to three counts of first degree murder, one count of attempted premeditated murder, three counts of robbery, and one count of attempted robbery. (See 2 CT 180-181; see also 45 Supp CT 12906-12909 (People's Exhibit 269) [memorandum of agreement, dated September 8, 1993, between Riverside County District Attorney and Munoz.).] In consideration

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[3]/ (See 1 Supplemental CT [hereafter "Supp CT"] 1-3 [felony complaint filed December 14, 1992 charging Munoz with three counts of murder, two special circumstances, and count of attempted murder]; see also 1 Clerk's Transcript [hereafter "CT"] 32-35 [felony complaint charging Munoz with three counts of murder, one count of attempted murder, robbery, and special circumstances]; 1 CT 52-61 [third amended felony complaint also charging Munoz, *inter alia*, with three counts of murder, three counts of attempted murder, robbery, and special circumstances]; 1 CT 95-116 [fourth amended felony complaint [also charging Munoz, *inter alia*, with three counts of murder, two counts of attempted murder, robbery, and special circumstances]; and 1 CT 143-154 [fifth amended felony complaint also charging Munoz, *inter alia*, with three counts of murder, three counts of attempted murder, robbery, and special circumstances]. Another amended felony complaint, filed against Munoz and Chavez on December 16, 1992, was deemed by settled statement "no longer in the Court file." (7 Fifth Supp CT 1926; 1 Sixth Supp CT 134.) A copy of the amended complaint was appended as Appendix B to codefendant Romero's second supplemental request to correct, complete, and settle the record on appeal (1 Sixth Supp CT 58-61) and has been deemed by settled statement to be an authentic copy of the amended complaint as filed. (7 Fifth Supp CT 1926; 1 Sixth Supp CT 134.)

[4]/ See 4 CT 903, 908-909 [transcript of April 30, 1995 proceedings in which Chavez severance discussed].

of his testimony, Munoz was promised and received a sentence of 51-years-to-life imprisonment in accordance with the terms of his plea agreement. (See 2 CT 180-181; see also 45 Supp CT 12907 [sentencing terms set forth in memorandum of agreement].)

In the amended information filed on April 26, 1995, appellant was charged with three counts of murder (§ 187) (counts 1, 2, 3); six counts of robbery (§ 211) (counts 4, 14, 15, 16, 19, 23); four counts of willful, deliberate, and premeditated attempted murder (§§ 664/187) (counts 5, 9, 10, 18); one count of aggravated mayhem (§ 205) (count 6); one count of attempted robbery (§§ 664/211) (count 7); one count of shooting at an occupied motor vehicle (§ 246) (count 8); one count of burglary (§ 459) (count 11); one count of aggravated vandalism (§ 594, subd. (b)) (count 12); one count of kidnapping to commit robbery (§ 209, subd. (b)) (count 13); and one count of receiving stolen property (§ 496) (count 17).

In addition, counts 1 through 10, 13 through 16, 18, 19, and 23, charged against appellant, alleged that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). Counts 1, 2, and 3 alleged one robbery-murder special circumstance (§ 190.2, subd. (a)(17)(i)) and two multiple murder special circumstances (§ 190.2, subd. (a)(3)). Counts 5, 7, 8, 18, and 19 alleged that appellant inflicted great bodily injury on the victim within the meaning of section 12022.7. (4 CT 821-834.) At his arraignment on April 28, 1995, appellant pled not guilty to all counts and denied all enhancements, special circumstances, and special allegations. (4 CT 839.)

On September 15, 1995, the trial court granted codefendant Romero's motion for separate juries. (4 CT 917-918.) Trial by jury commenced December 11, 1995. (5 CT 980.) On December 29, 1995, appellant moved pursuant to section 995 to dismiss counts 4, 5, 6, 9, 10, 11, 12, 15, and 23 and the alleged section 12022.7 enhancements as to counts 5, 7, and 8. (5 CT 983-1008; 1 Supp CT 250-274.) The prosecution conceded appellant's motion as to count 23 on January 9, 1996. (5 CT 1056-1073.) On January 11, 1996, the court denied appellant's section 995 motion except as to count 23, which was granted. The court subsequently dismissed count 23 as to appellant. (5 CT 1080-1081.)

On December 29, 1995, appellant moved, pursuant to section 1538.5, to suppress statements and evidence obtained after his arrest. (5 CT 1008-1033.) Appellant's motion was heard and denied on March 19, 1996. (6 CT 1230.) On January 4, 2004, the prosecution moved in limine to admit evidence of appellant's escape attempts following his arrest and while awaiting trial as evidence of consciousness of guilt. (5 CT 1034-1039.) On the same date, the prosecution also moved in limine to restrict or limit evidence of alcohol or methamphetamine use by the victims in counts 1 and 2. (5 CT 1040-1042.)

On January 11, 1996, appellant objected to the use of a jury questionnaire; appellant's objection was overruled on the same date. (5 CT 1080)

On February 20, 1996, codefendant Romero moved to exclude photographic evidence on grounds that the admission of various photographs would violate his rights to a fair trial, due process of law, and to a reliable

determination of guilt guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 13, 15, 16, 17, and 22 of the California Constitution. (5 CT 1128-1136.) Appellant joined in the motion on February 22, 1996. After a hearing, the court denied the motion in part and granted the motion in part, excluding the admissibility at trial of seven photographs (identified as IJ, 2R, 2U, and 3V, 3W, 3Y, and 3Z). (5 CT 1152; see also Second Supp CT 13, 28.)

On March 14, 1996, appellant moved to sever the three alleged counts of murder with special circumstances (counts 1, 2, and 3) from trial of the remaining counts of the amended information on grounds, inter alia, that joinder of highly inflammatory murder charges with the other alleged crimes would prejudice appellant in violation of his constitutional rights to a fair trial and due process of law.[5] (6 CT 1216-1223.)

Appellant moved to strike the prosecution's notice of aggravation and to exclude evidence of aggravation on grounds that the admission of the aggravation evidence noticed by the prosecution would, *inter alia*, violate section 190.3, subdivision (b) and appellant's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article

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[5]/ The minutes of proceedings as to codefendant Romero on March 14, 1996 provide that his severance motion was denied. (See 6 CT 1205.) Appellant's defense counsel was not present at that hearing. There were no court proceedings involving appellant on March 14, 1996. Proceedings as to appellant were held on March 12, 1996 and then continued to March 19, 1996. (See 6 CT 1204, 1229-1230.) The trial court did not rule on appellant's severance motion on either of those dates.

I, sections 1, 7, 15, 16, 17, and 27 of the California Constitution. (6 CT 1280-1304.) On May 2, 1996, the prosecution moved to strike from its notice of aggravation as to appellant four previously specified aggravating factors (items 8, 9, 10, and 11). (8 CT 1871-1872; 48 RT 7176.) Appellant's motion to exclude evidence of aggravation was denied on May 2, 1996. (8 CT 1877.)

On April 1, 1996, appellant moved for a separate penalty jury or, alternatively, to reopen voir dire of the jury on grounds that a single jury for both the guilt and penalty phases of trial would violate appellant's rights to a fair and impartial jury, fair trial, due process of law, and to a reliable determination of penalty guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 15, 16, 17, and 27 of the California Constitution. (6 CT 1318-1323.) The trial court held appellant's motion under submission.

On April 17, 1996, both sides rested. (6 CT 1345-1346.) Closing arguments took place on April 22, 1996. (6 CT 1361-1362.) On April 23, 1996, the jury was duly instructed and commenced deliberations. (6 CT 1361-1362, 1364, 1366.) The jury returned verdicts on April 25, 1996; the verdicts were ordered sealed pending the return of verdicts as to codefendant Romero. (6 CT 1370-1371.) The verdicts were unsealed, read, and recorded on April 30, 1996. (8 CT 1715-1723.) The jury found appellant guilty of three counts of first degree murder (§ 187) (counts 1, 2, 3) and as to each count found true the special circumstance of robbery-murder within the meaning of section 190.2, subdivision

(a)(17)(i) and two multiple murder special circumstances within the meaning of section 190.2, subdivision (a)(3). (8 CT 1733-1748.)

The jury also found appellant guilty of five counts of second degree robbery (§ 211) (counts 4, 14, 15, 16, and 19), four counts of willful, deliberate, and premeditated attempted murder (§§ 664/187) (counts 5, 9, 10, 18), one count of aggravated mayhem (§ 205) (count 6), one count of attempted robbery (§§ 664/211) (count 7), one count of shooting at an occupied motor vehicle (§ 246) (count 8), one count of second degree burglary (§ 459) (count 11), one count of aggravated vandalism (§ 594, subd. (b)) (count 12), one count of kidnapping to commit robbery (§ 209, subd. (b)) (count 13), and one count of receiving stolen property (§ 496) (count 17). On counts 1 through 10, 13 through 16, 18, and 19, the jury found that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1) and on counts 5, 7, 8, 18, and 19 that appellant inflicted great bodily injury on the victim within the meaning of section 12022.7. (8 CT 1748-1785.)

On or about April 30, 1996, appellant moved to exclude the admissibility of victim impact evidence during the penalty trial.[6] (CT 1843-1860.) On May 2, 1996, the court took up this motion and appellant's motion for a separate penalty jury. Both motions were denied. (8 CT 1877.)

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[6]/ The first 8 pages of appellant's motion were omitted from the Clerk's Transcript on Appeal [CT]. The record was augmented to include the missing pages; appellant's motion, dated April 30, 1996, is now found at corrected and renumbered 8 CT 1836-1860; however, the date on which appellant's motion was filed is illegible. (See corrected 8 CT 1836.)

The penalty trial commenced May 6, 1996, On May 14, 1996, during the penalty trial proceedings, appellant moved for a mistrial following an improper reference by a witness to a purported false statement by appellant while in jail awaiting trial. Appellant's mistrial motion was denied on the same date. (8 CT 1894.) On May 14, 1996, appellant also moved to dismiss and strike certain allegations in aggravation pertaining to the possession of jail weapons ("shanks") on grounds of loss of material evidence and failure to preserve exculpatory evidence in violation of appellant's rights to fair trial, due process, and a reliable determination of guilt guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (8 CT 1896-1906.) Additionally, appellant moved to suppress all statements allegedly made by him while in custody awaiting trial on grounds that admissibility of such statements as evidence in aggravation violated his rights to a fair trial, to counsel, due process of law, and to a reliable determination of guilt guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, section 15 of the California Constitution. (8 CT 1918-1920.) These motions were also denied. (CT 1920.)

Both sides rested on May 20, 1996. (8 CT 1881, 1931-1932.) On May 23, 1996, following closing argument and the reading of jury instructions, the jury commenced deliberations. (See 9 CT 2021-2084.) The jury returned verdicts on May 28, 1996, fixing the penalty as death on counts 1, 2, and 3. (8 CT 1958-1961; 9 CT 2030, 2086dd-2086G.) On August 16, 1996, appellant moved to reduce the

penalty of death to life imprisonment without possibility of parole and for a new trial pursuant to sections 190.4, subdivision (e) and 1181, subdivision 7. (9 CT 2088-2093.) The court denied appellant's motions on August 28, 1996 (9 CT 2147-2154A) and thereafter sentenced appellant to death on counts 1, 2, and 3. (9 CT 2148.) Count 1 was imposed consecutive to count 4; count 2 was imposed consecutive to count 1; and count 3 consecutive to count 2. (9 CT 2153.) The court also sentenced appellant on counts 1, 2, and 3 to consecutive one-year terms on each count pursuant to section 12022, subdivision (a). (9 CT 2148.)

On count 4 (§ 211), the court sentenced appellant to the aggravated term of 5 years and to a consecutive one-year term pursuant to section 12022, subdivision (a).

On count 5 (§§ 664/187), the court sentenced appellant to life without the possibility of parole to be served consecutive to count 3. The court also sentenced appellant to a consecutive one-year term pursuant to section 12022, subdivision (a) and to a consecutive thee-year term pursuant to section 12022.7.

On count 6 (§ 205), the trial court sentenced appellant to life without the possibility of parole and to a consecutive one-year term pursuant to section 12022, subdivision (a). The court stayed execution of sentence on count 6.[7]

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[7]/ Abstracts of judgments filed on August 30, 1996 and February 27, 2001 erroneously specified a one-year term on the section 12022, subdivision (a)(1) enhancement. (See 9 CT 2176 and 45 Supp CT 13157.) On appellant's motion, the abstract of judgment was corrected on January 13, 2003 and now provides correctly that the one-year section 12022, subdivision (a)(1) enhancement was stayed. (See 45 Supp CT 13161.)

On count 7 (§§ 664/211), the court sentenced appellant to 6 months in state prison (or one-third of the middle term of 18 months) to run consecutive to count 5.[8] The court also sentenced appellant to a consecutive four-month term (or one third of the middle term of 1-year) pursuant to section 12022, subdivision (a) and to a consecutive three-year term pursuant to section 12022.7. The court stayed execution of the sentence imposed pursuant to section 12022.7.[9]

On count 8 (§ 246), the court sentenced appellant to the middle term of 5 years. The court also sentenced appellant to a consecutive one-year term pursuant to section 12022, subdivision (a) and to a consecutive three-year term pursuant to section 12022.7. The court then stayed count 8 pursuant to section 654.[10]

On count 9 (§§ 664/187), the court sentenced appellant to life without the possibility of parole to run consecutive to count 7 and to a consecutive one-year

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[8]/ The original minutes of the August 2, 1996 sentencing proceedings stated erroneously that appellant was sentenced to one-third of the middle term of *"18 years* for a total of 0 years and 6 months." [Italics added.] On appellant's motion, the minutes were amended on January 14, 2003 to provide correctly that "the Court imposes 1/3 the mid term of 2 years and 0 months for the total of 0 years and 8 months." (See 45 Supp CT 13098; see also 9 CT 2154B.) On appellant's motion, the abstract of judgment was corrected to reflect that a consecutive 8-month term was imposed on count 7. (See 45 Supp CT 13159.)

[9]/ The abstract of judgment filed on August 30, 1996 erroneously omitted the stay and provided that a 3-year term was imposed. (See 9 CT 2175.) On appellant's motion, the error was corrected. Amended abstracts of judgment filed on February 27, 2001 (45 CT 13159) and January 13, 2003 (45 CT 13163) correctly provide that the section 12022.7 enhancement on count 7 was stayed.

[10]/ The abstract of judgment filed on August 30, 1996 omitted the stay and provided that a one-year term was imposed pursuant to section 12022, subdivision (a)(1). (See 9 CT 2175.) On appellant's motion, the error was corrected. Abstracts of judgment filed on February 27, 2001 (45 CT 13159) and January 13, 2003 (45 CT 13163) provide that the section 12022, subdivision (a)(1) enhancement on count 8 was stayed.

term pursuant to section 12022, subdivision (a).

On count 10 (§§ 664/187), the court sentenced appellant to life without the possibility of parole to run consecutive to count 9 and to a consecutive one-year term pursuant to section 12022, subdivision (a).

On count 11 (§ 459), the court sentenced appellant to 8 months in state prison (or one-third of the middle term of 2 years) to run consecutive to count 10.

On count 12 (§ 594, subd. (b)), the court sentenced appellant to 8 months in state prison (or one-third of the middle term of 2 years) to run consecutive to count 11.

On count 13 (§ 209, subd. (b)), the court sentenced appellant to life without the possibility of parole to run consecutive to count 12 and to a consecutive one-year term pursuant to section 12022, subdivision (a).

On count 14 (§ 211), the court sentenced appellant to the middle term of 3 years and to a consecutive one-year term pursuant to section 12022, subdivision (a). The court stayed count 14 pursuant to section 654.

On count 15 (§ 211), the court sentenced appellant to a one-year term (or one-third of the middle term of 3 years) to run consecutive to count 13 and to a consecutive term of 4 months (or one-third of the middle term of 1-year) pursuant to section 12022, subdivision (a).

On count 16 (§ 211), the court sentenced appellant to a one-year term (or one-third of the middle term of 3 years) to run consecutive to count 15 and to a consecutive term of 4 months (or one-third of the middle term of 1-year) pursuant

to section 12022, subdivision (a).

On count 17 (§ 496), the court sentenced appellant to the middle term of 2 years but stayed the sentence pursuant to section 654.

On count 18 (§§ 664/187), the court sentenced appellant to life without the possibility of parole to run consecutive to count 16. The court also sentenced appellant to a consecutive one-year term pursuant to section 12022, subdivision (a) and to a consecutive three-year term pursuant to section 12022.7.

On count 19 (§ 211), the court sentenced appellant to a consecutive one-year term (or one-third of the middle term of 3 years), to a consecutive one-year term pursuant to section 12022, subdivision (a), and to a consecutive one-year term (or one-third of the middle term of 3 years) pursuant to section 12022.7. The court stayed count 19 pursuant to section 654. The court imposed a restitution fine in the amount of $10,000 pursuant to section 1202.4, subdivision (b). (9 CT 2148-2154.)

A judgment of death was signed by the court on August 28, 1996 and appellant was committed to San Quentin State Prison for execution of sentence.[11] (9 CT 2169-2172, 2183-2184.) This appeal from a judgment of death following a trial by jury is automatic. (§§ 1237, subd. (a) and 1239, subd. (b).)

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[11]/ The commitment judgment of death erroneously provides that appellant was twice convicted on count 14 and omits reference to appellant's conviction on count 19. (See 9 CT 2170.)

STATEMENT OF FACTS

I. Introduction

During a two-month period between early October and early December 1992, twelve separate incidents involving various offenses -- including carjacking, robbery, assault, and burglary -- occurred in Riverside County. During this period, three murders also occurred. These incidents took place throughout the greater Riverside metropolitan area, including Lake Mathews, Moreno Valley, Mead Valley, Perris, and Beaumont.

The events that ultimately led to the capital charges at issue in this appeal occurred on the October 8, 12, 22, and 26 on November 14, 18, 20, 21, 25, and 30 of 1992. Until November 25 and 30, police investigation failed to reveal any apparent connection between the incidents, all of which had been investigated as separate crimes.

Predictably, the murders garnered the most attention. On October 12, a helicopter officer conducting a routine patrol in area of Lake Mathews overlooking Riverside spotted a car and a body on the ground. Upon investigation of the scene, officers found two bodies, the one observed by the helicopter pilot and another nearby but down-slope from the car in a hilly area covered with brush and rocks. Both male victims had been shot. They were later identified at Joe Mans and Timothy Jones, the murder victims alleged in counts 1 and 2.

Approximately six weeks later, on November 25, 1992, the body of Jose Aragon -- the murder victim alleged in count 3 -- was discovered in the back of his

truck in Timoteo Canyon. He had been shot numerous times. In the early morning hours of November 30, John Feltonberger was shot by a man who took his wallet and left the scene in Feltonberger's vehicle. Feltonberger told police that there were two assailants. Eventually, police learned that shotgun shell and wading collected from the Feltonberger shooting were identical to those collected at the Aragon crime scene.

The bank where Aragon had an account notified police that a man, eventually identified as Jose Munoz, had used Aragon's ATM card on the same day Aragon's body was discovered. This development ultimately revealed that the people apparently responsible for several robberies, shootings, and carjackings were also implicated in the deaths of Joe Mans, Timothy Jones, and Jose Aragon.

According to various statements given by Jose Munoz to police after his arrest, he was one of four persons involved in the murders and other crimes that occurred between October 8 and December 7, 1992.[12] Munoz named three individuals as his accomplices: Daniel Chavez, Orlando Romero, and Christopher Self. Romero and Self were brothers; Romero was older than appellant by six years.

Self was a high school dropout who had grown up in a violent and abusive family dominated by his mother's heroin and methamphetamine addiction and the addicts with whom she was involved over the course of appellant's life. He and

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[12]/ Appellant was not implicated in the offenses that occurred during December 1992.

his four siblings witnessed extreme and constant domestic violence between his mother and their father, who was also an alcoholic and drug addict, and the other men with whom she associated throughout their childhood years. Predictably, appellant began to abuse drugs and alcohol at an early age, and he exhibited dysfunction both at home and at school. Despite these difficulties, appellant's only contact with the criminal justice system prior to the capital offenses involved a juvenile joyriding charge that ultimately was dismissed. Two weeks before commission of the crimes that led to the capital charges, Self turned eighteen years old.

As the youngest of the four people involved in these offenses, Self was perhaps the most vulnerable to the influence of others, especially that of his older brother, Orlando Romero. Romero himself was a dropout, a drug addict, and unsuccessful at holding any sort of a job. Shortly before commencement of the crimes involved in this case, Romero returned to the Riverside area from Northern California where he had relocated in order to turn his life around. According to statements Munoz made to police, Self's behavior throughout the period of the offenses seemed to be precipitated and driven by the negative influence of his older brother, Orlando Romero. Munoz claimed that prior to Romero's return, Munoz was able to "talk [Self] out of doing stuff." After Romero returned to Riverside, however, Self seemed to be dominated by a need to impress his older brother.

The offenses that took place between October and December of 1992 were

highly sensationalized by the local media. Riverside County, known for its pro-death penalty climate, was the backdrop for a media blitz that dominated the case from the very beginning. Indeed, the television and newspaper coverage was so extensive that when Romero and Self were arrested, they were met by a mob of jeering citizens who shouted insults and invectives. Although over three years elapsed between the arrests and the trial, once trial began, the record reveals numerous media requests to broadcast the proceedings. In addition, during jury selection, numerous prospective jurors indicated they had seen, heard, read, and had otherwise been exposed to the media coverage of this case.

Initially, the state charged all four defendants with capital murder. However, the manner in which the case was prosecuted effectively portrayed Romero and Self as primarily responsible for the course of events. Although Munoz had a prior record of assaultive and dangerous criminal behavior and had participated in virtually all of the charged crimes, he walked away with the best deal of all, despite the leading role he played in initiating, planning, facilitating, and carrying out the most serious offenses, including all three murders. Munoz' case was severed from those of the other defendants. In exchange for his testimony against Romero, Self, and Chavez (in his separate trial), Munoz was allowed to plead guilty to his involvement and receive a determinate sentence without special circumstances and without having to face the death penalty.

Chavez was tried *after* the "dual" trial of Romero and Self. The manner of severing the cases not only inured to Munoz' and Chavez's benefit, but had the

pernicious effect of portraying Romero and Self as an evil duo, inextricably linked to the offenses by their familial ties and Munoz' well-rehearsed accomplice testimony. The severance of Munoz' case and his favorable plea agreement served to enhance Munoz' credibility and believability while at the same time shielding him from the wrath their juries ultimately would display against Romero and Self.

Because of the random and unplanned manner in which the offenses occurred, and the continual exchange of various weapons between and among the defendants throughout the period of the crimes, there is no way to know exactly what happened or precisely who was responsible for the specific actions which Munoz attributed to virtually everyone but himself. The law of accomplice liability made it unnecessary for the state to prove with precision which of the defendants committed which particular acts. Nevertheless, the state's case against Self rested primarily on the statements and versions of events given by Munoz, who at one point told police he would "say whatever they wanted" him to say. During his testimony at trial, Munoz admitted that he had repeatedly lied and prevaricated in his pretrial statements to police. Yet he was paraded before the jury as the paragon of truth, despite his evident motive to lie and to lay the blame at everyone's feet but his own.

In addition to the machinations of the state, appellant's case was also beset by the failure of defense counsel to marshal a cogent and tenable defense. While ineffective assistance of counsel claims are best raised in collateral habeas corpus

proceedings because the record on appeal rarely reveals the thinking and strategies of trial counsel, the record in this case is nevertheless telling precisely because of all the things that trial counsel *did not do.* [13] Notwithstanding the clear evidence of excessive publicity regarding the case, for example, trial counsel failed to investigate or move for change of venue. Despite overwhelming evidence of drug use during the time of the crimes; descriptions of Self's bizarre behavior during the time of the crimes; and Munoz' observations regarding Self's ready assent to his older brother's manipulations, Self's attorneys never presented any mental health defenses nor any evidence regarding Romero's dangerous and pernicious influence over Self, whose history of extreme alcohol and drug abuse and dysfunction was barely revealed to the jury. Indeed, it is this overlay of many crucial factors never presented or considered by the jury that led inexorably to appellant's capital conviction and sentence.

In addition to their failure to marshal a defense, defense counsel effectively gave the state carte blanche before the jury. They never objected to the

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[13]/ It is appellate counsel's view that trial counsel made serious errors and omissions in their representation of appellant at trial. While vindication of appellate counsel's position may lie outside the record and, thus, implicates issues better suited for habeas corpus proceedings, the assertions made here are fair extrapolations from the appellate record, which also establishes the many things counsel did not do. Whether counsel had a strategic basis for their acts and/or omissions remains to be seen. In any event, what is clear from the record is that the defense presented at trial did little to challenge the state's case or to contextualize appellant's life or his alleged involvement in the offenses. These failings severely prejudiced appellant who, as a result, stood before the jury sitting in judgment of him with no explanation or credible defense presented on his behalf.

prosecutor's frequent overreaching in characterizing and alluding to appellant as the leader or dominant person in the group, or to the excessive and improper victim impact evidence which the District Attorney proffered and which the court erroneously allowed. Nor did counsel challenge the state's presentation of the alleged aggravation evidence against him that, if true, was also undoubtedly the product of the life-long mental and psychiatric dysfunction that plagued appellant. By the time the jury faced the task of deciding whether Christopher should live or die, the only image they had misportrayed appellant as a remorseless, callous killer, rather than as the psychologically-damaged, mentally-ill and emotionally-unstable youth that he was.

In reviewing the case against Christopher Self, it is virtually impossible to avoid being overwhelmed by the sheer quantity and senselessness of the crimes charged against him and the other defendants. Yet, it is precisely this danger of being overwhelmed that makes the need to adhere to constitutional principle even more critical. In the face of such troubling facts, it is far too easy to conclude that any error is *de minimis*, that any prejudice pales in comparison to the harm suffered by the victims and society. But what must also be kept in mind is that, in such circumstances, what may seem to be minor or harmless errors in fact take on even greater weight and significance. In the case against Christopher Self, each and every violation of his rights led the jury to find him more culpable and more deserving of death than if the errors had not occurred. It is in this context that the appellate issues raised on Christopher Self's behalf must be considered.

II. Guilt Trial

A. Overview and Initial Investigation

In Riverside County, during the period between October 8, 1992 and November 30, 1992, a series of seemingly unconnected crimes occurred involving several offenses, including murder, attempted murder, kidnapping, carjacking, robbery, assault with a deadly weapon, and vandalism. The crimes occurred throughout the county, including Lake Mathews, Moreno Valley, Mead Valley, Riverside, Perris, and Beaumont. During this period, three persons were found murdered: Joey Mans, Timothy Jones, and Jose Aragon. Initial investigation of these incidents by the Riverside Police and Sheriff's Departments yielded few clues, and law enforcement officials had no inkling that the incidents were connected until November 30, 1992, when the police got their first break in the case.

On that date police were notified by an employee at Security Pacific Bank, where murder victim Jose Aragon held an account, that the bank had obtained information regarding transactions in Sun City, Riverside County, on Mr. Aragon's account on November 25, 1992, the day his body was discovered. The bank also provided an enhanced videotape photograph depicting the person who used Mr. Aragon's ATM card to withdraw money.[14] (36 RT 5489-5496.)

On the same day, during the early morning hours, another incident occurred

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[14]/ See People's Exhibit 250 (ATM photograph of November 25, 1992 transaction). (2 Supp CT (Photographs-Exhibits) 395.)

in Moreno Valley. At about 4:00 a.m., Ontario Police Sergeant John Feltonberger while driving home from work was accosted and shot by unknown gunmen wielding a sawed-off shotgun.[15] After the shooting, Feltonberger's Geo Metro was driven away, although he did not see by whom. Feltonberger staggered and crawled to a nearby home located at 28766 Kimberly, where he was assisted by the homeowners until police and emergency medical personnel arrived. When Feltonberger's shirt was cut off by the emergency medical team, a small, red plastic object (People's Exhibit 55) was observed underneath Feltonberger's shirt. (32 RT 4976-4978.)

B. The Arrests of Jose Munoz, Appellant, and Codefendant Orlando Romero, Jr.

On December 11, 1992, Jose Munoz was identified as the subject shown on the ATM videotape of the person doing the transactions involving Jose Aragon's bank account. Munoz was arrested the same day at his home on Bonham Street in Mead Valley. At the time of his arrest, Munoz was wearing the same hat seen in the Sun City ATM transaction photograph obtained from Security Pacific Bank.

Following his arrest, Munoz was interrogated by a succession of police officers and prosecutors in various sessions held over the course of the next two days.[16] During his interrogation, Munoz made a lengthy statement, naming

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[15]/ This incident was the subject of counts 19 and 20 of the information and is described in greater detail, *infra*.

[16]/ During post-arrest interrogation (People's Exhibit 371A), and apparently in reference to the Feltonberger incident, Munoz told Detectives Wilson and Hudson that if he were still identified after the victim saw appellant's picture, "I'll say anything you want me to say, even if it ain't true I'll say it." (45 Supp CT 12958.)

appellant, codefendant Romero, and Daniel Chavez as his accomplices in a series of incidents that took place between October 8 and November 30, 1992.

During the questioning, Munoz volunteered information about the Feltonberger shooting that occurred on November 30. Officers were unaware of his role in that incident until he admitted his involvement during the interrogation. In exchange for leniency, Munoz also related information regarding other crimes committed by him and his accomplices during October and November 1992, but he did not reveal his role in the Williams-Rankins incident[17] until he entered into and signed a formal plea agreement with the District Attorney of Riverside County. (39 RT 6029, 6032-6034.)

Following up on statements by Munoz, on December 12, 1992, sheriff's investigators located a Dodge Colt belonging to Romero's girlfriend, Sonia Alvarez. A red toolbox containing motorcycle parts and tools belonging to Jose Aragon was found in Alvarez's car. (35 RT 5471-5472.) On the same day, Riverside County Sheriff's Detectives Terry Hudson and Thomas Kimball drove to San Diego, where they contacted Ruben Munoz, Jose Munoz' brother, and Jose Munoz' mother and father. Munoz' parents gave Hudson a Craftsman socket set that Jose Munoz had given to them. Ruben Munoz retrieved and turned over to the officers a sawed-off .22 caliber rifle (People's Exhibit 252) that had been cut down and held together with tape. The gun was a .22 caliber Remington Speed

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[17] This incident took place on October 26, 1992 and was the subject of counts 9 and 10 of the information. It is described in greater detail, *infra*.

Master Model 552 with no visual serial numbers. (35 RT 5473-5475.)

Based upon Munoz' statements and his identification of appellant and Romero as his accomplices in the Feltonberger crime and other offenses, Sheriff Senior Investigator Joseph Arteaga contacted Florence Daul. Munoz had named Daul as an acquaintance of Romero. On December 17, 1992, Arteaga contacted Daul at her residence, located at 8150 Cypress in Riverside. Daul told Arteaga that Peggy Lopez, the aunt of appellant and Romero, had brought the suspects to her home a day or two earlier. She said that appellant and Romero stayed overnight. (37 RT 5628.) Daul told Arteaga that on the following night she had seen a news report on television that appellant and Romero were wanted for murder and that a no bail warrant had been issued for their arrest. She stated that she provided them with food, cigarettes, some blankets, and a sleeping bag, drove them to an abandoned house at 11952 Magnolia Drive in Riverside, and the next day called Lopez to tell her that appellant and Romero were safe. She informed Arteaga that they had left behind a cellular phone. She put the phone and other items they had given her into a box that she left with Tammy Villa[18] for safekeeping. (37 RT 5628-5631, 5634-5638.)

At 4:00 p.m. on December 17, 1992, Arteaga and the Riverside SWAT team arrested appellant and Romero at 11952 Magnolia Drive, the Riverside address proved by Daul. (37 RT 5638-5640, 5649-5664.) Appellant was wearing

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[18/] Tamara (Tammy) Villa knew and briefly dated Romero in 1992. She met him through Florence Daul, who lived in her apartment building.

a pair of British Knights (BK) tennis shoes when arrested. (RT 5728-5733.) Following their arrest, Arteaga searched the vacant house and found in a closet one Colt Gold Cup National Match .45 caliber semiautomatic handgun (People's Exhibit 244) and one .22 caliber Sturm Ruger semiautomatic handgun (People's Exhibit 245).[19] (37 RT 5639-5649.) In a Dunlop sports bag located in the same closet, Arteaga found a 25-round banana clip with four .22 caliber long copper-jacketed bullets (People's Exhibit 248), together with wallets, drivers' licenses, papers, and other documents belonging to both appellant and Romero.(37 RT 5649-5653.)

C. Searches in Connection with the Investigation

On December 12, 1992, police seized Sonia Alvarez's Dodge Colt (license 2RJG309) from C & C Transmission in San Bernardino. (37 RT 5675-5678, 6548.) The car was towed to the Riverside County Sheriff's station. On December 15, 1992, police searched the car and recovered, among other items, two ski masks, a red tool box with motorcycle parts and tools belonging to Jose Aragon, shotgun shells, and an empty box of Winchester Western Wildcat .22 caliber ammunition, and seventeen .22 magnum bullets with either full metal jackets or plastic birdshot. (37 RT 5678-5707.)

In addition, seven copper-colored shotgun pellets, about size of BBs, were found in the backseat of Alvarez's car. Two Super-X .22 caliber bullet casings

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[19]/ See People's Exhibits 15 (photograph of recovered .22 caliber Ruger) and 16 (photograph of recovered .45 caliber semiautomatic). (1 Supp CT (Photographs-Exhibits) 17-20.)

were found under the carpet on the floor in front of the back seat. A sack containing one live Super-X .22 bullet and one expended Super-X .22 shell casing were found under the rear seat. (37 RT 5696-5702.) A box of Spaulding Legacy Gold golf balls in a pouch (People's Exhibit 311) was found on the passenger seat. (37 RT 5683-5684.)

Two briefcases were also found in the trunk of Alvarez's car.[20] (37 RT 5686-5687.) One briefcase contained a Federal Premium Hi-Power shotgun shell box, a smaller, red box of BRI Sabot three-inch magnum 20-gauge shotgun shells with two Federal Premium shotgun shells, and two loose shotgun shells tucked into the fold or lining of the briefcase. The text on the box of sabot shells stated in part: "The bullet is a .40 caliber aerodynamically stabilized projectile which is centered in the shotgun bore by a 20-gauge plastic sleeve (sabot) which breaks away when the projectile leaves the muzzle." (37 RT 5688-5696.)

The other briefcase was empty.[21] The word "Chris" in block-letter graffiti had been written inside this briefcase. (37 RT 5687-5688.) The graffiti appeared similar to graffiti drawn or sprayed inside Magnolia Center Interiors during the break-in on November 13, 1992 charged in counts 11 and 12, as shown in People's Exhibits 14 (graffiti block letters), 22 (particularly graffiti block-letter "C"), and 194 (block-letter "C"). (1 Supp CT (Photographs-Exhibits) 15-16, 319-320).

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[20]/ See People's Exhibits 307-308 (Samsonite briefcase and briefcase in trunk). (2 Supp CT (Photographs-Exhibits) 460-463.)

[21]/ See People's Exhibit 310; see also People's Exhibits 27 (photograph of open truck) and 28 (interior of Samsonite briefcase with graffiti "Chris") (1 Supp CT (Photographs-Exhibits) 37-40)).

On December 12, 1992, Riverside Sheriff law enforcement officers executed a search warrant at the home of appellant's grandmother at 21905 Baily Street in Mead Valley where appellant and Romero lived. (37 RT 5655-5657.) Various items of evidence were seized from bedrooms occupied by appellant and Romero and from outbuildings at that location. (37 RT 5657-5660.) In the southeast bedroom, officers found or seized a ring of keys, leather golf bag with a full set of golf clubs, a paperweight with a scorpion encased in a resin bubble, a .22 caliber rifle magazine, and a tackle box containing several different kinds of bullets and bullet casings. (37 RT 5657-5661.) In the southwest bedroom, other keys with tags, one with the name "Magnolia Center Interiors, Jim Murphy," were also found and seized (37 RT 5662-5663.) A flashlight with the name "Feltonberger" and marked with his initials and badge number was found in a shed next to the house. (37 RT 5663-5664.)

On December 21, 1992, Sheriff's Investigator Thomas Kimball and Detective Thompson searched appellant's blue Oldsmobile (license 2NGR072) parked at the home of his mother and stepfather, Maria and Phillip Self, located at 21844 Baily in Mead Valley. (32 RT 5034-5036.) Various items of evidence were seized from the interior and trunk of appellant's car,[22] including a plastic Nissan brake cover (People's Exhibit 57) and a torn Visa ATM transaction receipt pertaining to the count 4 William Meredith robbery. The torn ATM transaction

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[22]/ See People's Exhibits 59-61 (photographs of Oldsmobile). (1 Supp CT (Photographs-Exhibits) 90-95.)

receipt, dated October 9, 1992 at 6:27 a.m., was found in the ashtray. When reconstructed, the receipt revealed that it had been obtained from a Wells Fargo ATM machine in Woodcrest and bore William Meredith's Visa account number. (32 RT 5036-5043.)

A British Knights shoe box top was found in the back seat of appellant's car during the search.[23] (32 RT 5039-5041) The word "Flaco" was written on the box top (32 RT 5040) in graffiti similar in style to the graffiti left on the walls inside Magnolia Center Interiors and the graffiti written inside one of the briefcases seized during the search of in Sonia Alvarez's car.

Munoz, appellant, and Romero where charged with various offenses arising from the incidents that took place between October 8 and November 20, 1992. At trial, Munoz was the state's primary witness against appellant and Romero, pursuant to the plea bargain he had entered into with the District Attorney. A discussion of the offenses charged and the evidence adduced at trial follows.

D. The Offenses Charged, Background Information, and the Evidence at Trial

Because of the numerous incidents involved and multiple counts charged against appellant and his codefendants, for the sake of clarity the charges involving appellant are presented in the order of the counts charged (counts 1-20). For each count, the facts and non-scientific evidence introduced by the state are

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[23]/ See People's Exhibits 64 and 65 (photographs of shoe box in car). (1 Supp CT (Photographs-Exhibits) 100-103.)

presented, along with a discussion of Jose Munoz' testimony regarding the particular count or incident. In contrast, and again for the sake of clarity, rather than set out the scientific evidence adduced for each count or offense charged, the entire body of scientific evidence proffered at trial in connection with all offenses is presented in a separate section. (See Subsection F, *infra*.)

It should be noted that during defense cross-examination at trial, Jose Munoz conceded he was regularly using methamphetamine ("speed"), crystal methamphetamine, as well as marijuana and alcohol, during the period of the crimes charged. (40 RT 6047-6049, 6056.) He also acknowledged on cross-examination that he frequently used methamphetamine, marijuana, and alcohol while in San Diego before moving to Riverside. (40 RT 6054.) He testified that he came to Riverside to get away from San Diego where he had been committing crimes, stealing and stripping cars. (40 RT 6050-6051, 6053.) He acknowledged on cross-examination that he had been stopped by the police in San Diego for gun possession. (40 RT 6052.)

During cross-examination, Munoz admitted he lied during his various interviews with police after his arrest. (40 RT 6046-6047.) He acknowledged that he specifically told officers that if he were identified in the Aragon shooting, he would say whatever officers wanted him to say. He admitted that he made this statement because he did not think he could be identified in connection with any of the other crimes charged. He testified that he expected to receive a sentence of twenty years for his involvement in the crimes. (41 RT 6277-6290.)

Munoz' interrogation tapes (People's Exhibits 370, 370-A, 370-B, and 370-C) were admitted into evidence as prior consistent statements and played for the jury. The tapes were not transcribed during trial. (41 RT 6338, 6342-6343, 6349-6350; 42 RT 6371-6372.) Redacted transcripts of tapes (People's Exhibits 371, 371-A, 371-B, and 371-C) were given to the jury when the tapes were played.[24] (41 RT 6336-6343; see also 8 CT 1952-1953 (list of exhibits).)

At the time of the crimes and incidents involved in this case, appellant's mother and stepfather, Maria and Philip Self, lived at 21844 Baily in Mead Valley, Riverside County. (32 RT 5043-5047.) Maria Self's mother – appellant's grandmother -- lived nearby at 21905 Baily Street. (32 RT 5046.) For a time in 1992, appellant was house-sitting across the street from his grandmother's home; after that house was sold, appellant moved into his grandmother's residence, where he had a small room.

On September 23, 1992, on appellant's eighteenth birthday, he received a small sum of money in settlement of a dog-bite case that occurred when he was a minor. With a portion of the proceeds, appellant bought a car. At the time, he was working as a busboy at Coco's in Sun City. Except for a minor incident while a juvenile, appellant had no prior criminal record -- no arrests and no convictions.

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[24]/ See People's Exhibit 371 (transcript of Munoz interview with Detectives Hudson and Wilson) (45 Supp CT 12911-12949); 371A (transcript of Munoz interview with Detective Hudson) (45 Supp CT 12950-12991); 371B (transcript of Munoz interview with Detectives Wilson, Hudson, and Thompson, and unidentified fourth person) (45 Supp CT 12992-13030); and 371C (transcript of Munoz interview with Detective Breitkruez) (45 Supp CT 13031-13052).

At some point during 1992, appellant's brother, codefendant Romero, returned to the Riverside area from Pacifica, California, where he had been living since July of 1991. Romero did not work and was unable to hold a job. He had a history of serious criminal activity, including involvement in assaults, carjackings, and car thefts. Because of his problems, Romero had moved to Pacifica to live with the family of a high-school friend who had offered their help in turning his life around. However, unsuccessful in keeping a job and repeatedly violating the trust of the family who was trying to help him, Romero ultimately was asked to leave. He eventually returned to the Riverside area and also took up residence in his grandmother's house where appellant was then living.

Appellant first met Jose Munoz in August or September 1992. Munoz had just moved from his parents' home in San Diego to Riverside to live with his sister and her young son in a trailer owned by their parents. Munoz had been stealing cars in San Diego; he also liked guns and had been involved in drugs and narcotics in that area. During this period, Munoz was using crystal methamphetamine, marijuana, and alcohol.[25] The San Diego police were constantly stopping and "hassling" him (40 RT 6049-6050), and he thus had moved to Riverside ostensibly to get away from the police and the drug environment in San Diego. (37 RT 5608; 40 RT 6050.)

The property where Jose Munoz lived was on Bonham Street and was

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[25]/ During his initial post-arrest interrogation (People's Exhibit 371), Munoz stated that he and appellant also used crystal methamphetamine together. (45 Supp CT 12935.)

located in back of the property owned by appellant's grandmother. (37 RT 5586.) Munoz' sister worked with Sonia Alvarez, codefendant Romero's girlfriend. (39 RT 5951-5952; 40 RT 6077.)

At some point after October 1992, Daniel Chavez came to live with Munoz and his sister. (2RT [Chavez] 309.) At that time, Munoz had only just met Chavez; he was dating Munoz' cousin, Isela. (40 RT 6231-6232; 2 RT [Chavez] 310.)[26]

In post-arrest interrogation (People's Exhibit 371), Munoz explained that appellant seemed to change after his brother returned to Riverside. (45 Supp CT 12942.) Munoz later explained (People's Exhibit 371B) that before Romero "came into the picture," he was able to persuade appellant "from doing stuff." (45 Supp CT 12996.) After Romero arrived, appellant was different, more threatening --"like, you know, you're next." (45 Supp CT 12996.) Munoz also said (People's Exhibit 371B) that appellant participated in shootings when Romero was present "to prove himself to his big brother." (45 Supp CT 13001.)

1. Murders of Joey Mans and Timothy Jones (Counts 1 and 2)

While flying helicopter patrol at 1:25 p.m. on October 12, 1992 near Lake

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[26]/ As discussed in the Statement of the Case, *supra*, Chavez was originally named as a codefendant on several of the counts, including the murders and special circumstances alleged in counts 1 and 2. Chavez's case was severed before trial, and he was tried separately by a jury and convicted, inter alia, of two counts of first degree murder with special circumstances. Chavez's trial transcripts (hereafter designated "RT [Chavez]") are separately bound and have been included in the record on appeal. Chavez was sentenced to life imprisonment without possibility of parole.

Mathews, Riverside Police Officer David Mullins observed a vehicle and a body lying beside the vehicle on a hilltop in the area of Lakepoint Drive, Riverside County.[27] (33 RT 5090-5091.) The hilltop was a popular spot because of the view of Riverside at night. (33 RT 5125-5126.)

The body on the hilltop was subsequently identified as that of 21-year-old Joey Mans, the owner of the vehicle at the scene. Notifying the Riverside County Sheriff, Officer Mullins landed his aircraft and walked around the crest of the hill to look at Mans' body, which was partially clad from the waist up.[28] He waited for sheriff's deputies to arrive. (33 RT 5089-5094, 5101.)

A second, fully-clothed body, subsequently identified as that of 21-year-old Timothy Jones, was found about 150 yards down the slope from Mans' body.[29] Both Mans and Jones had been shot. (33 RT 5097.)

Deputy Sheriff Frederick Breitkreuz was called to the scene at 2:40 p.m. Breitkreuz was designated primary crime scene investigator. Breitkreuz observed an older-model, blue Subaru station wagon on the hilltop with both doors open.

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[27]/ For aerial photographs of hilltop area and hilltop showing the location of the Subaru and the two bodies, see People's Exhibits 1A, 2A, 85. (1 Supp CT (Photographs-Exhibits) 131-132; 2 Supp CT (Photographs-Exhibits) 595-596; 3 Supp CT (Photographs-Exhibits) 615-616.) During his testimony, Officer Mullins marked on People's Exhibit 85 where his helicopter landed. Pursuant to settled statement, Mullins' mark was no longer visible, and neither the trial attorneys present nor the court recalled where the witness indicated. (Item 58, Amended Settled Statement (Romero), Sixth Supp CT 134.)

[28]/ See People's Exhibits 1B and 1C. (2 Supp CT (Photographs-Exhibits 597-600).)

[29]/ For the location of Subaru and area around Jones' body before and after body was removed, see People's Exhibit 2B, 2C, 129, 146. (1 Supp CT (Photographs-Exhibits) 219, 220, 239-240; 3 Supp CT (Photographs-Exhibits) 617-620.)

The front seat of the vehicle seemed to be leaning forward. (33 RT 5098, 5100, 5159-5164.)

Deputy Sheriff Thomas Kimball was designated secondary investigator of the hilltop scene. Mans was found supine, face-down on his stomach. He was naked from the waist down and had a gray sweatshirt on top.[30] There was a burnt cigarette on the ground near his left hand.[31] There was a bullet hole through the sweatshirt near the shoulder blades;[32] gunshot residue was present. (33 RT 5098-5102.)

In Kimball's opinion, the gunshot to Mans' back looked like a contact wound. Mans was shot at close range; it appeared the muzzle of a weapon had been held close to body. There were powder stains around the entrance to the wound. (33 RT 5102-5103.)

Mans' body was moved when the coroner arrived. When rolled over, Mans was found clutching a cigarette lighter.[33] Mans' sweatshirt was lifted up. A gunshot wound was observed underneath the hole in his sweatshirt. Black or brown marks around the hole in the shoulder blades also indicated gunshot residue and a close contact shot. (33 RT 5103-5104.)

Evidence collected from the area around the Subaru and Mans' body included both .45 and .22 caliber shell casings. Some of the casings appeared

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[30]/ See People's Exhibits 1D. (3 Supp CT (Photographs-Exhibits) 601-602.)
[31]/ See People's Exhibits 1E. (3 Supp CT (Photographs-Exhibits) 603-604.) This photograph actually shows the cigarette butt closer to the right hand.
[32]/ See People's Exhibit 1F. (3 Supp CT (Photographs-Exhibits) 605-606.)
[33]/ See People's Exhibits 1G. (3 Supp CT (Photographs-Exhibits) 607-608.)

discolored, suggesting they had been at the scene for a while. Various shoe impressions and footprints were observed near Mans' body. Mans' shoes matched only some of the shoe impressions observed and photographed on the hilltop. Numerous BK shoe impressions or footprints were observed on the hilltop and at the edge of the hilltop area continuing down to the location of Jones' body.[34] (33 RT 5127-5137.)

Sheriff's Detective William Frogue was designated secondary investigator of the area where Jones' fully-clothed body was found. (33 RT 5098.) Jones was wearing a bulky jacket.[35] The body was lying face-down in a rocky and hilly terrain 190 feet north and 275 feet west of the hilltop scene. (43 RT 6552-6553.) There were horizontal abrasions on the left side of Jones' lower back area above the belt line.[36] There was a bullet would to left side of Jones' head and two additional bullet wounds to the rear of the neck area. Black smudges on Jones' jacket near the bullet wounds indicated a contact-type wound and signified that the barrel of the weapon was extremely close or touching the back of Jones' neck when bullets were fired. (33 RT 5135-5137, 5145-5146.)

Footprints and tracks were noticed around Jones body. BK shoeprints and tracks were observed approximately one and a half feet from Jones' head.

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[34]/ See People' Exhibits 26, 90-93, 95-98, 100-102, 104-108, 134, 136-138 (BK shoe impressions). (1 Supp CT (Photographs-Exhibits) 35-36, 141-148, 151-158, 161-166, 169-178, 229-230, 233-238.)

[35]/ See People's Exhibits 2D, 2E, 2F, 2H. (3 Supp CT (Photographs-Exhibits) 621-626, 629-630.)

[36]/ See People's Exhibit 2G. (3 Supp CT (Photographs-Exhibits) 627-628.)

Another BK shoeprint was observed 12 feet from his body. One .22 caliber Federal-brand shell casing was found next to Jones' body. When the coroner arrived, Jones was rolled over and another .22 caliber Federal brand shell casing was found on the ground near the body. Jones' body was removed at 11:20 p.m. (33 RT 5137-5148.)

The coroner removed Mans' body at 4:40 a.m. on October 13, 1992. The Subaru was towed to the Riverside Police garage on Spruce Street for forensic processing.[37] Detective Kimball searched and photographed the Subaru before it was towed. Kimball recalled that it was dirty inside. Paperwork in the car had identification of both Joey Mans and Timothy Jones. The keys were not in the car.

On October 14, 1992 Deputy Breitkreuz returned to the scene accompanied by Detective Frogue and Riverside Deputy DA Bill Mitchell. They located and retrieved cowboy boots on the right side of the road as one proceeded up to the hilltop. In a further inspection of the hilltop area, Breitkreuz found two .22 caliber Federal shell casings, one near the driver's side of the Subaru and a second near the front of the vehicle where Mans' body had been found.[38] (33 RT 5164-5171, 5177-5182.) Tire tracks and additional shoeprints were also photographed. Shoe impressions near the Subaru also showed a heel with a diamond pattern in the center of a circular area.[39] (33 RT 5104-5119.)

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[37]/ See People's Exhibits 123-128 (exterior, interior, and cargo area of Subaru photographed at police garage, including open glove compartment and papers on front seat). (1 Supp CT (Photographs-Exhibits) 208-218.)

[38]/ See People's Exhibits 130-133. (1 Supp CT (Photographs-Exhibits) 221-228.)

Breitkreuz returned to hilltop area again on December 16, 1992 after interviewing Jose Munoz in jail following his arrest. Munoz had given information about the location of the Subaru car keys. Munoz told Breitkreuz that he had tossed keys out the driver's side of the vehicle while coming down from the hilltop after the shooting. (33 RT 5171-5173.) Searching the area described by Munoz, Breitkreuz found keys on the dirt road, approximately two-tenths of a mile from where the Subaru had been parked and 10 yards from where the cowboy boots had been found previously in October.[40] (33 RT 5172-5173.)

At a later time, Breitkreuz tried the keys in Mans' Subaru which had been released to Charlotte Thornton, Joey Mans' sister, and was parked at her apartment complex. The keys worked both the ignition and door locks. (33 RT 5173-5177.)

During their investigation, police learned that around midnight on Sunday, October 11, 1992, Joseph L. Willmann and a friend drove to the hilltop area where Mans and Jones' bodies were found to use his CB radio. An older, blue or bluish gray stationwagon was parked on top of hill. At trial, Willmann identified Mans' Subaru as the vehicle parked on the hilltop at that time. Willmann testified that he observed three people around the car; one was the uniformed security guard for

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[39]/ Identification technicians photographed Officer Mullins' boots and the shoes or boots of all deputies and law enforcement officers at the scene. No one present was wearing either BK or Nike boots or shoes. (33 RT 5092.)

[40]/ During his testimony, Breitkreuz marked People's Exhibit 85 to show where the car keys were found. Pursuant to settled statement, Breitkreuz mark was no longer visible and neither the trial attorneys present nor the court recalled where the witness indicated. (Item 58, Amended Settled Statement (Romero), Sixth Supp CT 134).)

the area. The security guard did not have his vehicle on the hilltop. While using the CB radio, Willmann saw the Subaru leave the hilltop with the security guard. After a while, the security guard returned to hilltop in his own vehicle. The Subaru also returned with the same two guys a little after 2:00 a.m. The security guard then talked to the two guys. The guys were friendly. Willmann and his friend left the area at 3:00 a.m.. The two guys in the Subaru and the security guard in his vehicle were still on the hilltop. About 15 to 20 minutes after he left, and while reattaching his antenna to his car, Willmann saw the security guard driving down from the hilltop. (33 RT 5151-5158.) Willmann did not see any other cars going up toward the hilltop as he and his friend were driving down. (33 RT 5158.)

According to Charlotte Thornton, Mans and Timothy Jones were best friends. Thornton was familiar with her brother's Subaru and with things he owned. Thornton last saw Mans and Jones on October 11, 1992. They had intended to go fishing at Forest Falls, taking Mans' Subaru on the trip. Mans had a red milk crate in the hatchback area of his Subaru where he kept magazines and other items. Mans owned a pair of cowboy boots that he kept in his car. Thornton identified a pair of cowboy boots (People's Exhibit 144) (found off the dirt road down from the hilltop by Breitkreuz) as her brother's boots. Mans always carried a leather wallet with a horse design and two straps or fasteners. The wallet was found in the Subaru's glove compartment when his car was released to Thornton. There was no money in wallet, just Mans' birth certificate. (33 RT 5183-5189.)

Dr. Robert DiTraglia, a board-certified anatomic and forensic pathologist,

employed by the Riverside County Coroner's office, performed autopsies on the bodies of Joey Mans and Timothy Jones on October 16, 1992 by. (38 RT 5721, 5745.) Dr. DiTraglia did not observe any abrasions on or trauma to Mans' body. He observed a gunshot wound on Mans' left back which, in his opinion, was a contact wound based on the presence of soot or gunsmoke around entrance to the wound.[41] Dr. DiTraglia determined that the bullet entered left side of Mans' back; it perforated the spinal column, lacerated the spinal cord, proceeded through right lung and heart, and stopped in the right front chest area. Dr. DiTraglia recovered a small, .22 caliber, unjacketed projectile from the wound. In Dr. DiTraglia's opinion, the single gunshot likely paralyzed Mans almost immediately and would have killed him rapidly between 5 and 20 minutes, more or less. The mechanism of death was internal hemorrhage, bleeding. (38 RT 5720-5723, 5737-5745.)

During the autopsy on Timothy Jones, Dr. DiTraglia observed four gunshot wounds as well as a large number of abrasions (scrapes) and contusions (or blunt force injuries) to the right side of his face, lower back, left hip area, right palm and wrist.[42] The abrasions resulted from blunt force trauma, consistent with falling down while running in rocky or rough terrain. (38 RT 5745.) Dr. DiTraglia recovered two .22 caliber bullets from Jones' head and gave them to Deputy

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[41]/ For a photograph of the bullet wound showing soot and powder burns, see People's Exhibit 1H. (3 Supp CT (Photographs-Exhibits) 609-610.) The List of Exhibits incorrectly describes Exhibit 1H as a "bullet wound front." (See 8 CT 1945.) The photograph (People's Exhibit 1H) shows an entry wound on the back; the bullet did not exit in front according to Dr. DiTraglia's testimony.

[42]/ For photographs taken at the scene of these abrasions, see People's Exhibits 2I-2N. (3 Supp CT (Photographs-Exhibits) 631-642.)

Sheriff Kimball who attended the autopsies. (38 RT 5723-5728, 5756-5759.) In Dr. DiTraglia's opinion, the cause of Jones' death was multiple gunshot wounds. (38 RT 5763.)

Wound 1 was a bullet entry wound behind the left ear.[43] A projectile went through the collar of Jones' jacket, entered the head behind the left ear, and embedded itself in thick bone behind the ear. Although the bullet did not penetrate the brain and the wound was not necessarily fatal, in Dr. DiTraglia's opinion, a large percentage of people would die from such a wound. There was no soot or gunpowder on the jacket collar adjacent to the wound. (38 RT 5745, 5753-5756.)

Wound 2 was located on the back of the neck. It was a through and through wound from the back of left neck exiting on the right side.[44] A bullet perforated the skin and subcutaneous tissue right underneath the skin. In Dr. DiTraglia's opinion, the bullet wound was superficial and not fatal. (38 RT 5759-5761.) Wound 3 was a gunshot wound on the back side of left shoulder. There was no soot around the wound itself, but there was soot deposition on the left shoulder of the jacket worn by Jones. The wound 3 bullet exited on the front side of Jones' left shoulder above the armpit.[45] In Dr. DiTraglia's opinion, wound 3

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[43]/ See People's Exhibit 2T (wound 1). (3 Supp CT (Photographs-Exhibits) 653-654.)

[44]/ See People's Exhibit 2S (wound 2). (3 Supp CT (Photographs-Exhibits) 651-652.)

[45]/ See People's Exhibits 2O-2P (wound 3 entry wound); 2Q (wound 3 exit wound). (3 Supp CT (Photographs-Exhibits) 643-648.)

probably was not fatal by itself. (38 RT 5761-5763, 5764.) On cross-examination, Dr. DiTraglia acknowledged that Jones could have first received either wound 2 or wound 3 and then could have run for 150 yards. (38 RT 5801-5805.)

Wound 4 was a gunshot to the head, close to left ear and near wound 1.[46] There was no soot associated with the wound itself, although there was soot on Jones' jacket adjacent to wound. A gunshot entered the back left side of Jones' head, went through skull, underlying brain, through the brain stem, across the right side, and lodged in bone of the skull above the right eye. In Dr. DiTraglia's opinion, wound 4 was a fatal gunshot wound; it would have rendered the victim immediately unconscious and dead very shortly thereafter. There was high degree of medical certainty that no physical activity occurred after gunshot wound 4. (38 RT 5801-5805.)

Jose Munoz' Testimony at Trial

Munoz testified that he, Romero, Daniel Chavez, and appellant participated in the Lake Mathews killings on the night of October 11, 1992.[47] Munoz made ski masks earlier in the evening. Although he gave masks to Romero, Chavez, and appellant, only he wore a mask to disguise himself. (39 RT

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[46]/ See People's Exhibits 2V-2W (gruesome autopsy photographs showing location and trajectories in head and brain of wounds 1 and 4. (3 Supp CT (Photographs-Exhibits) 657-660.)

[47]/ In his post-arrest interrogation (People's Exhibit 371), Munoz said that Romero and appellant told him they shot two boys in the hills by a lake. (45 Supp CT 12942-12943.) Munoz said he also read about it in the newspaper. (45 Supp CT 12942-12943.)

6004-6005.) Appellant was wearing British Knights (BK) shoes; Munoz was wearing boots.

Munoz was armed with a .22 single shot and had a box of .22 caliber bullets in his pocket. (40 RT 6181-6185.) Codefendant Romero was armed with a .22 caliber Remington rifle that Munoz had previously purchased.[48] When he bought the Remington, Munoz knew that it did not work well and had difficulty in firing repetitively. The Remington used bullets with an "F" on the casings; Munoz loaded the rifle at home earlier that evening. (41 RT 6266-6269.).

On Sunday night, October 11, 1992, Munoz, Chavez, and appellant accompanied codefendant Romero to go stealing.[49] Romero drove Sonia Alvarez's Dodge Colt. While driving around, Romero said he had a feeling that night that somebody was going to die.[50] He said it could be one of them but he did not think so. He also said that more than likely it would be somebody else. The four drove to the hilltop in the Lake Mathews area. They spotted two guys in a car. Munoz was opposed at first to robbing the two men, because it did not look like they had anything. Romero and Munoz approached the victims' car; both were armed. They ordered the two guys out of their car at gunpoint. Appellant

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[48]/ In a further statement to police during the interrogation (People's Exhibit 371), Munoz said that they were armed only with a twenty-two. (45 Supp CT 12944.)
[49]/ During the interrogation (People's Exhibit 371A), Munoz said that the plan was for him to steal a car. (45 Supp CT 12970.)
[50]/ In his post-arrest interrogation (People's Exhibit 371A), Munoz said that while driving around in search of a car to steal, Romero kept saying that "somebody's gonna die tonight" and he kept talking about killing somebody. Munoz thought he was not serious. (45 CT 12970-12971; see also 45 CT 13033.)

and Chavez drove the Dodge Colt closer to other car, and they also got out. At gunpoint, the two occupants were ordered out of their car. The passenger was told to lie on the ground; the driver was ordered to drop his pants. Romero lit a cigarette for the driver. Munoz took the passenger's wallet; in order to go through the contents of the wallet, Munoz handed his gun to Chavez. Munoz then took the car keys from the driver and ordered him to lie on the ground next to his passenger. Munoz went to the back of the car to look for things to take. While doing do, he heard Romero tell Chavez to shoot.[51] Munoz said "don't shoot." Codefendant Romero then shot the driver in the back. He then tried to shoot the passenger, but his gun clicked and misfired twice. The passenger then got up and took off running down the hill. Romero told Chavez to shoot. Chavez fired at the fleeing passenger. Romero and appellant ran after the passenger. Romero was armed with the .22 caliber Remington rifle as he gave chase.

While Romero and appellant were running after the passenger, Munoz spoke with Chavez and continued to remove items from the victims' car. Munoz heard two to four more shots. Two or three minutes later, Romero and appellant returned to the hilltop. At this time, appellant was holding the .22; Romero was unarmed. Munoz and appellant got into the back seat of the Dodge Colt; Romero got into the front passenger seat, while Chavez drove. On the way

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[51]/ Munoz also said (People's Exhibit 371A) that while Mans and Jones were lying on the ground next to their car, Romero told Chavez, "just put the gun here and press the trigger." Chavez refused. Munoz then heard a shot; he thought it was a warning shot just to scare they guy. (45 Supp CT 12973-12974; see also 45 Supp CT 13038-13039 (Romero telling Chavez to shoot the driver).)

down from the hilltop, Munoz threw car keys and a pair of cowboy boots out of the window. They drove to 21905 Baily Street where they went through the items taken from the victims. Appellant said that he caught up with the passenger and beat him down with his fists. He also found a pipe or something and hit the guy over the head. When Romero approached, appellant took the rifle.[52] The passenger was lying on the ground with his hands behind his head. Appellant said he had to jam the rifle through the victim's fingers and fire through his hand to shoot him in the head. (39 RT 5894-5926; 40 RT 6081-6103, 6181-6185.)

During cross-examination at trial, Munoz testified that he burned his ski mask and some gloves in his backyard later that night after returning from Lake Mathews. Munoz did not know what the others did with their masks. (41 RT 6312-6313.)

2. Murder of Jose Aragon (Count 3)

On the morning of November 25, 1992, 22-year-old Jose Aragon loaded his motorcycle and motorcycle gear in his pickup truck at his parents' home in Redlands. Before leaving home, he left a note for his parents, telling them he was going motorcycle riding in San Timoteo Canyon near Beaumont in Riverside County (People's Exhibit 234). (35 RT 5410.)

On the afternoon of November 25, 1992, G.F.I. motorcycle club member

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[52]/ During post-arrest interrogation (People's Exhibit 371A), Munoz said that Romero was holding the rifle when he and appellant ran after Jones. He also said that Romero hit Jones once and then gave the gun to appellant because "he wanted everybody to be a part of it, ..." (45 Supp CT 12978.)

Ted Lehmann, his 10-year-old son, and a friend also went motorcycle riding in San Timoteo Canyon. When Lehmann arrived at approximately 2:00 or 2:30 p.m., he saw a gray pickup truck and a rider lying in the bed of the truck.[53] Lehmann was acquainted with Jose Aragon, who was also a member of the same riding club. Lehmann recognized Aragon's truck and his motorcycle gear. He thought Aragon was asleep. (35 RT 5421-5427.)

About 4:00 p.m., Lehmann's son, who had ridden his motorcycle close to the truck, said that he thought something was wrong with man who appeared to be sleeping. Lehmann went over to truck and found that Aragon was not sleeping. Lehmann observed a large throat injury and other wounds on the rider. Trying to assist Aragon before realizing he was dead, Lehmann threw his white motorcycle helmet into the bed of the truck. Once he realized that Aragon was dead, Lehmann told everyone to get way from the truck, and he went to a nearby Mexican restaurant to call the Beaumont Police. (35 RT 5424-5425.)

When Aragon did not return by 5:00 p.m., his father drove to San Timoteo Canyon to look for him. It was already dark when he arrived; police vehicles and lights had surrounded a grove of trees where Aragon always used to park his truck. Initially, police informed Aragon's father that Jose had an accident; later, he was told by police that Aragon had been shot. Aragon's father called his wife, Aragon's stepmother, who joined him at Timoteo Canyon. After about two hours, the police told the parents to go home and that they would be contacted in the

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[53]/ See People's Exhibits 3A-3C. (3 Supp CT (Photographs-Exhibits) 661-666.)

morning. (35 RT 5409-5413.)

Riverside County Sheriff's Detective Terry Hudson was assigned to the Banning Sheriff's station. On the afternoon of November 25, 1992, Hudson was advised that a male subject had been found dead, with a large hole in his neck. His body was in the back of a pickup truck parked in an unofficial motorcycle area in San Timoteo Canyon. (35 RT 5429, 5475-5476.) Hudson responded to the call and arrived on scene at 6:15 p.m. Other sheriff units and Beaumont police officers had already arrived. Hudson observed a motorcycle parked to the right of a gray pickup truck. The tailgate of the truck was down. A male subject, determined to be Jose Aragon, was lying on his back in the bed of the truck with his legs hanging over tailgate. A motorcycle ramp was on the ground below the rider's feet. The area was taped off. Since weather and lighting conditions were poor, Hudson called the California Department of Forestry for floodlights. (35 RT 5429-5432.)

According to his father, Steven Aragon, as a competitive rider Jose Aragon always wore full protective racing gear, including shoulder pads, kidney belt, thigh pads, racing boots, helmet, goggles, and white AXO gloves (People's Exhibit 227). Because he wore racing boots while riding, Aragon usually kept his tennis shoes in the truck (People's Exhibit 236). (35 RT 5413-5414.) He also kept in the truck a red toolbox with tools (People's Exhibits 230 and 231) as well as a Craftsman socket set (People's 249). Loose change was kept in the ashtray. (35 RT 5114-5417.)

Under Hudson's direction, the scene was processed for evidence.[54] No shoe or footprints were observed in the sandy soil around the truck. The door of truck cab was open with papers on the floor. The ashtray was open. Keys were on the driver's side floorboard. Hudson did not observe a toolbox or Craftsman socket set in or around the truck, nor did he find Jose Aragon's wallet or its contents. One .22 caliber bullet casing was found on the ground behind the truck near the tailgate; seven .22 caliber bullet casings were found in the truck bed near and forward of Aragon's body. (35 RT 5432-5438.) Of the seven .22 caliber bullet recovered from the truck bed, six were Super X Winchester casings and one was aluminum C brand casing. (35 RT 5441-5444.)

Hudson observed a white motorcycle helmet in the truck bed; it was subsequently identified as belonging to Ted Lehmann. Aragon's tennis shoes and gloves were also found in the bed of the truck. There were bullet fragments near the gloves and under Aragon's body. (35 RT 5438-5441.)

Hudson attended autopsy of Jose Aragon on December 1, 1992. The autopsy was performed by Dr. Robert DiTraglia, the same coroner who autopsied the bodies of Joey Mans and Timothy Jones. (35 RT 5445-5446.) During the autopsy, Hudson observed bloodstains on the left shoulder area of Aragon's clothing, gunshot residue and powder burns in the left shoulder area. In Hudson's

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[54]/ In collecting and photographing evidence, the number "B92330010" was assigned to the Aragon crime scene – "B" for Banning; "92" for year 1992; "330" for the 330th day of the year; and "010" for daily report number for that day. (35 RT 5444-5445.)

opinion, the powder burns were caused by close proximity of the firearm when the weapon was fired. Hudson observed a bloodstain on front of the kidney belt worn by Aragon and a small tear on the inside of the front portion of the kidney belt.[55] He observed scrapes and a tear on the second louver of the flak jacket where something had impacted the jacket. He noticed another defect -- the distortion of a small vent hole -- on the upper left shoulder area of Aragon's flak jacket.[56] He also observed an exit hole caused by a shotgun round in the back of Aragon's motorcycle helmet.[57] (35 RT 5450-5455.)

Altogether, Hudson observed 11 different bullet wounds to Aragon's body, including one neck wound by shotgun, two bullet wounds in the abdomen and eight chest and shoulder wounds.[58] Bullet fragments were removed from Aragon's body during the autopsy. Shoulder wound 2 was a graze-type wound. Projectiles were recovered from wounds 3 through 11. Two plastic fragments,[59] from what was later identified as a sabot round,[60] were removed from Aragon's throat. Hudson was unfamiliar with the plastic; he had never seen anything like

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[55]/ See People's Exhibit 3E. (3 Supp CT (Photographs-Exhibits) 669-670.)
[56]/ See People's Exhibit 3K (flak jacket). (3 Supp CT (Photographs-Exhibits) 681-682.)
[57]/ See People's Exhibit 3M. (3 Supp CT (Photographs-Exhibits) 685-686.)
[58]/ See People's Exhibits 3P-3Q. (3 Supp CT (Photographs-Exhibits) 691-694. Other extremely gruesome and inflammatory autopsy photographs were admitted into evidence. (See People's Exhibits 3S-3U (neck and head wounds). (3 Supp CT (Photographs-Exhibits) 697-701.)
[59]/ See People's Exhibits 340-341 (photographs of plastic fragments from sabot shell in Banning SO [Sheriff's Office] Case No. 92330010). (2 Supp CT (Photographs-Exhibits) 484-487.)
[60]/ See People's Exhibit 342 (photograph of sabot slug shot shell with plastic sleeves and pieces). (2 Supp CT (Photographs-Exhibits) 488-489.)

them. (35 RT 5455-5467.)

Dr. Robert DiTraglia determined during the autopsy that Aragon had been shot 11 times. Wound 1 was an uncommon wound to the neck and head, not a contact wound or near-contact wound. The presence of plastic sabot halves meant that the weapon was fired close enough for sabots still to be traveling with the projectile, close enough so that they, too, entered the body. (38 RT 5792-5795.) Dr. DiTraglia had never before encountered sabot-type objects. The entrance wound was under the chin; the exit wound was on left back side of head. There was no indication of shotgun pellets in gunshot wound 1, and no projectile was found. (38 RT 5788-5792.) Wound 2 was a graze wound to the front left shoulder, and wounds 3 through 10 all traveled left to right through the body. Wound 11 was a gunshot wound to the right abdomen that entered the right side of the abdomen and traveled through the abdominal wall, colon and kidney, ending in muscle tissue adjacent to the spine on right side. The exit wound was an exit reentry wound (meaning the bullet broke the skin on the right lower back but did not go out of the body owing perhaps to the presence of the kidney belt worn). The back area of the kidney belt was stained with blood where bullet was "attempting to exit." There was no soot or powder deposition associated with this wound. A projectile was recovered. (38 RT 5782, 5785-5787)

In Dr. DiTraglia's opinion, the cause of Jose Aragon's death was multiple gunshot wounds, including a very severe, devastating wound to the head and numerous gunshot wounds to the torso. (38 RT 5792) In Dr. DiTraglia's opinion,

while the head wound overshadowed the other wounds, they all contributed to his death. Dr. DiTraglia could not tell order of wounds. (38 RT 5792-5793.) The abdominal wound was not absolutely fatal. Although the victim might have had a chance if given prompt medical attention, still, the abdominal wound was a severe wound. Even if the victim had not received the gunshot wound to the throat, he probably would not have survived, because he received too many gunshot wounds through too many vital organs. All wounds were antemortem; the heart was still beating when Jose Aragon received the throat wound. (38 RT 5793-5800.)

Aragon's father later retrieved the truck. Bloodstains and bullet indentations were still visible in the bed of the truck and back of the cab. Aragon's wallet was missing and never found. The red toolbox was missing, and there was no change in the ashtray (People's Exhibit 229). (35 RT 5416-5418.) At trial, photographs of the red toolbox and its contents were shown to Jose Aragon's father. He identified Aragon's red toolbox; it had been found in and seized by police from the trunk of Sonia Alvarez's car.[61] (35 RT 5414-5416.) He also identified Aragon's motorcycle pants and repair tools. (35 RT 5472.) Neither Aragon nor his father knew appellant or codefendant Romero. Neither appellant nor codefendant Romero had permission to possess Aragon's red toolbox. (35 RT 5417-5419.)

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[61] / Pursuant to stipulation (35 RT 5380-5381), Aragon's red toolbox (weighing 80 pounds) was not admitted into evidence but released to the Aragon family. At trial, Aragon's father identified the toolbox from a photograph. (See also People's Exhibits 308-310 (photographs of toolbox in trunk of Alvarez's car). (2 Supp CT (Photographs-Exhibits) 462-467.)

At trial, Virginia Kautzman, formerly customer services manager at Security Pacific Bank (SPB) where Jose Aragon held an account, testified that monthly customer statements for Aragon showed that his ATM card was used three times on November 25, 1992, the date of his death.[62] First, it was used at 1:58 p.m. at a Great Western Bank at Sun City to withdraw of $120 from his SPB account.; second, it was used at 2:20 p.m. at a Sun City SPB ATM machine in a purported $500 deposit as to which the money envelope was found empty when processed; and third, Aragon's ATM card used again at 2:24 p.m. at the same Sun City SPB branch to withdraw $180 against the purported $500 deposit. (36 RT 5479-5488.)

The state also introduced the testimony of Ramon Reyes and Christine Tosti, both of whom worked with appellant in 1992 at the Coco's restaurant in Sun City, California. Both Reyes and Tosti testified that appellant had come to Coco's in Thanksgiving 1992, accompanied by a couple of Hispanic guys. (36 RT 5497-5499.) Reyes did not recognize the other guys (36 RT 5499); appellant told Tosti that one of them was his brother. (36 RT 5506.)

Tosti, who worked as a waitress at Coco's, went out on one date with appellant when they worked together at Coco's. She testified that after their date, appellant quit and never came back to work. When she saw appellant at the restaurant around Thanksgiving 1992, Tosti asked appellant how he was doing and

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[62]/ See People's Exhibit 235 (Security Pacific Bank (Bank of America) transaction records for Aragon's account). (45 Supp CT 12902-12905A.)

what he was doing for money. Tosti recalled that appellant said, "I'm getting by" (36 RT 5502-5507, 5513), looked over at his brother, and "kind of smirked, like a funny smirk." Tosti testified that she did not "really get the joke" and his statement "seemed weird." (36 RT 5507-5508, 5510.) Tosti identified Romero as the person appellant identified as his brother the day she saw him in the restaurant. Tosti also testified that a Great Western Bank was located across from the restaurant. (36 RT 5506-5509.)

Investigator Hudson, lead investigator on the Aragon case, testified that in 1992 both a Great Western Bank and a Security Pacific Bank were located right across the street from the Coco's restaurant in Sun City.[63] (36 RT 5522-5524.)

Jose Munoz' Testimony at Trial

At trial, Munoz testified that on November 25, 1992, appellant and codefendant Romero awakened him at his house. They asked for the shotgun and told Munoz to accompany them. Munoz had borrowed the shotgun from appellant after the Williams-Rankins shooting. (40 RT 6227-6231.) The shotgun was already loaded with a slug shell that appellant had previously purchased. (39 RT 6009-6011.) Munoz loaded the shotgun himself the night before. (41 RT 6269-6273.)

Armed with the shotgun, as well as a .22 caliber rifle with scope, a .45

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[63]/ See People's Exhibits 256 (Coco's restaurant), 257-260 (Great Western Bank). ((2 Supp CT (Photographs-Exhibits) 396-405.) Pursuant to settled statement, People's Exhibit 257 depicts a scene most consistent with testimony describing the location of the Security Pacific Bank in relation to Coco's restaurant. (Item 35, Amended Settled Statement (Romero), (Sixth Supp CT 132).)

caliber pistol, and a .22 caliber Ruger, the three drove to a deserted area in Banning in Sonia Alvarez's car. On the way, they drank a 12-pack of beer. Munoz wanted to find somebody with guns so that he could get one of his own.[64] They spotted a guy riding a motorcycle and stopped the car. According to Munoz, appellant wanted to shoot the rider with the scoped rifle as he was riding the motorcycle. Romero said they should park first and check out the area. (39 RT 5974-5979; 40 RT 6139-6155; 41 RT 6299-6307.)

Munoz, appellant, and Romero approached the motorcycle rider and Romero engaged him in a conversation about his motorcycle. Romero then introduced Jose Aragon to appellant and to Munoz. According to Munoz, no one was wearing a mask. Munoz claimed that he said he was going back to the car to put on his gloves and ski mask because he was cold. Munoz testified that he put on a real ski mask; not the one he had made. (41 RT 6311-6315.) By this time, Romero had asked Aragon to show him some motorcycle tricks. Aragon drove away on his motorcycle. Romero told Munoz and appellant that Aragon was alone and that he was not expected anywhere for a long time. The three agreed to rob him. Munoz testified that appellant again repeated that he wanted to shoot Aragon while he was riding his motorcycle. (39 RT 5979-5983.)

Munoz testified that, at this point, he, appellant, and Romero went back to

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[64]/ In his trial testimony, Munoz offered that he only reluctantly accompanied Romero and appellant because he was afraid of them. During his initial post-arrest interrogation, however, Munoz stated that the impetus for this incident was his own desire to get a gun. He wanted a gun. They went out looking for somebody who was "shooting" from whom they could steal weapons. (45 CT 12982.)

Alvarez's car. Aragon returned and parked his motorcycle to the right of his truck. Munoz claimed that as he started walking toward Aragon to rob him, appellant shot him in the stomach with the .22 scoped rifle. Saying "ow," Aragon grabbed his side and fell on the ground. Munoz ran to Aragon and asked for the keys to his truck. Aragon said everything was in the truck. (39 RT 5983-5988.)

Munoz stated that Romero then picked up Aragon and put him in the bed of the truck. Face-to-face, Romero asked Aragon "how does it feel to get shot?" and "Does it burn?" Munoz noticed that Aragon was nodding out. Munoz, appellant, and Romero began removing things from Aragon's truck. Munoz claimed that before doing so, he took off his gloves; he admitted he opened the door of the truck cab with a sweatshirt to avoid leaving fingerprints. (39 RT 5987-5988; 41 RT 6315-6320.)

Munoz testified that Romero took a red toolbox from the truck. Munoz took a set of Craftsman tools that he later gave to his father. (39 RT 5994-5995, 6003-6004.) He also found Aragon's wallet in the truck. Appellant grabbed a clear plastic box with change and ATM receipts. He stated that either he or appellant found Aragon's ATM card in the wallet. Munoz and appellant went to back of the truck and asked Aragon for his PIN number. Munoz testified that appellant told Aragon, "Give me the code or I'm going to kill you." Munoz admitted that he also repeatedly demanded the PIN number, because Aragon was nodding out. Aragon eventually gave the PIN number to Munoz. According to Munoz, while he kept repeating the PIN number to himself, appellant pulled out the .22 Ruger and

repeatedly shot Aragon on his left side. Appellant held the gun right up to his body, right up to his ribs. When appellant shot Aragon with the Ruger for the first time, Aragon's body jerked. Appellant fired other shots one after another, about eight times altogether. Aragon jerked a little after the subsequent shots, but not much. Toward the end, he was not jerking. By this time, Romero had already gone back to Alvarez's car. Munoz was standing in back of the truck when appellant shot Aragon. (39 RT 5988-5992; 40 RT 6213; 41 RT 6260-6264.)

During his testimony, Munoz denied that he shot Aragon at all. He claimed he only intended to rough him up and steal his things. He testified that after shooting Aragon with the Ruger, appellant shot Aragon with the shotgun. Appellant was standing over Aragon when he fired the shotgun. He had either retrieved the weapon from Alvarez's car or was carrying it along with the .22 caliber Ruger. Munoz heard the shell hit the bed of the truck (39 RT 5993; 40 RT 6217-6224.)

Munoz testified that appellant returned to Alvarez's car and got into the front seat. He said, "Oh, wow, you should have seen the hole it made." Appellant allegedly demonstrated the size of the hole -- about two and a half inches -- with his hands. Munoz claimed that appellant also said, "It made a hole, went all the way through. And then it just closed up with blood" According to Munoz, appellant was "kind of goofy" and "kind of laughing" when he made those remarks. (39 RT 5993-5994.)

Munoz, appellant, and Romero left the area and drove to Perris, stopping to

buy some gas with money taken from Aragon's wallet. They unsuccessfully tried to use Aragon's ATM card at two banks in Perris. They then drove to Sun City where Munoz admitted he used Aragon's ATM card at a Security Pacific or Great Western Bank. Munoz used the ATM card because he knew how to use the machine to withdraw money. (40 RT 6155.). Aragon first checked Aragon's balance and then withdrew $120. The three proceeded to a Coco's restaurant across the street from the bank where they discussed how to get more money with Aragon's ATM card by making a fake deposit first. Munoz and appellant went to another bank across the street from Coco's. They first made a fake $500 deposit and then withdrew $180 from Aragon's account. (39 RT 5995-6001.) Munoz share of the money was $90; appellant and Romero each got $100.[65] After lunch, Romero drove back to Mead Valley, dropping Munoz off at home. (39 RT 6001-6003.)

Munoz also admitted that he tried to use Aragon's ATM card the next day or a couple of days later. At one bank, the ATM machine said he could not use it; at a second bank, the ATM machine took the card and did not return it. (39 RT 6003.)

On the day after Aragon was killed, Munoz brought the .22 caliber Remington rifle to San Diego and gave it to his brother, Ruben. He returned to Riverside the same day. He had worked on the weapon, and it did not function.

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[65]/ During post-arrest interrogation (People's Exhibits 371A-371B), Munoz said he ended up with a total of $80. Although first given $90, Munoz contributed $10 for lunch, leaving him with $80. (45 Supp CT 12952, 12996.)

Munoz believed that he was going to be caught soon and wanted to get rid of the rifle. Munoz testified that he called Ruben from jail after his arrest and told his brother to give the Remington to the police. (39 RT 6008-6009; 41 RT 6264-6266.)

3. Other Charges Against Appellant (Counts 4-19)

a. William Meredith robbery (count 4)

At approximately 10:30 p.m. on October 8, 1992, William Meredith and an unidentified man were sitting in Meredith's red 1991 Nissan Pathfinder (license plate "DRMBUIE") on Day Street in Moreno Valley, Riverside County.[66] (32 RT 5018-5019.) Meredith's companion had parked his own white compact next to Meredith's Pathfinder. Meredith was seated in the driver's seat. Looking over his shoulder, the other man told Meredith "we better get out of here." Meredith turned around and saw two men running toward his Pathfinder. (32 RT 5020-5021.)

The two men had gotten out of an older, two-door hardtop, possibly a Buick Monte Carlo or Regal, that pulled up right in back of Meredith's Pathfinder. Meredith was not sure of the type of car; he just knew it was "a larger kind of dark hardtop type." One of the men approached Meredith on the driver's side; the other approached the passenger side of the Pathfinder. Meredith's companion jumped

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[66]/ The identity of Meredith's companion, if known, was not revealed at trial, and the man did not testify. There was no evidence at trial as to what, if anything, Meredith and the other man had been doing in his car at 10:30 p.m. on the night of the robbery.

out of car and tried to get away. Meredith started the ignition. The man who approached the driver's side of the Pathfinder was holding what appeared to be a sawed-off shotgun. That man told Meredith to shut off the engine; Meredith complied. (32 RT 5021, 5032-5033.)

Pointing the shotgun at Meredith's head and face, the gunman ordered Meredith out of his vehicle. He told Meredith to go around by the front of the Pathfinder and to empty out his pockets on the hood. Scared, Meredith put his wallet and a money clip with $30 on the hood of his Pathfinder. Although ordered to remove his jewelry, Meredith did not do so. The gunman ordered Meredith to drop his pants around his ankles and then to step over guardrail.[67] The gunman told Meredith to lie down in the grass and neither to move nor get up until they left. The gunman said: "Don't get up until we leave." In Meredith's opinion, the gunman was "kind of excitable" (32 RT 5022-5024.)

Meredith did not know what happened to his companion. After few minutes and while still in the field, Meredith heard both his Pathfinder and the car in which the gunmen arrived drive away. Meredith got up and left the field. Meredith found that his wallet, cash, driver's license, ID card, retired military card, and American Express and Visa cards had been taken, as well as his Pathfinder. (32 RT 5203-5205.) Meredith had previously written his PIN number on his Visa card.

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[67]/ See People's Exhibit 74 (photograph of guardrail and adjacent open field). (1 Supp CT (Photographs-Exhibits) 120-121.)

Leaving the field, Meredith found that his companion was still at the scene. So, too, was his car. The man drove Meredith to a nearby market where Meredith called the police and his wife. (32 RT 5025, 5031.) Later that night, Meredith returned to scene with his wife and found his money clip. (32 RT 5024-5025.)

Meredith's Visa card, issued by the Federal Credit Union at March Air Force Base, was used at 11:48 p.m. on October 8, 1992 for a $20.20 gas purchase at a Shell station in Sun City and twice on October 9, 1992 at 6:26 and 6:27 a.m., respectively, for two withdrawals of $100 from a Wells Fargo Bank ATM in Woodcrest.[68] (32 RT 5028-5030.) Meredith contested these charges. (32 RT 5062-5071.)

At approximately 1:25 p.m. on October 20, 1992, CHP Officer Martin Steven Martinez was called to Temescal Canyon, between La Sierra and Cajaclo Road to investigate a reported vehicle off the road. In the vicinity of so-called Cadillac Hill, Officer Martinez found a red Nissan Pathfinder with license plate "DRMBUIE" backed into a pond. The vehicle was totaled and the interior stripped.[69] There was a rag in the gas tank. (33 RT 5084-5088.)

Two weeks after the robbery, Meredith saw his Pathfinder after it had been recovered from the Cadillac Hill area. Police informed him that his car had been

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[68]/ See People's Exhibits 262-263 (photograph of ATM at Wells Fargo Bank). (2 Supp CT (Exhibits-Photographs) 406-409.)

[69]/ See People's Exhibit 21 (photograph of red Pathfinder after recovery). (1 Supp CT (Photographs-Exhibits) 29-30); see also People's Exhibits 75 and 76 (stripped interior), 77 (front view Pathfinder exterior), and 79 (left side exterior). (1 Supp CT (Photographs-Exhibits) 122-129.)

pushed down an embankment into a pond. The vehicle, shown after its recovery in People's Exhibit 79, had been totaled. A rag was stuck in the gas tank; a key on Meredith's key ring was in the ignition. (33 RT 5026-5028.)

At trial, appellant's stepfather, Philip Self, identified a photograph of a blue Oldsmobile and testified that the car belonged to appellant. It had been parked on Philip Self's property at 21844 Baily. Appellant bought the car from a neighbor. The car had to be towed when purchased. Philip Self never saw appellant or anyone else driving the car. (32 RT 5045-5047.)

Thomas Litzinger, parts manager at Quaid Imports, a Nissan dealer, identified the black plastic cover found in the search of appellant's Oldsmobile as the cover of an antilock brake system for July 1990 and later Nissan four-wheel drive pickup trucks and Pathfinders. (32 RT 5048-5051.) John Guthrie, a Nissan technician employed by Quaid Imports, had been a Nissan mechanic for 20 years. Guthrie was familiar with Pathfinders and also owned a 1991 Pathfinder. Guthrie identified People's Exhibit 57 as a cover for a Nissan anti-skid control device installed underneath the radio in the Pathfinder. Photographs of the interior of Meredith's Nissan Pathfinder (People's Exhibit 75) showed that the ABS control unit had been removed. (32 RT 5054-5060; see also 1 Supp CT (Photographs-Exhibits) [Pathfinder interior showing where brake control device would have been installed] 110-120)

In Guthrie's opinion, the ABS control unit could have been mistaken for a radio amplifier if someone did not know what it was. The part could not be used

in another vehicle. (32 RT 5060-5061.)

Jose Munoz' Testimony at Trial

Munoz testified that he, codefendant Romero, and appellant committed the Meredith robbery in early October 1992. Intending to commit a carjacking or robbery, they drove around Moreno Valley in appellant's car one night looking for a victim. (39 RT 5882, 5885-5886.) Romero was driving. (39 RT 5885.) He was armed with a .22 caliber sawed-off Remington rifle that Munoz and appellant had previously bought in San Diego for $20. (39 RT 5882-5884, 5887; 40 RT 6169-6179.) Appellant was armed with a .22 caliber single-shot rifle sawed-off front and back. (39 RT 5887; 40 RT 6071.) The rifle was missing the feeding tube but could fire a single shot if pointed down. If pointed in an outward direction, the rifle could fire bullets as fast as the trigger was pulled. (39 RT 5884.)

While driving in Moreno Valley, Munoz saw two parked cars, one a Pathfinder, the other a small, compact car. Romero parked in back of two cars. Romero and appellant got out of the car. Munoz refused to get out but agreed to be the getaway driver. (35 RT 5886.) Romero approached driver's side of the Pathfinder where Meredith was seated; appellant approached the passenger. Munoz overheard Romero order the driver to exit the car and lower his pants. Appellant held his rifle on the passenger, ordering him to lie down between the Pathfinder and the compact car. (35 RT 5888.)

Munoz did not see the robbery or what was taken from the victims. He saw

appellant get into the compact car. Unsuccessful in starting that car, appellant returned to his own car. He got into the front passenger seat next to Munoz. Munoz drove appellant's car away from the scene. Romero drove away in the Pathfinder to his grandmother's house on Baily Street. (35 RT 5887-5889.) On their return, Romero, appellant, and Munoz went through a wallet taken from one of the victims, which contained approximately four credit cards, including a Visa with PIN number. Later that night, Munoz, Romero, and appellant used the Visa card at a Shell station to buy gas. The next day, Munoz used the Visa card at an ATM; he obtained $200, splitting the money with Romero and appellant. (35 RT 5889-5892.)

Munoz admitted that he removed the stereo speakers from the Pathfinder and also a box from under the seat that he thought was an amplifier. The Pathfinder disappeared from the grandmother's house several days later. Munoz testified that either appellant or Romero said they went off-roading somewhere and let it go off a cliff. (35 RT 5982-5894.)

b. Mills-Ewy shooting (counts 5-7)

On the night of October 22, 1992, Kenneth M. Mills and his girlfriend, Vicky Ewy, were driving in Ewy's two-door, red Nissan along Moreno Beach Drive in Moreno Valley, Riverside County.[70] While driving, Mills observed two cars approaching in the opposite lane both of which appeared to be driving

[70]/ See People's Exhibit 148 (front of red vehicle identified as Nissan). (1 Supp CT (Photographs-Exhibits) 241-242.)

erratically. One of the cars made a U-turn in front of Mills' vehicle and then drove in front of Mills on Moreno Beach Drive. Mills followed that car, passing it at the Allesandro intersection. Following Mills' vehicle as it continued along Moreno Beach Drive, the car turned on its high beams. Mills slowed down at the intersection of Moreno Beach and John F. Kennedy Drives.[71] Mills looked over his left shoulder; he saw the silhouette of a car and a person leaning out of the passenger window and pointing a gun. Mills saw the muzzle blast from a shotgun. The blast blew out a hole in the driver's side window where Mills was sitting,[72] blinding him in the right eye, tearing off his right eyelid, and damaging his left eye. (33 RT 5191-5196.) Although barely able to see from his left eye, Mills drove away on JFK Dr. with the other car in pursuit. (33 RT 5196-5197.) After turning on Olive, Mills stopped at some model homes and then drove onto a golf course path to some homes.[73] The other car stopped and left the area after Mills turned onto the golf cart path. Mills stopped to push out the right front passenger window that had also been shattered by the blast.[74] Mills and Ewy drove to some

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[71]/ See People's Exhibit 149 (road conditions and visibility on night of shooting). (1 Supp CT (Photographs-Exhibits) 243-244.) For views of area, road conditions, and street signs during daytime, see People's Exhibits 156-161 (1 Supp CT (Photographs-Exhibits) 257-268.)

[72]/ See People's Exhibits 24 and 25 (showing hole in driver's window and shattered glass) (1 Supp CT (Photographs-Exhibits) 31-34.)

[73]/ See People's Exhibits 18 and 150 (aerial photographs of homes, golf course, and golf course path), 162-164 (golf course path adjacent to homes). (1 Supp CT (Photographs-Exhibits) 23-24, 245-246, 269-274.)

[74]/ See People's Exhibit 19, 151 (shattered right passenger window) (1 Supp CT (Photographs-Exhibits) 25-26, 245-246.) For other views of the car's interior and exterior after the shooting, see People's Exhibits 152 (interior) and 153 (seat with hole) (1 Supp CT (Photographs-Exhibits) 249-252.)

homes at the edge of the golf course. Ewy went up to the houses and banged on doors. When one of the occupants responded, the police were called. (33 RT 5197-5211.)

Mills was taken to a nearby hospital. He lost his right eye and sustained scarring on his face; Mills' left eye escaped permanent damage, and he eventually regained 20/20 vision. (33 RT 5201.) Mills was unable to describe the car involved in the shooting or its occupants. While in the hospital, he reported that the other car was a late-model, 1980s hatchback, either dark gray or blue in color. (33 RT 5202.) He told police that he saw a man from the waist up pointing a gun; he also said he saw the muzzle blast but not the gun. The blast seemed to come from the front passenger window. He recalled seeing possibly two occupants in the other car, at least a driver and front passenger. Mills was unable to describe the occupants. (33 RT 5211-5214.)

Riverside County Deputy Sheriff Eric Albert was on patrol on the night of October 22, 1992. He was dispatched around midnight to 15615 Thornberry in Moreno Valley and arrived a few minutes after midnight on October 23, 1992. Albert observed a red vehicle on the street with several subjects milling about the vehicle. He observed a young man holding a rag to his right eye and blood on his face. He observed an emotionally upset female, distraught and crying. Since Moreno Valley Hospital was nearby, Albert drove Mills to the hospital within two or three minutes after arriving at the scene. Mills was in considerable pain and emotionally distressed. Mills described the other vehicle as a dark gray or blue,

1980s-model hatchback. He said he saw the muzzle flash. (33 RT 5215-5218.)

After driving Mills to the hospital, Deputy Albert later returned to the Thornberry address. He was accompanied by a forensic technician, who photographed Mills' vehicle.[75] Albert observed a hole in the driver's window. He recovered plastic wadding from a shotgun blast on the floor of Mills' vehicle.[76] Albert also observed pellet marks on the upholstery and inside the right passenger door above the passenger handle. He collected pellet fragments from the passenger door and from the flooring. (33 RT 5218-5224.)

Criminalist Paul Sham examined lead pellets recovered from the Mills-Ewy vehicle. Although he was able to identify them as shotgun pellets, Sham was unable to determine the gauge of the shotgun from which they were fired. Plastic shotgun wadding from the passenger floor of Mills' vehicle was identical to one-piece wadding from a 20-gauge Remington shot shell. Pieces of lead removed from the passenger door were also consistent with lead shotgun pellets. (38 RT 5825-5826, 5847-5849.)

Jose Munoz' Testimony at Trial

According to Munoz, he, codefendant Romero, and appellant drove Sonia Alvarez's car in the area of Moreno Beach Drive on the night of October 22, 1992.[77] Appellant was seated in back; Romero was driving, Munoz was sitting in

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[75]/ See People's Exhibits 20 and 155 (interior of vehicle). (1 Supp CT (Photographs-Exhibits) 27-28, 255-256.)
[76]/ See People's Exhibit 154 (shotgun wadding on floor). (1 Supp CT (Photographs-Exhibits) 253-254.)

the front passenger seat. Munoz was armed with a .22 single shot rifle; appellant was armed with a 20 gauge shotgun, sawed-off front and back, that had been purchased from "white boy Dave," a neighbor who lived a couple of blocks away in area of Bonham and Baily.[78] (39 5926-5929; 40 RT 6102-6103, 6106.)

Munoz testified that Romero pulled alongside Mills' vehicle. Munoz pointed the .22 rifle out of the car window at the other driver. Romero told him to shoot. Before Munoz could shoot, appellant fired the shotgun loaded with birdshot at the driver over the top of the car from the rear left passenger side. In order to shoot, appellant put his head and body out of the rear car window and positioned his upper body and arms over the top of the car, facing Mills' vehicle. Appellant only had one shell. Munoz did not shoot. (39 RT 5929-5933; 40 RT 6103-6117, 6185-6190.)

After the shooting, Romero continued to follow Mills' vehicle to an area near some apartments and a hospital. While in pursuit, Munoz fired once from his rifle at the fleeing vehicle. When Mills started honking his horn near apartments, Romero drove away and returned to Munoz' house. (39 RT 5933-5934.)

c. Williams-Rankins shooting (counts 9 and 10)

In 1992, Randolph Rankins (aka "Pint" or "Half Pint") acted as a drug

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[77]/ In post-arrest interrogation (People's Exhibit 371B), Munoz said that they had been out drinking beer and brandy before the shooting. (45 Supp CT 13025.)

[78]/ In post-arrest interrogation (People's Exhibit 371), Munoz said that he purchased the shot gun from "white boy Dave." (45 CT 12933-12934; see also People's Exhibit 371B (where Munoz said that appellant purchased the shotgun and three shells from Munoz' friend David). (45 Supp CT 13014, 13027.)

middleman in addition to using rock cocaine several times a week. Rankins was a runner for drug dealers, taking a cut in drugs of sales he brokered. (34 RT 5253-5254, 45270-5278, 5281.)

In the early morning hours of October 26, 1992, Rankins was stopped by three men in a four-door car (People's Exhibit 176) in Mead Valley.[79] Rankins recognized and was acquainted only with appellant, having seen him before in the area. He did not know the other occupants, including the front seat passenger, whose long hair was in a ponytail. (34 RT 5253-5255, 5259, 5281-5283.)

Appellant and his companions asked Rankins for help in buying methamphetamine ("speed"). Rankins did not deal in methamphetamine, but he agreed to help, intending to defraud the buyers by supplying rock cocaine rather than methamphetamine in order to acquire a small cut in the deal in the form of rock cocaine for his personal use. Rankins first drove with the buyers to a location in Mead Valley (where he and appellant got out) and next to a house on Markham Street (where Rankins told the three to stay in the car). (34 RT 5255, 5257-5260, 5281.) Rankins was given $20 for methamphetamine. Rankins went into the house at that location where he met, among others, Paulita Williams with whom he had previously smoked rock cocaine. (34 RT 5270-5278.)

Instead of methamphetamine, Rankins bought rock cocaine. Taking a small bit of cocaine as his cut, Rankins gave the rest to the buyers who were waiting

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[79]/ People's Exhibit 176 (photograph of blue car); see also People's Exhibit 175 (aerial photograph of Munoz residence and other marked locations described by Rankins).) (1 Supp CT (Photographs-Exhibits) 291-292.)

outside. Romero got very upset when Rankins gave them cocaine instead of methamphetamine. Rankins refused to give a refund. Unhappy with Rankins, one of the occupants, later identified as Romero, said he would see him later. (34 RT 5258-5260.)

After the sale, Rankins went back into the house. He soon left again with Paulita Williams, driving away in her VW Scirocco to smoke his share of the rock cocaine. After they smoked the cocaine, Williams agreed to drive Rankins home. While en route, Rankins spotted the buyers' car; in turn, the buyers spotted Williams and Rankins. The buyers' car pulled up behind Williams. The driver of that car jumped out; he was armed with a gun. Rankins was unable to identify the driver. Rankins told Williams to get out of there. (34 RT 5227-5230, 5260, 5280-5290.)

Williams recalled that while driving Rankins home, she passed the street where he lived. Williams stopped to back up and turn around. As she did so, a small car blocked her from behind. Williams only saw the car's headlights, which blinded her vision. The driver and front passenger of the car got out. As they approached her car, Williams saw that both were armed with big guns – bigger than pistols. Williams at first thought they simply had water guns and that the incident was a joke. Suddenly, Williams felt as though someone had socked her on the side. She realized that she had been shot by a blast from the left side of her car. Her driver's side window was shot out. Rankins started screaming "wait a minute, wait a minute." He then jumped out of Williams' car and ran away.

Williams did not see Rankins after he fled. (34 RT 5229-5240.)

Rankins recalled that after shooting Williams, the gunmen started walking around to the passenger side where he was sitting. He opened the passenger door, jumped out, and ran. Rankins thought three or four shots were fired at him as he ran. He ran into field, fell down, and yelled that he was hit hoping that the gunman would stop shooting. Rankins heard one of the gunmen say, "we got him, we got him down, let's go finish him off." Seeing the gunmen coming through field, Rankins got up and started running. More shots were fired at him. Rankins ran around the corner to a dumpster and jumped in to hide. He hid in the dumpster until 4:00 or 5:00 a.m. (34 RT 5260-5263.)

After Rankins fled, Williams tried to remove her seat belt. Then, trying to drive away, Williams stalled her car. Another man approached Williams on the driver's side and started cutting her arm with a knife through the shot-out window. Williams first thought that the man was trying to grab her. Williams noticed for the first time that both men on the her side of the car were wearing ski masks. The third assailant was standing at the rear of Williams' car; she could not tell if he, too, was wearing a ski mask. (34 RT 5231-5232, 5244-5250; 40 RT 6193.) Williams did not realize immediately that she had been cut. (34 RT 5231.) She did not know if the man wielding the knife was also armed with a gun. (34 RT 5250-5251.)

The gunman next to the one wielding the knife, pushed him away from Williams. That gunman cocked his gun and placed it to Williams' head. She

screamed, "don't kill me." Saying "die bitch," and standing next to the man with the knife, the gunman shot Williams in the back with his shotgun. Williams fell over onto the passenger seat and pretended to be dead. All three men then left, driving away in their car. Although injured, Williams drove her damaged car to the nearby home of a friend. Police and paramedics were called. Williams was taken by ambulance to the Riverside General Hospital shortly after 2:30 a.m.. (34 RT 5232-5234.)

Deputy Sheriff Robert Masson was dispatched to a house at Rider and Brown in Mead Valley at 2:00 a.m. on October 26, 1992. He observed a damaged VW Scirocco (People's Exhibit 172).[80] (34 RT 5293-5300.) He also found shotgun wadding in the car but no expended shells. (34 RT 5300-5303.). Inside the house, Masson found Paulita Williams lying on the floor with a gunshot wound, bleeding from her back, neck area, and wrist. Williams said that she had been shot and described the location of the incident. Masson drove to Alexander and Myron, about quarter of a mile away, where Williams reported the shooting had occurred. Masson saw a puddle of antifreeze in middle of the street, some broken glass and blood-stained glass fragments, as well as a downed street sign.[81] Masson observed auto collision damage and parts from an automobile in the street. (34 RT 5295-5296.)

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[80]/ For photographs of Williams' car and interior after shooting, see People's Exhibits 169-173. (1 Supp CT (Photographs-Exhibits) 279-288.)

[81]/ See People's Exhibits 167-168 (puddle of antifreeze on road). (1 Supp CT (Photographs-Exhibits) 275-278.)

At trial, Williams testified that she suffered a punctured left lung and sustained a deep, eight or nine-inch long gash on her left arm that required 80 stitches, a deep gash on her shoulder, a shorter gash on her left wrist near the palm of her hand, and other cuts.[82] She stated that despite receiving treatment, her shoulders were still very sensitive because some shotgun pellets remained embedded in her body, including in her spine, shoulder, and muscles. She testified that she felt the wounds "all the time" and showed her scarred left arm to the jury. (34 RT 5234-5237.) She told the jury that, in her opinion, the man who stabbed her seemed "like he was enjoying what he was doing. It was almost like a smirk." She thought his eyes looked like they were "smiling." (34 RT 5240-5242.)

Rankins also testified at trial, identifying Romero as the driver and appellant as the rear sear passenger in the car that followed Williams. Rankins also detailed his prior felony convictions. He was rearrested just before trial and given a four-month jail sentence. He did not want to return to prison on a parole violation. In exchange for his testimony at trial, the prosecutor agreed to contact Rankins' parole agent, tell him that Rankins had done a good job in court and ask for reinstatement of his parole with 120 days jail time. (RT 5258-5259, 5266-5267, 5277-5278, 5280.)

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[82]/ At trial, Williams indicated by gesture where the gash wound on her shoulder was located. By settled statement, it is not possible to determine where she indicated the gash on her shoulder had occurred or what her gestures regarding her shoulders were. (Item 24, Amended Settled Statement (Romero), (Sixth Supp CT 130).)

Jose Munoz' Testimony at Trial

At trial, Jose Munoz admitted that he disclosed the Williams-Rankins incident only after he signed his plea agreement. (40 RT 6160.) He told the authorities he wanted to get the Williams' incident off his chest. He thought that Williams died in the shooting. Munoz thought, but was not sure, that he would not get any additional prison time for shooting Williams. (41 RT 6309-6320.) In order to get a deal with the prosecutor, Munoz understood he would also have to plead guilty to shooting Paulita Williams. (41 RT 6325.)

Munoz testified that on October 26, 1992, four days after the Mills-Ewy shooting, he, appellant, and Romero met "Pint" while looking to buy methamphetamine. Pint got into Sonia Alvarez's car that Romero was driving. Appellant was in the front passenger seat. Romero drove first to one house and then to another in search of drugs. Pint bought drugs at the second house with $20 that Romero had given him. Romero broke off a piece and gave it to Pint. Pint then drove away with a woman in a white car. (39 RT 5935-5939.)

According to Munoz, he, Romero, and appellant drove back to 21905 Baily Street where they learned that they bought rock cocaine, not methamphetamine. Although not what they wanted, each "snorted" (or nasally ingested) a line of cocaine. Romero became angry and said that they were going to go out and look for Pint, ask him for a refund, or "take him out." They armed themselves with a single-shot rifle and a shotgun. Driving around, they saw a white car with Pint and a woman in Mead Valley. (39 RT 5939-5941.)

Romero blocked the woman's car from behind. On backing up, the woman hit Romero's car. Munoz got out and fired the shotgun loaded with birdshot at the rear of the woman's car. Armed with a .22 rifle, Romero went around to the front of the woman's car. After Munoz fired the shotgun, Pint got out of the car and ran away. Munoz reloaded. Romero then pointed the .22 single shot at Pint. He later told Munoz and appellant that he pulled trigger but the gun did not fire. (39 RT 5941-5944.)

Munoz testified that appellant approached the woman and started stabbing her arm with a serrated kitchen knife obtained from Munoz' kitchen. Appellant was "kind of laughing" while slashing the woman. (39 RT 5945, 5946.) Wearing a mask, Munoz approached the driver's window and told appellant to get out of the way. Figuring that appellant was going to kill the woman with the knife anyway, Munoz decided that he "might as well just do it and get it over with." (39 RT 5944-5946; 40 RT 6193, 6207, 6212-6213.) Munoz thus fired his shotgun again directly at the woman from a distance of one or two feet "so she'd stop screaming." (40 RT 6131.) Munoz claimed he closed his eyes as he pulled the trigger, so did not see the effect of the shotgun blast. The three got back into Romero's car and drove away. They looked for Pint but could not find him. They returned to Munoz' house. Appellant went into kitchen and ate some cereal, humming while eating. Munoz told appellant to shut up; appellant got up and left. (39 RT 5934-5949.) Munoz testified that appellant later told him that the blast "splattered her brains all over windshield" and stated that appellant was laughing

like it was funny. (39 RT 5946.)

After the shooting, Munoz became concerned that Pint would retaliate. He borrowed a .22 Remington rifle for protection from Pint, obtaining the weapon from a neighbor, Al Cole, who got it from appellant. Munoz also told his sister about the Rankins incident, who in turn told Sonia Alvarez, since both worked together at a wrecking yard. Romero later told Munoz that appellant wanted to take him out for talking. Romero also told Munoz to tell his sister that he was lying and that he made up everything. Munoz told his sister that everything he told her was true but that she should tell Sonia Alvarez that he was lying. (39 RT 5949-5954.)

d. Magnolia Center Interiors burglary (counts 11 and 12)

At approximately 9:00 a.m. on Saturday, November 14, 1992, James Bradford Murphy, the owner of Magnolia Center Interiors at 6359 Magnolia Drive in Riverside, discovered that his store had been vandalized overnight. A glass panel on the rear door had been broken, permitting entry.[83] Murphy left the store in good shape on closing at 5:00 or 6:00 p.m. on November 13, 1992. Glass panels in the rear door were intact when Murphy closed on Friday night. (34 RT 5354-5355, 6352-5366.)

The shop and office areas had been spray-painted and tagged with graffiti. The sample room had been sprayed with the fire extinguisher causing white

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[83]/ See People's Exhibits 188 (front of store) and 189 (rear door). (2 Supp CT (Photographs-Exhibits) 309-312.)

powder from the extinguisher to cover everything in the store. Footprints had been left in the powder on the floor. The office and shop were in shambles. An antique safe had been turned on its side.[84] Office and other reupholstered customer furniture had been cut or sliced with scissors.[85] Other items, including office furniture, copier, computers, fax machine, and telephones had been sprayed with glue, permanently damaging most of the equipment.[86] Graffiti included such expressions as "sad place in hell see u there," as well as other, repeated references to death and dying.[87] Graffiti in block letters included a drawing of what appeared to be a flower and the number "666."[88] The bathroom toilet was tagged with "now you die," "now is then," and "67."[89] A sonogram of Murphy's unborn son appeared to have been stabbed with a pencil or scissors and "You're going to die" was written on the sonogram. A set of keys to shop buildings and locks, coins from Murphy's desk, a World War II dummy pineapple grenade, and a scorpion encased in Lucite were missing from the store. Murphy's damage totaled approximately $18,000. (34 RT 5355-5379.)

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[84]/ See People's Exhibit 202. (2 Supp CT (Photographs-Exhibits) 333-334.)
[85]/ For photographs of damaged chairs, see People's Exhibits 10 and 198. (1 Supp CT (Photographs-Exhibits) 7-8; 2 Supp CT (Photographs-Exhibits) 327-328.)
[86]/ For photographs of the damage, see People's Exhibits 23 (chair), 29 (computer), 192, 195 (desk area), 193 (printer), 194 (sewing machine), 195 (fabric bolts and work area), 201 (fax machine). (1 Supp CT (Photographs-Exhibits) 43-46; 2 Supp CT (Photographs-Exhibits) 315-324, 331-332.)
[87]/ See People's Exhibits 12, 13, 186-187, 197. (Supp CT (Photographs-Exhibits) 11-14, 2 Supp CT (Photographs-Exhibits) 305-308, 325-326); see also People's Exhibit 199 (graffiti reference to "white trash"). (2 Supp CT (Photographs-Exhibits) 329-330.)
[88]/ See People's Exhibit 14. (1 Supp CT (Photographs-Exhibits) 15-16.)
[89]/ See People's Exhibit 11. (1 Supp CT (Photographs-Exhibits) 9-10.)

Riverside Police Officer Georgina Perez Holderness responded to the reported burglary at around 9:00 a.m. on November 14, 1992. She lifted four latent fingerprints (People's Exhibit 203) from rear door broken glass. (34 RT 5357-5361.)

Deputy David F. Collins was working in the Moreno Valley sheriff's station on December 12, 1992. Noting that a number of keys had been recovered during the search of 21905 Baily Street on December 12, 1992, Collins contacted Jim Murphy and arranged to meet him at the Moreno Valley Police Department. At the meeting, Collins showed Murphy the keys that had been seized during the search. Except for a square-topped key, Murphy identified all of the keys as belonging to his business. (34 RT 5377-5378; 37 RT 5668-5669.) Collins released a set of Chrysler vehicle keys to Murphy, since he was about to replace the locks on the vehicle. (RT 5669.)

e. Alfred Steenblock kidnapping-robbery (counts 13 and 14)

The state's evidence at trial established that at 1:15 p.m. on November 18, 1992, Alfred Steenblock was eating a sandwich in his Pontiac Grand Prix (license number 2BAR803), at a parking lot at Mission Grove Plaza, located at the intersection of Alessandro and Trautwein Streets in Riverside.[90] (34 RT 5308-5309.) A car pulled up and stopped perpendicular to Steenblock's car. A stocky, Latin male wearing sunglasses, about 5'8" tall and 25 years old, got of the car that

[90]/ See People's Exhibits 181-182 (shopping center and parking lot). (1 Supp CT (Photographs-Exhibits) 295-298.)

pulled up and, armed with a pistol, approached Steenblock's car. From about 6" away, the gunman pointed the pistol at Steenblock's head. Steenblock described the weapon as a large-bore, gray pistol with a 6" barrel and no sight-bead. In a calm voice, the gunman told Steenblock to move over, and he got into the driver's seat. He told Steenblock, "I'm not going to kill you." While holding the gun in his lap with his right hand, the gunman drove away from the parking lot. The gunman told Steenblock not to look at him, to keep his eyes down toward the floor, and not to draw attention to them. The gunman drove for a minute or two, about a quarter of a mile to a dead-end street next to an empty field.[91] (34 RT 5310-5313.)

Someone followed in the gunman's car and parked behind Steenblock's car. Steenblock described the gunman as very calm and cool; in his opinion, the gunman knew what he was doing. (34 RT 53115.) After both cars had parked, the gunman asked for Steenblock's wallet. At the same time, two occupants got out of other car, one of whom approached Steenblock on the passenger side. The other stayed back behind Steenblock's car. Steenblock testified that the person who approached him was quite belligerent and more uptight and excited than the gunman. He demanded Steenblock's personal belongings, including his watch. Steenblock handed over his wallet, his money clip with $80, and his watch to the gunman in his car. The gunman pulled out Steenblock's ATM card and asked for his PIN number, threatening him by saying they knew his home address and his

[91]/ See People's Exhibit 183. (1 Supp CT (Photographs-Exhibits) 299-300.)

phone number. Steenblock gave the gunman his PIN number for his Bank of America account. The gunman then went through the glove compartment and removed its contents. The gunman told Steenblock to get out of the car and to start walking into the adjacent open field. He ordered Steenblock to stay in the field for at least an hour. Steenblock eventually heard both cars pull away. He later saw that his car and the other car were gone. (34 RT 5314-5318.) Steenblock testified that he had a briefcase, cell phone, a box with a dozen gold golf balls, and a full set of golf clubs (woods and irons) in his trunk. (34 RT 5321-5326.)

Once he knew the assailants were gone, Steenblock walked back to the shopping center where he had been parked and called the police and his wife. He attempted to cancel his credit cards, and he contacted the Bank of America to cancel the ATM card. He testified that before he could cancel his cards, his credit card had already been used to withdraw money at an ATM machine in Sun City. (34 RT 5326-5328.)

Steenblock described the other car at the crime scene as a dark blue or black, early model, Oldsmobile Cutlass or Buick Regal-type sedan. At the trial, Steenblock identified appellant as the gunman who first approached his car, got in, and drove with Steenblock to the field area. (34 RT 5318-5319.) Prior to trial, he had identified appellant, first in a line-up at the jail after his arrest and, later, at the preliminary hearing. (34 RT 5319-5320.) Steenblock also identified Daniel Chavez as the belligerent one who approached the passenger side where he was sitting and ordered him out of the car. (34 RT 5331-5332, 5335-5336.)

Deputy Sheriff Giulio F. Simms recovered Steenblock's car on May 31, 1993 in the area of Carousel Drive and Idaleona Road in Mead Valley, a rural, mountainous area with numerous dirt roads.[92] The car had been stripped. (34 RT 5349-5352.) Steenblock inspected his car after its recovery. Engine components and mostly everything under the dash had been removed. Only one wheel was left on the car. The trunk had been forced open and was empty. (34 RT 5336-5337.)

At trial, Steenblock identified the box of golf balls found in Alvarez's car as the one he had bought at a golf shop in Mission Viejo and which were in his trunk at the time of the robbery. He also identified a Diamond-Tele portable cellular phone (People's 179) and Samsonite hard shell briefcase (People's 177), seized during the search of the residence at 21905 Baily Street, as items contained in the trunk of his car trunk at the time of the robbery. He recognized his briefcase from a paper clip he routinely kept tucked into a pocket on the lid. His briefcase key also fit the lock. Steenblock testified that he did not have any shotgun shells, ammunition boxes, or sabot rounds in his briefcase at the time of the robbery.[93] (34 RT 5321-5326.)

Jose Munoz' Testimony at Trial

Munoz testified that sometime after the Williams-Rankins incident, he saw Romero with some golf clubs, a bunch of golf balls, a cellular phone, and a watch.

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[92]/ See People's Exhibit 180 (front exterior of Steenblock's car after recovery). (1 Supp CT (Photographs-Exhibits) 203-204.)

[93]/ See People's Exhibits 17, 303-306 (open briefcase with paperclip, shotgun shell, and ammunitions boxes). (1 Supp CT (Photographs-Exhibits) 21-22; 2 Supp CT (Photographs-Exhibits) 452-459.)

Romero pulled them out of the trunk of Alvarez's car. Appellant and Daniel Chavez were also present at that time. Romero told Munoz that he stole from somebody. (39 RT 5954-3957.) Munoz later saw the cell phone again in appellant's room at 21905 Baily Street. (RT 5957.)

f. Albert Knoeffler robbery (count 15)

The state introduced evidence that at 3:30 p.m. on November 20, 1992, seventy-year-old Albert George Knoeffler was tending beehives at Markham and Washington Streets in Riverside.[94] (34 RT 5340.) His 1987 Chevrolet Tahoe pickup truck was parked nearby. Knoeffler testified that he was approached by a man who struck up conversation with him about bees. After awhile, the man left but soon returned armed with a shotgun. Pointing the shotgun directly at Knoeffler and saying he was not going to hurt him, the man said he needed the keys to Knoeffler's pickup. According to Knoeffler, the man seemed liked a pretty nice guy. Knoeffler handed over his keys. Another man wearing a ski mask then appeared, having come down the road. Knoeffler did not see another vehicle in the immediate area. The man in the mask got into Knoeffler's truck while Knoeffler continued working with his bees. The man who demanded Knoeffler's keys handed the shotgun to the masked man and then approached Knoeffler again, saying he needed money for gas. Knoeffler pulled some money out of his wallet and handed it over. Saying "that's enough," the man took only

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[94]/ See People's Exhibit 185 (Knoeffler's bee boxes in field). (2 Supp CT (Photographs-Exhibits) 303-304.)

$40 or $50. More money remained in Knoeffler's wallet. The man walked back to Knoeffler's pickup, got in, and both men drove away in his truck. (34 RT 5340-5345.)

Knoeffler stated that after the robbery, he kept working with his bees. He later decided he should let someone know what had happened. Having no transportation home, he spoke to a young man who was walking by the area. The young man invited Knoeffler to his house to use the phone, telling him "my dad's a cop." The police responded to Knoeffler's location. (34 RT 5345.)

About two weeks later, Knoeffler's truck was recovered. Knoeffler testified that when he saw his truck at the tow yard, it was "pretty well beat up." (34 RT 5346.) Only the window on the driver's side was still intact. All the lights had been vandalized; the alternator and other parts had been removed.[95] (34 RT 5346.)

Knoeffler was unable to identify anyone at the preliminary hearing or at trial. (34 RT 5348.)

Jose Munoz' Testimony at Trial

In his testimony, Munoz admitted that on November 20, 1992, he participated in the robbery of a beekeeper with Romero, appellant, and Daniel Chavez. (39 RT 5957-5958.) Romero was driving Sonia Alvarez's car. Although Munoz could not recall for sure, he thought they possibly were armed with the .22

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[95]/ See People's Exhibit 184 (photograph of vehicle as subsequently repaired by Knoeffler after recovery). (2 Supp CT (Photographs-Exhibits) 301-302.)

caliber single shot rifle and a shotgun. Munoz wore a mask. (39 RT 5958-5959; 40 RT 6133-6137, 6225-6227.)

Munoz told the jury that Romero parked the car he was driving away from the beekeeper. Armed with the shotgun, Romero walked down the road to where the beekeeper was working. After awhile, Munoz went to see what was taking so long; he found Romero talking to the beekeeper. He overheard him telling the beekeeper he was going to need his truck.[96] He saw the beekeeper take out his wallet and offer Romero $25. Saying he needed money for gas, Romero told the beekeeper, "Give me all of it." Romero then took about $75 from the wallet. He and Romero then drove away in the beekeeper's truck to where Sonia Alvarez's car was parked. Daniel Chavez was driving Alvarez's car. Romero and Munoz drove the truck to an open field and let it go down a hill. They all then went to a store and bought beer, cigarettes, and "munchies." (39 RT 5959-5966; 40 RT 6133-6137.)

g. Mills robbery (counts 16-17)

Between 12:30 and 1:00 p.m. on November 21, 1992, Jerry Mills, Sr. and his 15-year-old son, Jerry, Jr., were target shooting from the back of their Nissan pickup truck about two miles south of the Perris airport in Riverside County. Jerry, Sr. had four firearms in the truck. (35 RT 5381-5384.)

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[96]/ During post-arrest interrogation (People's Exhibit 371), Munoz stated that he walked down the road to see what was happening and to make sure that Romero was not going to shoot the old man. (45 Supp CT 12979.)

As they were reloading their weapons, an older model hatchback pulled up and stopped about six feet from their truck. Mills, Sr. did not hear the car approach because he was wearing earplugs. The front passenger in the approaching car pointed a shotgun at Mills, Sr. Three men got out of the car. The man wielding the shotgun approached Mills' truck. Mills, Sr. decided not to react with guns because his son was standing next to him. He told the gunman, "Just take what you want." Mills and his son were told to go stand behind a nearby telephone pole. Mills, Sr. looked back and saw the men taking things out of his truck and loading their car. At that point, the gunman with the shotgun, and who now had with Mills' .45 pistol in his belt, approached and demanded money. He took Mills' wallet and removed about $150. After taking the money, the gunman wished Mills a merry Christmas. Two men got into the car; the third man got into Mills' truck and both vehicles drove away southbound. Mills and his son walked southbound in the direction their truck had been driven. They contacted a man driving a four-wheel vehicle, who said he would call the sheriff. Mills' son then crossed the river to where some people were camping. They drove Mills' son in a four-wheel drive vehicle back to Mills, Sr. Mills, Sr. hopped into the vehicle with his son, and they all drove back to the scene of the robbery. Shortly thereafter, sheriffs' deputies arrived and contacted Mills and his son. (35 RT 5384-5389.)

Several sheriffs' units in the area looked for Mills' truck. Within half an hour, they located Mills' truck about a mile down the road. The keys were still in the truck. The robbers had made off with a jacket, mobile phone adapter, radio,

toolbox, a tan ammunition box that opened from the top (People's Exhibit 247), an assortment of ammunition and cleaning equipment, three pistols, and a rifle. (35 RT 5390.) The weapons taken included a .45 caliber Colt Gold Cup semiautomatic pistol with red sights, special grips, and an ammunition clip (People's Exhibit 244) (35 RT 5390-5393), a .22 caliber semiautomatic Ruger (People's Exhibit 245) with 10-round clip (35 RT 5393-5394), a .22 caliber Ruger semiautomatic 10/22 rifle with dark mahogany stock, leather sling, and telescope sight (People's Exhibit 246) (35 RT 5394-5397), and a .22 caliber Ruger convertible western-style single action pistol with two interchangeable cylinders (35 RT 5397-5400.) Mills also lost two 10-round magazines and one 25-round curved banana clip for the .22 caliber Ruger 10/22 rifle (People's Exhibit 248). (35 RT 5400-5401.)

During the investigation, police learned that Carl Rife was married to Sonia Alvarez's sister. After Alvarez's home was searched in December 1992, she asked Rife to check whether there was a gun in the attic of the Donut Factory located on Bloomington and Cedar in Fontana, San Bernardino County, where Alvarez had worked. Rife checked but did not see one at that time. (42 RT 6399-6401.) The investigation revealed that Roxanne Boudreau also worked at the Donut Factory in Fontana. Sometime before September 1995, a man named Eric Davenport was helping Boudreau clean up the shop. While in the attic, he found a .22 caliber rifle with a scope but no stock (People's Exhibit 246). He turned the rifle over to the San Bernardino County Sheriff. (37 RT 5707-5713.) Davenport

later testified that although the attic was dirty and dusty, the rifle was relatively clean and had minimal dust. (37 RT 5713.). No other items were found along with the rifle. (37 RT 5714.) It was identified as a .22 caliber Ruger 10/22 (People's Exhibit 246). (37 RT 5711.)

Following recovery of this rifle, Riverside District Attorney investigator Martin Silva retrieved it from the San Bernardino County Sheriff's substation in Fontana. He impounded the rifle at the district attorney's office and later took it to the Department of Justice for ballistics analysis. (43 RT 6540-6542.)

After appellant's arrest, Mills, Sr. identified him in a photo line-up and at the preliminary hearing as the person wielding the shotgun during the robbery. (35 RT 5403.) According to Mills, appellant was same person who took money from him and who wished him a merry Christmas. (35 RT 5388-5389, 5401-5405.) Mills identified the .22 caliber Ruger (People's Exhibit 244), the .45 caliber Colt (People's Exhibit 245), and the 25-round banana clip (People's Exhibit 248) found in the vacant house on Magnolia where appellant and Romero were arrested. He testified that these weapons and the banana clip for his .22 caliber Ruger 10/22 rifle were taken from him during the robbery on November 21, 1992. (35 RT 5390-5397.) Mills also identified his ammunition box (People's Exhibit 247); he recognized the cleaning accessories it contained and parts from a convertible pistol. (35 RT 5399-5400.) Finally, he identified the .22 caliber Ruger 10/22 rifle with scope (People's Exhibit 246) found in the Donut Shop attic as the rifle taken during the robbery on November 21, 1992. The rifle was missing its wooden

stock and sling; only the working mechanism and scope remained. (35 RT 5394-5397.)

Jose Munoz' Testimony at Trial

At trial, Munoz claimed he did not participate in the Mills' robbery. (39 RT 5966.) He testified that Daniel Chavez told him about it. (39 RT 5966.) Munoz stated that he later saw appellant in his backyard shooting some guns, including a .22 caliber Ruger pistol. He claimed he also saw a .22 caliber rifle with a banana clip and scope in appellant's room at his grandmother's home on Baily Street. Munoz identified a .22 caliber rifle without a stock (People's Exhibit 246) as the same rifle he saw in appellant's room. He stated that appellant carried the .22 caliber Ruger all the time and said it was his gun. Munoz testified that there was talk about another gun, and he later saw Romero armed with a .45 caliber pistol that he carried in his waistband. Munoz identified a photograph of the .45 caliber pistol (People's Exhibit 16) as the one carried by Romero. Munoz also testified that he saw a tackle box that opened from the top in appellant's room. The tackle box had trays and held bullets. Munoz identified People's Exhibit 247 as the tackle box he saw in appellant's room. Finally, Munoz testified that another weapon, a .22 caliber revolver, was sold to a neighbor named Dave. (39 RT 5966-5972.)

During his post-arrest interrogation, Munoz gave varying accounts of what happened to the revolver (People's Exhibit 371). He first stated that the .22 caliber revolver like a "cowboy gun" was sold to white boy Dave. (45 Supp CT

12932, 12934.) Later in the interrogation (People's Exhibit 371A), Munoz said that *he* sold the gun to Dave. (45 Supp CT 12982.)

h. Feltonberger shooting (counts 18-19)

At 4:00 a.m. on November 30, 1992, Officer John Feltonberger was on his way home from work, driving his red 1991 Geo Metro. He was off-duty and was dressed in civilian clothes. Near the intersection of Wilmot and Alessandro in Moreno Valley and less than a quarter mile from home, Feltonberger noticed a white foreign-model car. (32 RT 4945-4946.) Thinking that it was the newspaper deliveryman whom he regularly met at that early hour on coming home from work, Feltonberger pulled over. The white car pulled up next to Feltonberger's car. The front seat passenger got out; he was holding a silver or chrome, single-barrel shotgun in his right hand. Pointing the shotgun down or parallel to the ground, the gunman approached Feltonberger. He ordered Feltonberger out of his car and told him to hand over his wallet. Feltonberger stated he did not have his wallet. After repeated demands, Feltonberger backed 10 or 15 feet away from the gunman. Feltonberger heard the driver of the white car say "kill him" or possibly "shoot him." Speaking in a clear, staccato, commanding-type voice, the driver repeatedly said "kill him" or "shoot him" several times. (32 RT 4946-4952, 4966.)

Feltonberger told the gunman "nobody has to get hurt." He threw his wallet on the ground. The driver again said, "kill him." Holding the shotgun in his right hand, the gunman reached for Feltonberger's wallet, picked it up, and

opened it. (32 RT 4952.) Speaking in an accented, soft whisper, the gunman told Feltonberger, "I ought to shoot you." Everything the gunman said, though, was clearly enunciated in English, and his voice was "never threatening, per se." (32 RT 4952-4953.) Feltonberger again told the gunman, "nobody has to get hurt." Almost instantaneously, the shotgun went off. (32 RT 4953.)

Feltonberger was struck in his right chest by a slug fired from the shotgun. His left rib cage was lacerated. Feltonberger also received a wound to his right bicep area. A slug from the shotgun -- not pellets -- went into Feltonberger's chest, through his right lung, and out his right back. (32 RT 4953-4954.) Feltonberger's car was driven away. Feltonberger staggered and crawled to a nearby home where he was given assistance by the homeowners until police and emergency medical personnel arrived. (32 RT 4954-4955.)

Feltonberger was taken by ambulance to the Riverside Community Hospital. (32 RT 4955-4956.) Deputy Green followed the ambulance to the hospital. While in the emergency room with Feltonberger, Green observed the medical staff removed a piece of red plastic (People's Exhibit 55) from Feltonberger's arm. The object was handed to Green, who booked it into evidence. Green had never before seen anything like it. (32 RT 4956, 4979-4984.)

Feltonberger remained in intensive care for three days and then in a ward for seven more days. At trial, he testified that, as a result of his injuries, his lung capacity was 90% of normal. Feltonberger continued to suffer from breathing problems and shortness of breath. He subsequently underwent surgery on his right

arm. He also suffered knee problems, perhaps from falling on his knees after the shooting. (32 RT 4958-4959, 4968.)

Riverside Sheriff's investigator Gary Thompson and police technicians collected shotgun wadding and other evidence from the street where the shooting occurred. Thompson identified photographs showing red plastic wadding in the street and a blood trail going from the street to the driveway of the house on Wilmot where Feltonberger sought assistance. Other photographs identified by Thompson showed blood smears on the back and rear fender of the car parked in the driveway at the same location, and a pillow, blanket and large pool of blood on the porch area.[97] (32 RT 4990-4998.)

The state's evidence established that at 10:45 a.m. on the morning of the shooting, Thompson was notified that Feltonberger's car had been recovered in a ravine in the Mead Valley area at Oleander and Day Street.[98] (32 RT 4999.) The key was still in the ignition, but the interior had been ransacked.[99] Shoeprints with the BK sole pattern of a diamond in a circle were found and photographed at the scene above the ravine where the car was found.[100] The car was towed to

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[97]/ See People's Exhibits 31, 35-37, 43-44 (street, plastic and other pieces of shotgun wadding); 32 (piece of plastic wadding on street), 33 (comparison of shotgun wadding); see also People's Exhibits 38 (house), 39 (rear view of car in driveway), 39 (walkway), and 40-42 (entranceway with blanket and pillow, porch, and front door). (1 Supp CT (Photographs-Exhibits) 47-48, 51-71.)

[98]/ See People's Exhibits 45-46 (photographs of vehicle in ravine), 47 (dirt road in area where vehicle recovered), 48 (left side of vehicle after recovery), 78-79 (interior of vehicle). (1 Supp CT (Photographs-Exhibits) 72-81.)

[99]/ See People's Exhibit 52 (interior of Geo after recovery). (1 Supp CT (Photographs-Exhibits) 86-87.)

Riverside for forensic processing. (32 RT 4999-5008.)

Forensic technician Kenneth Sorenson processed Feltonberger's 1991 Geo Metro for fingerprints on December 1, 1992. (32 RT 5013.) He located and developed nine lifts, including six comparable lifts. One comparable lift was taken from the exterior of the driver's door (People's Exhibit 81). No other latent prints were found or lifted by Sorenson inside or out. (32 RT 5013-5016.)

Feltonberger identified appellant as the shooter in a photo line-up after his arrest. (32 RT 4957.) Feltonberger testified that he could not be sure whether appellant had eye contact with him when he shot him, although appellant had eye contact just before he said "I ought to shoot you" or "I ought to kill you." (32 RT 4967, 4969.) At trial, Feltonberger also identified appellant as the shooter. (32 RT 4956-4957.)

Feltonberger testified that he next saw his Geo Metro again in January 1993. His flashlight, ammunition pouch, and axe were missing. (RT 4962.) Before the shooting, Feltonberger had never seen appellant. He did not know of any reason before the robbery and shooting why appellant would have touched his car. (32 RT 4962.)

In addition to the witnesses' testimony, the state also introduced physical evidence seized in connection with its investigation and various searches conducted by police. At trial, Feltonberger identified his flashlight (People's

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[100]/ See People's Exhibit 50 (Supp CT (Photographs-Exhibits) 82-83); see also People's Exhibit 51 (hillside area where shoe print found and Geo recovered) (1 Supp CT (Photographs-Exhibits) 84-85.)

Exhibit 54) seized during the search of a shed next to appellant's home on Baily Street in Mead Valley. He identified the flashlight by his initials, "J.F.F.," written on it, along with the letters "O.P.D. 53" (People's Exhibit 54), which signified Feltonberger's badge number at the Ontario Police Department when he was first hired. (32 RT 4960.) He also recognized tape remnants at the bottom of the flashlight. (RT 4960.) Feltonberger also identified a leather, double ammunition pouch (People's Exhibit 53) found in a sleeping bag in the house on Magnolia where appellant and coappellant Romero were arrested. The ammunition pouch was in Feltonberger's Geo Metro at the time of the shooting.(32 RT 4962.) He testified there were no bullets or magazines in the pouch at the time of the shooting. The state's evidence showed that when recovered, however, the pouch contained two copper-jacketed .45 caliber bullets.[101] (32 RT 4961.)

Finally, the state presented evidence of appellant's statements in respect to the Feltonberger shooting following his arrest. Detective Hudson interrogated appellant after his arrest on December 17, 1992. The interrogation was recorded and transcribed. A portion of appellant's taped interrogation pertaining to the Feltonberger shooting (People's Exhibit 398) was played for the jury, which was provided a transcript of the interrogation (People's Exhibit 399) while the tape was being played. (RT 6604-6608; 45 Supp CT 13053-13082 (People's Exhibit 399).) Appellant told Hudson that Munoz was a "speed freak" and that he had heard that

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[101]/ See People's Exhibit 279 (photograph of leather ammunition pouch). (1 Supp CT (Photographs-Exhibits) 3-4.)

Munoz shot Feltonberger. (45 Supp CT 13056.) Appellant then acknowledged that he was present at the time of the shooting and said that he was "out of it," "amping pretty good," and "zapped" at the time on crystal methamphetamine. (45 Supp CT 13058-13059, 13063, 13075.) He stated he had used drugs about an hour before the shooting. (45 Supp CT 13075.) Appellant said that he remembered only cruising around in Munoz' car, some "white guy" standing on the side of the road, and then starting and taking off in his car. (45 Supp CT 13058-13061.) He did not know why he approached the driver. (45 Supp CT 13075.)

The state proffered evidence that during the interrogation, appellant at first denied being armed but later stated he shot the driver with a chrome 20-gauge shotgun that had both the butt and a portion of the barrel sawed-off. (45 Supp CT 13072.) He claimed the shell in the shotgun was yellow; it was not birdshot. (45 Supp CT 13078-13079.) Appellant stated he had the weapon for about a month (45 Supp CT 13073) and that he bought the shells at "Coast to Coast" about two weeks before the shooting. (45 Supp CT 13079-13080.)

In his statement, appellant said he was in the driver's seat when the driver slammed the car door on his leg. (45 CT 13061, 13064-13065.) The gun then went off; appellant's was close enough to see his face. (45 Supp CT 13065-13066, 13070-13072.) Appellant did not remember taking the man's wallet; he did not have it. (45 Supp CT 13066.) After the shooting, Munoz drove away in his own car. Appellant took the other car, ultimately driving back to Munoz' house. (45 Supp CT 13068.) He did not touch anything in the car, but left Munoz to do

anything he wanted with it. He denied taking a flashlight. (45 Supp CT 13069.) He and Munoz dumped the car around his neighborhood by rolling it down a hill. (45 Supp CT 13062-13063, 13068.) Appellant claimed that whatever Munoz said was learned by reading the newspaper. (45 Supp CT 13061.)

The state called Feltonberger's wife, Marcella Feltonberger, who attended the preliminary hearing when her husband testified on January 19, 1993. After her husband testified, Marcella remained in courtroom. At trial, she testified that at the preliminary hearing, appellant, who had been seated in the jury box, got up, and asked a gentleman seated two rows in front of her what he thought of Feltonberger's testimony. Mrs. Feltonberger heard the man tell appellant that "it was consistent with everything he had read." Appellant then said: "Do you think he could have remembered all of that if he hadn't been a cop? The man replied: "Probably not." Mrs. Feltonberger heard appellant state, "Well, I didn't know he was a cop. I thought he was a farmer." (32 RT 4985-4988.)

Jose Munoz' Testimony at Trial

According to his testimony at trial, Munoz and appellant robbed Feltonberger on November 30, 1992. (39 RT 6012.) In the hours before the crime, both had been drinking.[102] Appellant also used drugs. According to

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[102]/ During post-arrest interrogation (People's Exhibits 371A-371B), Munoz first said that he had appellant had been drinking beer purchased from a Ralph's store. Munoz said he and appellant were "buzzing" at the time. They drove to the area of the shooting because Munoz wanted to show appellant the location of a job his father had arranged for him. (45 Supp CT 12964, 13000.) Munoz further explained (People's Exhibit 371B) that before the beer, he and appellant also used crystal methamphetamine. Appellant had called Munoz over to his house because

Munoz, appellant shot Feltonberger after picking up his wallet. Munoz denied saying "kill him" or "shoot him." Munoz said rather, "don't shoot him." (39 RT 6014-6015, 6018.)

Munoz testified that he drove his sister's white Toyota Tercel to the scene of the shooting. He and appellant were armed only with a shotgun. (39 RT 6013.) Romero had the .45 caliber pistol and appellant had lent the .22 Ruger to a neighborhood kid. According to Munoz, the .22 rifle with scope was too big.

Munoz told the jury that he followed a Geo Metro in Moreno Valley until it stopped.[103] (39 RT 6013.) While Munoz remained in the car, appellant got out. Armed with the shotgun, appellant pointed it at the driver. The driver got out of his car and dropped his wallet on the ground. As appellant bent over to pick it up, Munoz thought the driver was lunging forward. He yelled "Chris" and then "don't shoot." Munoz again denied that he told appellant to "kill him." (40 RT 6155-6159.) Munoz saw the driver put hands up and walk backwards about four feet from appellant. Appellant pointed the shotgun at the driver and fired. The blast

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he had some pink crystal methamphetamine. Munoz brought his own "little stash" of "speed" to appellant's house which they also used. (45 Supp CT 12999-13000.) They were thus heavily intoxicated from both alcohol and methamphetamine before the shooting. (45 CT 13000.)

[103]/ In post-arrest interrogation (People's Exhibit 371B), Munoz explained how the shooting occurred. "I never wanted to do anything ... , but, it's like, I'll play the role sometimes, you know, and like yeah, you know, and yeah, I'll drive, you know, and I just cruise em' around the town. Oh it doesn't look like nothing's happening. Let's go home. I do that a lot. And um, that time, you know, he [appellant] was buzzin'. And then he like told me, I know it doesn't have any relevance to this but um he said um he's all lets jack somebody. The car was at a stop sign. I'm all, okay." (45 Supp CT 13000.)

hit the driver in the upper left chest, and he went down. (39 RT 6015-6016; 40 RT 6232-6242.)

Munoz and appellant drove back to appellant's place on Baily Street. Appellant drove away in victim's Geo Metro, arriving back home about an hour after Munoz. Munoz and appellant searched the car, including the contents of a leather folder. They found the driver's wallet underneath the front seat, an axe, flashlight, magazine pouch, and gym bag. After looking at papers in the leather folder, Munoz and appellant realized that the driver was a police officer. Appellant kept the flashlight. Munoz threw the axe into the shed in the backyard. Appellant and Munoz later dumped the car four blocks away. They pushed the car into a gully. (39 RT 6018-6023.)

The next afternoon, coappellant Romero took the leather magazine pouch that he found in appellant's room. Munoz and appellant told Romero about the carjacking and the stuff they stole. Munoz testified that he burned the wallet and other disposable items in the backyard. (39 RT 6020-6022.)

E. Testimony of Ruben Munoz

In addition to Jose Munoz testimony and the testimony of the victims and/or family members who survived the various offenses charged against the defendants, the state also introduced the testimony of Ruben Munoz, brother of Jose Munoz. Ruben Munoz lived in San Diego with his parents. His older brother Jose and his sister Margarita lived on Bonham Street in Mead Valley in a trailer on

a lot their parents owned. In the Fall of 1992, Jose left San Diego and went to live with Margarita and her son because Jose was into drugs and the police were looking for him. (37 RT 5573-5575.) Jose had been stealing cars and had also been caught by the police with his father's gun. Jose liked to show it off. (37 RT 5609-5610.)

Ruben testified that in September 1992, around appellant's birthday, appellant and Jose drove to San Diego. While in San Diego, appellant bought a sawed-off .22 caliber rifle. Jose helped set up the deal. Jose brought the rifle back to San Diego around Thanksgiving and left it with Ruben, telling Ruben he did not want to get caught with it. Ruben testified that Jose was nervous when he gave him the rifle. (37 RT 5610.) Ruben identified People's Exhibit 252 as the .22 rifle that appellant bought in San Diego and which Jose later left with Ruben on Thanksgiving. (37 RT 5600-5602.)

Ruben told the jury he used to drive to Mead Valley every weekend to pick up his sister Margarita's son and bring him back to San Diego. On his December 5, 1992 trip, Ruben stated that appellant and Romero asked him to help them dispose of a brown Honda Accord they said they had stolen. (37 RT 5575-5577.) At that time, Romero showed Ruben a .45 caliber pistol. Ruben handled it with his shirt to avoid leaving fingerprints and then gave it back to Romero. (37 RT 5614-5620.)

As requested, Ruben followed appellant and Romero in his truck to an area three or four blocks away from Bonham Street, where the Honda was torched and

abandoned behind a big rock. Ruben then drove appellant and Romero back to their grandmother's house on Baily Street. Ruben was under the impression that neither appellant nor Romero had a car. (37 RT 5582-5586, 5612-5614.)

When they arrived at Baily Street, Ruben went with appellant and coappellant Romero into their rooms. Appellant and Romero each had a small room in the house. Once in his room, Romero took off his coat. Ruben saw that Romero had magazine clips on his side and was carrying a gun. The magazine clips were in some kind of holster. Ruben identified People's Exhibit 53 (Feltonberger's leather ammunition pouch) as similar to the one that Romero was wearing. In Ruben's presence, Romero cocked the .45 caliber pistol and said "look at that hole." Romero pointed the gun at Ruben, who told Romero not to point the gun at him. At trial, Ruben identified the weapon pictured in People's Exhibit 16 as the same .45 caliber pistol shown to him that day by Romero. (37 RT 5590-5592.)

Romero also pulled out a wad of money from his back pocket and what he described as "some guy's" driver's license. Ruben grabbed the license and looked at it, telling Romero, "Oh, he's a donor." Ruben knew that the person was a donor because the license "had little dot on it." (37 RT 5589.) Romero replied, "Well, he was." Ruben got the impression that something had happened to the driver. (37 RT 5586-5588.)

Ruben also went into appellant's room, where appellant showed his "stuff," pulling out a .22 caliber pistol from his right or left leg. According to Ruben, the

pistol looked like a Luger. It was fat, pointy, and black. Appellant told Ruben, "This is mine. This is my gun." Ruben identified a gun shown in People's 15 as the .22 pistol that appellant showed him. (37 RT 5590-5592.)

Appellant and Romero asked Ruben for a ride to Kentucky Fried Chicken. At that point, Ruben told them that he did not want to drop them off. (RT 5590-5592.) Romero then showed Ruben a .22 caliber rifle with a banana clip, scope, and wood stock. Romero mentioned another gun -- "Big Bertha." Ruben never saw it; Romero said they had lent it out. (37 RT 5592-5593.)

During this incident, Romero also told Ruben that his brother Jose should have a gun "because he needs one." Romero said he was going to give him one. Romero also told Ruben that Jose was talking too much about what was going on between them and that he did not like it. Romero then told Ruben he was going to shoot Jose, kill him, because he was talking about the business. (37 RT 5598.)

In Ruben's presence, appellant and Romero argued about giving him some money for helping them dispose of the Honda.[104] Both Ruben and appellant then went outside and sat down. Ruben saw that appellant was wearing white BK (British Knights) tennis shoes. Ruben started asking appellant "nosy" questions, such as "What are you doing?" and "What would he do if the cops come after you guys?" According to Ruben, appellant said that he would run. Ruben asked what would he do if his brother were arrested. Appellant allegedly replied that he

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[104]/ During interrogation (People's Exhibit 371), Jose Munoz stated that Ruben was given $40 for helping dispose of the Honda. (45 Supp CT 12939.)

"would jack harder" and told Ruben, "It's like I'm addicted to it" and "I like it." Appellant said he liked the feeling, the satisfaction. Appellant told Ruben that they were carjacking. (37 RT 5593-5596, 5599.)

Ruben testified that appellant said if the police came for him, "he's not going to go out without a bang." Ruben further testified that when appellant made these statements, he had an "evil look in his eyes, you know, the way he told me. It was like, you know, just an evil look in his eyes, basically." (37 RT 5596-5597.)

Ruben testified that after Jose was arrested, but before appellant and Romero were arrested, he was contacted by Riverside sheriff's officers who were looking for them. Jose contacted Ruben from jail and told him to give police the .22 caliber rifle that Jose had given to him on Thanksgiving. Ruben complied and turned it over to Riverside detectives who had traveled to San Diego. (RT 5602.) Ruben told the jury that he was aware that Jose would be testifying and of the deal he made in exchange for his testimony. Ruben claimed that his testimony would not affect Jose's deal. He also acknowledged his own prior conviction of grand theft auto in connection with a car he stole. (37 RT 5602.) Ruben testified that detectives promised him that he would not get in trouble if he talked to them. After Jose's arrest, the detectives even wrote a statement saying that Ruben was not in trouble and was not an accomplice. (37 RT 5620-5622.)

F. Scientific Evidence

1. Firearm and ballistics evidence

California Department of Justice criminalist Paul Sham had 19 years

experience with shotgun shells and the identification of their components. According to Sham, a sabot round is a certain type of shot shell designed to be fired in a shotgun. Sabot rounds do not have pellets but a lead projectile encased in two plastic sleeves called sabots. Sabot shells, if in stock, could be purchased at any store selling shotgun ammunition. Any 20-gauge shotgun could fire a sabot shell or any Remington or Federal shotgun shells. (38 RT 5815, 5849-5850.)

Sham obtained an unused BRI sabot round and compared its components with two red pieces of plastic and shot wad retrieved in the Feltonberger case. Sham determined that four items -- (2 pieces of plastic and 2 waddings) -- were components of a 20-gauge sabot shot shell manufactured by BRI.[105] (38 RT 5813-5820, 5822.)

Sham also received two damaged red plastic sabots from the Jose Aragon investigation. In Sham's opinion, two red plastic sabots in that case were also consistent with plastic sabots found in 20-gauge sabot shot shells made by BRI. (38 RT 5820-5822.)

Sham received clothing taken from Paulita Williams and other evidence retrieved from her car. Holes in Williams' clothing were consistent with shotgun pellets. Sham found a No. 6 lead pellet on the surface of her sleeve. Two plastic shot shell wads retrieved from Williams' car were two different pieces from a single shot shell. One piece was an over-powder wad; the larger piece was the

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[105]/ See also People's Exhibits 33 (plastic pellet) and 55 (plastic sabot sleeve). (1 Supp CT (Photographs-Exhibits) 52-52, 88-89.)

shot cup. Both items were from a 20-gauge shot shell; consistent with a Federal brand 20-gauge shot shell. (38 RT 5822-5825.)

Sham received lead pellets from the Kenneth Mills case. He determined they were shotgun pellets. Pieces of lead removed from the passenger door were consistent with lead shotgun pellets. Sham was unable to determine shell gauge. Shotgun wadding from the passenger floor was identical to one-piece wadding from a 20-gauge Remington shot shell. (38 RT 5825-5826, 5847-5849.)

Department of Justice senior criminalist James Hall was an expert in firearms and firearm identification, also known as "ballistics," and testified for the prosecution. He test fired Jerry Mills' .22 Ruger and compared test-fired bullets with bullets removed from Jose Aragon's body during his autopsy. In Hall's opinion, items 20, 21, 23, and 27, removed from Jose Aragon's body, could have been fired from the .22 Ruger or from any other gun with similar characteristics consistent with a .22 Ruger. In Hall's opinion, another bullet, (item 26) did not have any rifling impressions that permitted comparison. A bullet taken from Jose Aragon's abdomen (item 24) had different rifling from those test fired from the .22 Ruger. In Hall's opinion, item 24 could have been fired from a Ruger 10/22 .22 caliber rifle (People's 246) as it was similar to and consistent with bullets test fired from that weapon. (43 RT 6555-6574.)

Hall also compared bullet casings. Casings from the test-fired .22 Ruger were consistent with a .22 caliber casing (item 22) found in the bed of Jose Aragon's truck. The casings were also consistent with other .22 casings found at

the scene (items 2, 4, and 5). In Hall's opinion, one .22 casing (item 1) found at the Aragon crime-scene was not fired either by the .22 caliber Ruger pistol or the Ruger 10/22 .22 caliber scoped rifle (People's 246). (43 RT 6574-6581.)

Hall also examined five .22 caliber casings from the Lake Mathews case. A .22 casing found at the lower crime scene (item 26801) and two from the upper scene (items 26802 and 26840) were fired from same weapon. Two other casings found at the upper scene were fired by two different guns; one of those casings was old and flattened in appearance and dirt was caked inside. (43 RT 6582-6584.)

Hall examined three bullets removed during the autopsies of Timothy Jones and Joey Mans. The bullets were in poor condition and could not be used for comparison purposes. Two of the bullets appeared to be .22 caliber long rifles; the third was a lead fragment. (43 RT 6584-6585.)

Hall examined a .22 caliber Remington Speedmaster rifle (People's Exhibit 252). In Hall's opinion, the rifle was "a piece of garbage" and "in pretty bad shape." The stock had been cut off, and the weapon was missing the safety button, grips, and tubular magazine plunger. The trigger was inoperative; the firing pin was stuck in an outward position and fused into position. After test-firing the .22 Remington rifle and comparing bullets removed from Jose Aragon, Hall's opinion was that the .22 caliber Remington did not fire any of the bullets removed from Jose Aragon's body (items, 20-27, and 29). Although Hall did not compare casings fired from the .22 caliber Remington with casings recovered from the Jose Aragon crime scene, he found that one casing (item 1) from the Jose Aragon crime

scene did not match any other casings recovered either in that case or at the Lake Mathews scene. (43 RT 6585-6587.)

Casings found at Lake Mathews did not match casings test fired from the .22 caliber Remington. In Hall's opinion, casings found at Lake Mathews were not fired by that gun. Indeed, in Hall's opinion, none of the weapons given to him for testing fired the casings in the Lake Mathews case. (43 RT 6589-6593.) He testified, however, that his findings and conclusions would be affected if the weapon had been modified after the shooting. He noted that if the firing pin had been soldered or altered after the shooting, the firing pin impression on casings would have been different. Similarly, if the extractor on the .22 caliber Remington had been broken, different markings might have been left on the casings. (43 RT 6585-6591.) Differences between casings found at Lake Mathews and casings test-fired from the .22 caliber Remington could be accounted for by changes to the weapon after the killings. (43 RT 6589-6592.) Hall stated that with the exception of the firing pin, everything else on the .22 caliber Remington, including the firing chamber, appeared to be normal. In Hall's opinion on cross-examination, and contrary to Jose Munoz' testimony, there was no evidence of a casing having exploded in the chamber. (43 RT 6592-6593.)

2. Fingerprint evidence

Riverside Sheriff's forensic technician Richard Gomes processed Sonia Alvarez's Dodge Colt for fingerprints on December 15, 1992. He located and

lifted two latent fingerprints on a chrome strip outside driver's door, two latent fingerprints from the red toolbox found in the trunk, and a latent fingerprint from a plastic motor oil bottle. (42 RT 6375-6385.) Two fingerprints on the red toolbox were on the front pointing down; one fingerprint was pointing across the toolbox. (42 RT 6385-6386.)

Riverside Sheriff's fingerprint examiner Yolanda Perez compared Romero's rolled prints with latent prints lifted by Richard Gomes from the red toolbox and oil container in Sonia Alvarez's Dodge Colt. In Perez's opinion, latent prints from the toolbox matched Romero's left and right middle fingers and his right thumb. In Perez's opinion, the latent print from the oil container matched Romero's left thumb. (42 RT 6490-6496.)

Perez compared appellant's rolled fingerprints with latent prints lifted from the driver's door of Feltonberger's Geo Metro after it had been recovered. In Perez's opinion, latent prints from the Geo Metro matched the rolled prints of appellant's right middle and right ring fingers. (42 RT 6496-6498.)

Riverside Police Detective John P. Burtt performed latent fingerprint examinations for the Riverside Police. He had been qualified on many occasions as an expert in latent fingerprint examination. (37 RT 5547-5548.) On May 27, 1997, Burtt compared fingerprints on a fingerprint card ("lift card") collected by Officer Holderness from Magnolia Center Interiors on November 14, 1992 (People's 203) with Romero's rolled prints taken on December 17, 1992. (37 RT 5548-5551.)

Comparing the latent prints lifted from Magnolia Center Interiors with Romero's rolled prints, Detective Burtt determined, in his opinion, that Romero's right index finger matched (with at least 13 points of comparison) one of the latent fingerprints lifted from Magnolia Center Interiors. Burtt also determined, in his opinion, that a second latent fingerprint lift matched (with at least 14 points of comparison) Romero's right middle finger. (37 RT 5551-5554.)

On cross-examination, Burtt acknowledged he found no matches with appellant's rolled fingerprints. (37 RT 5556.) Although requested to compare the prints of four individuals, Burtt could not recall if he had compared the rolled fingerprints of Jose Munoz or Daniel Chavez. (37 RT 5557.)

3. Shoeprint evidence

Jose Munoz and Daniel Chavez were arrested on December 12, 1992. When arrested, Munoz was wearing boots (People's Exhibit 317), which were seized later that day after his Riverside County Jail interview. When he was arrested, Chavez was wearing blue Air Nike tennis shoes (People's Exhibit 316). Later the same day, Chavez was driven to Munoz' home at 21918 Bonham where Chavez had also been staying. Chavez retrieved for authorities another pair of Nike tennis shoes that he had worn (People's Exhibit 318). (37 RT 5671-5675.)

Sheriff's Detective Terry Hudson was present on December 17, 1992 outside the abandoned house at Pierce and Magnolia in Riverside when appellant and Romero were arrested. When arrested, appellant was wearing a pair of British

Knights (BK) tennis shoes. Appellant's clothing, including his tennis shoes, were taken from him at the Riverside County Jail on the same date. (41 RT 6334-6336, 6543-6548.) There were no observable blood stains or spatters on appellant's BK shoes.

Criminalist Sham was also trained in shoe print impression identification. He had previously qualified as an expert in shoe print identification in other California courts. Shoe impressions at crime scenes were commonly preserved by photographs. He compared shoe impression test prints taken of the soles of British Knight (BK) shoes with photographs of BK shoe impressions taken both at the Mans-Jones upper and lower crime scene areas and at the Feltonberger scene. (38 RT 5830-5832.)

In Sham's opinion, Photo K, taken at the upper Mans-Jones scene, was made by a BK shoe similar to the BK shoe obtained from appellant. It was the same size and same sole pattern. There were no observable individual characteristics in either the photograph or the shoe impression, precluding a conclusion that appellant's shoe and only his shoe could have made the print shown in Photo K. Sham concluded that appellant's left BK shoe impression was generally consistent with impression in Photo K. Shoe impressions in Photos M, J, and T, also taken at the Mans-Jones scene, were consistent with test prints made from appellant's BK tennis shoes. The shoe impressions shown in Photos M, J, and T could have been made by appellant's right BK shoe. (38 RT 5832-5837.)

In Sham's opinion, the shoe impression shown in Photo AB (lower crime

scene) was consistent with and could have been made by appellant's left BK shoe or any other pair of BK shoes of similar sole design and size. (38 RT 5838.)

In Sham's opinion, shoe impression "M" at the scene of the Feltonberger shooting (People's Exhibit 365) could have been made by appellant's left BK shoe or any other left BK shoe of the same size and design. (38 RT 5838-5839.)

Sham looked at more photos of shoe impressions than those used during his direct testimony. He compared all photographs with Munoz' black boots and other shoes examined but found no matches with any other shoes examined. (38 RT 5852-5853.) Sham's comparisons also included the victims' shoes and photographs of shoes worn by all investigating officers. (38 RT 5853.)

4. Tire tracks

Criminalist Sham was also trained in tire track analysis. He compared photographs of tire impressions taken at the Lake Mathews Mans-Jones crime scene with tread on the tires mounted on Sonia Alvarez's Dodge Colt. In Sham's opinion, photographs of tire impressions on the hilltop near and adjacent to Man's body and his Subaru, shown in People's Exhibits 109 through 112 (Supp CT (Photographs-Exhibits) 179-186), were consistent with test prints made from one of the two Goodyear Eagle GT4 tires mounted on the front of Sonia Alvarez's Dodge Colt. (38 RT 5843-5847.)

G. Evidence of Escape Attempts

Senior Deputy Sheriff Scott Collins arrested Sonia Alvarez in the parking

lot of the Riverside County Southwest Detention Center (SDC) near Temecula at 1:00 a.m. on December 16, 1994. Alvarez gave conflicting statements as to why she had parked in an unauthorized area in the back of B pod and directly in front of the window to cell 54. Alvarez reported that she had been visiting appellant; Collins relayed the information to deputies working inside SDC. (42 RT 6504-6512.)

Jail Correctional Deputies Eddie Edmundson and Jerry Compton were assigned to central control at SDC on December 16, 1994. (42 RT 6514, 6527.) Edmundson received a communication from Deputy Scott Collins advising that he had detained Sonia Alvarez in back of the jail. Collins indicated that Alvarez had mentioned that she had been visiting appellant. Accompanied by Deputies Lujan and Compton, Edmundson went to appellant's ground-floor cell 54 in B pod. On searching appellant's cell, the officers observed that appellant had a one-inch cut on the little finger of his left hand. Appellant's cell had a narrow, 6" to 8-inch wide window, with a metal frame set in cinder blocks, 8 feet off the ground. The window looked out onto the parking lot where Alvarez had been arrested. Appellant was removed from his cell and the cell examined. An examination of appellant's cell revealed pry marks around the rear window. In order for anyone to get through the window, the frame had to be removed. (42 RT 6517-6519, 6528, 6532-6533.) Paint had been scratched away from the metal window frame. (42 RT 6518.) A metal TV bracket had been removed and was found in appellant's cell underneath the TV. There were also gouges and scratches in the cinder block

around the window and around the top of the window frame. Edmundson also observed concrete chips on the floor of appellant's cell and cinderblock chips on appellant's sheet, blanket, and mattress. (42 RT 6513-6525, 6526-6532.)

III. Penalty Trial

A. Prosecution Evidence in Aggravation

During the penalty phase, the state presented extensive victim impact evidence from the family members of Jose Aragon, Joey Mans, and Timothy Jones. In all, the state presented testimony from six witnesses. Jurors heard testimony from Aragon's stepmother, his sister, and a neighborhood friend. These witnesses not only testified about every aspect of their relationship with Aragon and their grieving process after Aragon's death, but they also testified to hearsay statements of others regarding Aragon's death. Jurors also heard testimony from the family members of Joey Mans and Timothy Jones. Again, the witnesses were permitted to testify not only to the impact of the victims' deaths on them, but to out-of-court statements of other persons who were not called as witnesses.

In addition to the victim impact evidence, the state also presented incidents in aggravation involving "Factor (b)" evidence. The state presented one incident involving a high school altercation between appellant and a classmate, and four incidents involving assaults in the Riverside County Jail, where appellant was housed following his arrest. In the school assault, the state also presented the testimony of a school classmate and friend of appellant's who witnessed the

incident at the time it occurred and who subsequently visited him in jail. In two of the jail assaults, the state presented hearsay evidence through the testimony of investigating officers, rather than the testimony of the persons allegedly assaulted.

1. Victim Impact Evidence

a. Jose Aragon

Aragon's stepmother Lydia Aragon married Jose Aragon's father, Steven, in 1984. (49 RT 7276.) Jose Aragon was about 13 years old at the time. (49 RT 7277.) The family lived in New Mexico and later moved to Redlands, California. At the time of his death, Aragon was a senior at Cal State Poly majoring in engineering. (49 RT 7277.) Lydia described him as shy and studious. (49 RT 7284.) Lydia testified that, until he died, she did not know how much other people respected Aragon. (49 RT 7284-7285.)

Lydia told jurors that Aragon and his brother, Steven, were very close; only 11 months separated them in age. (49 RT 7280-7281.) Aragon was also close with his younger brother Carlos and younger sister, Laura. Carlos was 4 years younger than Aragon, and Lydia claimed that Carlos idolized him. (49 RT 7279, 7281-7282.) Laura was five when Aragon died. Lydia described how whenever Aragon came home, Laura always jumped into his arms. (49 RT 7282-7283.) She testified that Aragon's other sister, Stephanie, lived in New Mexico with their birth mother, but remained very close to Aragon as well. (49 RT 7283-7284)

Lydia identified photographs of Aragon on his skateboard and on his

motorcycle that he rode competitively. (49 RT 7280.) Aragon had a dresser full of trophies. He used to go every weekend to San Timoteo Canyon to ride. (49 RT 7280.) Sometimes, he used to go with his father. (49 RT 7285.)

When Aragon went riding on November 25, 1992, the day before Thanksgiving, he wanted someone else to go with him. His father had to work, and his girlfriend couldn't go either. Lydia said that it was probably better that no one else went, "because then we would have had two dead people on our hands." (49 RT 7285.) Lydia described how her husband went to look for Aragon. Aragon had left a note saying that he went riding at San Timoteo Canyon. (49 RT 7287.) Less than an hour later, Steven called Lydia with the news that Aragon was dead but that the police would not tell him how. She initially thought he had fallen off his bike because on a prior occasion Aragon suffered a concussion while riding. (49 RT 7287-7289.) Lydia joined her husband at San Timoteo Canyon where she learned that he had been shot. (49 RT 7288.)

After Lydia and her husband returned from San Timoteo Canyon, they called everyone to say that Aragon was dead. Aragon's girlfriend started screaming when she learned. All his friends came to their house, and they just sat and cried and cried. (49 RT 7290.) The next day, Lydia made the funeral arrangements. Other people arrived to bring food and comfort, but there was no comfort. (49 RT 7291.) They went to the coroner's office to identify a photograph of his body. They would not let them see his body because it was too mutilated. (49 RT 7291.)

Aragon's funeral was held at a church in Redlands; it was standing room only. Before the funeral service, the family got to see Aragon for the first time after his death. He appeared cold and swollen. They could not even stay for the people who came to the viewing. After the services, friends and family came to the Aragon home. They flew the body to New Mexico where Aragon was buried. Aragon had previously told everybody that he wanted to be buried in New Mexico where he was born. Because of snow and severe weather conditions, only half the number of those who had made arrangements to attend the funeral actually arrived. (49 RT 7293.)

At some later date, Aragon's father picked up his truck from the impound area. It had not been cleaned and was still full of blood and dents from bullet holes. According to Lydia, Aragon's "life's blood was just splattered all over" his truck. (49 RT 7292.) Aragon's uncle cleaned the truck; the family found it "too intolerable" to do. (49 RT 7292.)

During her testimony, Lydia described in detail how Aragon's death affected the family. She missed Aragon's presence. It was like somebody came "along and cut off your arm and you can't put it back." (49 RT 7297.) All the energy she put into their relationship was lost. (49 RT 7297.)

Lydia testified that after the funeral, Aragon's father became a shadow of the man he was; he wandered around the house. He stayed up and could not sleep. According to Lydia, Aragon's father still could not sleep three and a half years after Aragon's death. (49 RT 7295.) Lydia believed that if her husband did not

have other children, he would not be alive. (49 RT 7298.) According to Lydia, Aragon's father seemed to lose his purpose in life; he even lost interest in the job he loved. Lydia said that her husband wanted to run and hide but could not hide from the pain. (49 RT 7299.) After work, her husband would go into his bedroom, shut the door, and turn on the television. The family would not see him again. (49 RT 7294.)

After Aragon's death, brother Steven stayed in his room; brother Carlos played "Nintendo and more Nintendo" and studied. He seemed to turn inward and wall himself off from others. (49 RT 7294, 7296.) When Steven did not come home on time, the parents would wait for him. Lydia and her husband did not want brother Carlos to go anywhere because they did not want him to be killed or to go anywhere where somebody could hurt him. Sister Laura lost everybody, because no one was there for her. She was troubled and became scattered in school. (49 RT 7294-7296.) Laura was also fearful and did not want to be alone. She was upset by her mother's crying and anger. (49 RT 7297.)

Lydia recalled that Aragon liked sports, particularly soccer. (49 RT 7278.) There was a basketball hoop in the backyard where they used to hang out and shoot baskets. She testified that after Aragon died, nobody shot hoops at the house anymore. (49 RT 7285.) For over two years, the family left Aragon's room untouched, thinking perhaps that if they did not touch or move anything he would come back. But he never did. Although they yearned for him, he never comes back. (49 RT 7297.) The holidays without Aragon were not the same. (49 RT

7298.)

Over time, the family attended "all the grief classes," but it was very difficult for everyone. Lydia told the jurors that a part of them was "ripped out" and they did not know where it went and what to fill it with. (49 RT 7295.) She described how she and her husband became angry and fought with each other and with the children. (49 RT 7295.) According to Lydia, Carlos said, "I used to have parents that never fought. And now I have parents who are irrational, who take all their pain. They take it out on everybody. And that everything I request, every place I want to go, is always met with 'No, you can't go. You have to stay here.'" (49 RT 7295.)

Lydia testified that she thought all the time about the last few minutes of Aragon's life. She described how she imagined him shot and left to die alone with "no one to cradle him, hold him, and say that you love him and to say good-bye." She told jurors she realized that even if they were there they could not have saved him because he was left for dead, stating "They made sure of that." (RT 7301.) Lydia imagined Aragon lying in his truck by himself while his ATM card was being used and the money in his account stolen. She told jurors he did not have much money, because she went to the bank herself and closed Aragon's accounts. She described her concerns about the little 10-year-old boy who found Aragon and who could not sleep thereafter for "months and months and months." (49 RT 7301.)

In Lydia's opinion, Aragon was a kind, gentle, soul who never hurt

anybody. She did not know why anybody would do something so senseless like that, intentionally go and search out someone who is vulnerable and then shoot him. And ask, "does it burn?" "And to laugh." And to shoot him several more times and then try out a new shotgun on him and say, "'Oh, look at the big hole I left.' That hole was our son. He was a grandson, a friend." (49 RT 7289.)

Aragon's younger sister Stephanie was 15 years old and living in New Mexico with her mother when Aragon died. She testified that she was shocked at his death. She described her brother as quiet and shy. She told the jury that he always made her laugh and always looked after her. (49 RT 7319.) She described her brother Steven as angry when he received the news of Aragon's death. She told the jury that Steven went outside and started hitting, punching, and kicking the car. (49 RT 7321-7322.) Stephanie described how she felt bad at the funeral because she realized on seeing her brother's body that she was never going to see him again or hear his voice. (49 RT 7322.)

During her testimony, Stephanie read from a letter that she had sent to Aragon's girlfriend in February 1993. In the letter, she described how she had dreamed of her brother. She described how she felt like a big part of her had been ripped out. She wrote that she did not understand why he was killed. (49 RT 7322-7324.) Stephanie also read from another letter describing her feelings and memories of her brother. (49 RT 7324.) She wrote that she was blessed to have been given such a wonderful brother and to have spent 16 years of her life with him. She wrote that the thought of her brother every day and described a constant

pain in her chest that did not go away. (49 RT 7324-7326.) She felt that she had been cheated out of so much by losing her brother. (RT 7326.) She was also constantly angry and had many mixed emotions, including anger, sadness, loneliness, and emptiness. (49 RT 7327.) She explained to jurors that, in memory of her brother, she and most of the members of her family all got license plates with variations of his name or nickname, "Hoz," that his friends used to call him. (49 RT 7327.)

She went one to describe to the jury how she was living her life now with fear, thinking constantly that the same thing was going to happen to her. She told the jury that she and her mother went to the cemetery every weekend to bring her brother cards, flowers, and flags. At Christmas, they took a tree and on Easter they took an Easter basket. She testified that Aragon had the cleanest headstone; they took care of him as if he were still alive. (49 RT 7327-7328.)

Stephanie explained that, after Aragon's death, her mother became overly protective, worrying about her safety. Her mother cried a lot and was always sad. (49 RT 7328.) Stephanie identified several photographs, offered into evidence, one showing her with her brothers standing next to the old Studebaker that Aragon's mother had given to him; and another showing brothers Jose and Steven. (49 RT 7318-7328.) Stephanie testified that after he died, Aragon's friends decided to do something in his memory. (49 RT 7328.) They got together and completely fixed up his truck, inside and out, and painting it a bright yellow, Aragon's favorite color. (49 RT 7299, 7328.)

Best friend and neighbor Leighette Hopkins also testified regarding the impact of Aragon's death. She met Aragon at Redlands High School. Hopkins saw Aragon nearly every day; they hung out together. He helped her with her studies and homework. She testified that Aragon was always calm and had a smile. Hopkins testified about how Aragon's death affected his family. She told the jury how she kept a Pepsi bottle with some Pepsi that Aragon had been drinking on the night before he was killed. She also told the jury that, as a result of his death, she felt paranoid and feared getting killed. She did not feel safe anymore and worried about people breaking into her house. She told jurors it was hard for her to celebrate Thanksgiving. (49 RT 7303-7317.)

Hopkins testified to a conversation she had with Aragon, who told her about seeing a deer at his house one day as he returned from school. He called her to come and see it, but when she arrived, the deer was long gone. She told jurors that sometime after Jose's death, she was visiting his family. Aragon's father told her that one day, he was on the front porch, thinking about why this had happened to his son, when he saw a deer standing in front of him. Aragon's father told Hopkins that the deer took off into an open field across the street. He followed, but the deer's footprints disappeared in the wet soil. Hopkins told the jury that she described to Aragon's father how excited Aragon had been the time he saw a deer in their yard. (49 RT 7306-7307.)

b. Joey Mans

The state presented testimony from Catherine Mans and Angela Mans in

connection with counts 1 and 2 of the charges against appellant, the murders of Joey Mans and Timothy Jones. Catherine Mans, mother of Joey Mans, had five daughters. Joey, whom she called "Punckon" when he was growing up, was her only son. (49 RT 7331-7332.) Mans grew up in Riverside and then moved to Florida with his mother in 1986. After about a year, Mans returned to Riverside. (49 RT 7332.)

Catherine last saw Mans about a year before he died. (49 RT 7332-7333.) She described him as a marvelous son, shy, but very neat and well-mannered. (49 RT 7334.) He was overprotective of his mother and sisters. (49 RT 7333.) He was very good with money and used to save. He always asked his mother whether she needed any money. (49 RT 7336.) Catherine used to tell him that he should have been born Jewish because he saved every penny. (49 RT 7336.) She recalled he used to stutter because he would try to say too many things at one time. (49 RT 7335.) He loved camping and the outdoors. (49 RT 7333.) Mans used to tell Catherine about the view from Lake Mathews. (49 RT 7334.)

Catherine described how Mans met Timothy Jones through his sisters. They knew Jones' sister. Mans and Jones were always at their house in Riverside; the garage was their hangout. (49 RT 7343.) She testified that Jones was very nice, police, and quiet. (49 RT 7344.)

Catherine told jurors that she last spoke with Mans about a month before his death. Unable to find work, he called to say that he wanted to return to Florida. She wanted him to finish air conditioning school, but he dropped out,

unable to pass the math tests. (49 RT 7335, 73377.)

When she heard the news of her son's death, Catherine could not believe that he had been shot. She described to jurors how she went outside and started screaming and banging on a car. (49 RT 7338.) She could not believe that he was gone. She told jurors she did not go to his funeral, because she did not want to see her son in a box. She testified that she had never even visited his grave, but told jurors she intended to go after finishing her testimony. (49 RT 7338-7339.)

Catherine testified that she was still upset, angry, and depressed about Joey's death. She prayed a lot and had to take tranquilizers. (49 RT 7339-7341.) She described to jurors how she could not get over his death and how she dreamed that she was holding and kissing him. She told jurors that in her dreams Mans told her that he was okay. She described how she also dreamed that she asked him what happened and he pointed to his back, saying "it hurts me back here." He kept saying, though, that he was okay. (49 RT 7339.) Catherine testified that she constantly thought about her son; the thoughts never went away. She told jurors he was always around her, and she talked to him; she felt him. (49 RT 7340.) She explained that the hardest thing for her to deal with was the fact that he was murdered and that somebody took something, her flesh and blood, away from her. (49 RT 7341.) She described in detail how she kept thinking that Mans was gasping for air and struggling to breathe when he died, because he was shot in the back of the neck. She thought he was in pain. (49 RT 7344.) She did not have time to deal with it. Although she was getting better with the passage of time, she

still cried a lot, unable to stop. (49 RT 7341.)

Catherine testified that her daughters were affected by her son's death as well. She explained to jurors that they talk about it all the time and cry and were unable to put it aside. (49 RT 7342.) She identified a photograph of Mans as a four-year old in Illinois with his sister Mary (People's Exhibit 428); another at age 8 in the backyard swimming pool (People's Exhibit 427); and still another of Mans with his father in Las Vegas when oldest daughter Charlotte got married (People's Exhibit 429). (49 RT 7342-7343.)

Mans' sister Angela was 20 years old when her brother was killed. He was 26. (49 RT 7346.) She described Mans as very kind and both trusting and gullible. (49 RT 7346.) He looked after Angela when their parents separated. After the separation, she, Mans, and their father left Florida and moved to Arizona. (49 RT 7347.)

Mans loved to play the guitar and make up his own songs. He liked to work on cars and loved the outdoors. (49 RT 7347.) Angela missed her brother and wished he was here. She was aware of the pain her parents were suffering because Mans was the only boy in the family. When she thought about her brother, she knew he was scared. She saw him in the casket and saw that he had a scared expression on his face. (49 RT 7348.) Not a day went by without her seeing that expression on his face. (49 RT 7349.)

When Angela was told by their father that Mans had been murdered, she started screaming. She did not remember much else; she was numb. About an

hour after her father told her the news, she went to church and kept waiting for Mans to come and say good-bye and to tell her that he was okay. At the funeral, Angela kept talking to him, waiting for a response, but he would not talk back. She felt bad because she was unable to protect him, particularly after he had always protected her. Her father was also very upset. The funeral was hard for both of them. Her father was in a daze, just numb. (49 RT 7350.) Mans later told her in a dream to stop crying and that he was okay. (49 RT 7349-7350.)

After Mans' funeral, the doctor gave Angela's father a lot of tranquilizers. Although her father's health was okay by the time of trial, he aged a lot and drank a little more. (49 RT 7350-7352.) He refused to celebrate some of the holidays, like Christmas, because the family was not complete. He left town at Christmas even though Angela wanted him to stay. (49 RT 7353.)

Angela became very fearful and scared, more paranoid about her surroundings. Her father developed the same feelings. (49 RT 7351-7352.) Her sister Charlotte also was affected. She became very touchy and lost her patience a lot. She began to talk about Mans constantly and went to the cemetery all the time. (49 RT 7354.) Charlotte named her son Joey, after her brother. (49 RT 7355.)

Angela herself began to fear that the same thing that happened to her brother would also happen to her. She started calling home every night on leaving work. She would not walk to her car alone. She was unable to sleep well. At least once a night, she got up and double-checked to make sure everything was

locked. (RT 7351.) She always worried about getting hurt and about the safety of her sisters. (49 RT 7351-7352.) Angela still had a lot of anger. She was angry that she could not share her life experiences with her brother and that she had to go through life without him. (49 RT 7352.)

Angela identified a photograph of Mans with his sister Trina at Big Bear (People's Exhibit 403). She also identified photographs of her brother's plaque at the cemetery as well as his grave on Valentine's Day and on his birthday (People's Exhibit 423-425). (49 RT 7354-7355.)

Since she was five or six, Angela had also known Timothy Jones. Jones used to stay overnight a lot at their home. He was much like her brother – quiet, trusting, and shy. Angela identified a photograph showing, among others, her fiancé with her father, Mans, and Jones (People's Exhibit 421). (49 RT 7356.) Angela recalled seeing a video of her sister Charlotte's wedding in which her father, Mans, and Jones were seen in a car saying goodbye to her sister Mary and her mother who were returning to Florida. Jones was also saying good-bye to his dad in the video as well. (49 RT 7357.)

c. Timothy Jones

James Jones, Timothy's father, had three children, Timothy, Jimmy, and Darlene (Dottie). He also had two stepchildren. (49 RT 7360.) Timothy was born on December 2, 1969. As a boy, Timothy had a speech impediment which he overcame. He liked all kinds of sports. According to his father, Timothy was the

most wonderful kid in the world -- a very loveable kid, his favorite. (RT 7361-7362.) He never caused any problems. (49 RT 7362-7363.) Jones and Mans were very good friends. The palled around together for years. Mans was also a very polite kid. (49 RT 7364.)

James last saw his son the night before he died. (49 RT 7365-7366.) Timothy was staying at a friend's house. James went to see if he needed anything. At the time, Timothy said he was not feeling too well. When his father left. Timothy gave him a hug and told his father, "I love you pop." (49 RT 7366.)

When his daughter and an officer came to his house to tell him that Timothy was dead, he did not believe it. They said someone had shot him in the head. (49 RT 7366.) The news of Timothy's death was devastating. James wished he could have died instead. (49 RT 7367.) The news also devastated Timothy's mother, from whom James had been separated for many years. The mother died from a stroke about a year and a half after Timothy died. James thought that Timothy's death contributed to her death. (49 RT 7368.)

Both James and his daughter took Timothy's death very hard. If they started thinking about him, the next moment they would be crying. It was very hard after the funeral for James to accept that Timothy was dead and that he had to go on with his life. Timothy's death was very hard on his nerves. (49 RT 7369.) When holidays came around, they started crying. The family did not celebrate Christmas around a tree as they had in the past. (49 RT 7370.)

Timothy's brother Jimmy was paralyzed and in a convalescent hospital.

James testified that when he visited Jimmy the day before, Jimmy had pointed out a kid who looked exactly like Timothy. Jimmy called out "Timmy, Timmy" and they both started crying. (49 RT 7370.) James testified that he did not attend the trial very much because he could not stand the thought of what his son had gone through when Timothy knew he was going to die and could not do anything about it. James testified that he could not forget his son's death and could not stand the thought of finding out exactly how Timothy died. He believed that Timothy suffered and tried to get away. He told jurors that it was more difficult knowing that his son had been murdered, rather than if he had an accident or had gotten sick. He felt he would have been able to understand that type of death, but he just could not understand why anyone would want to take the life of a kind and generous kid. (49 RT 7370-7371.)

James testified that on Memorial Day, he goes to the cemetery. He told jurors he thinks about how much Timothy suffered and he would talk to him even though he knew he was not there. He always tells his son that they will meet again some day, that everything is going to be okay, and that he did not have to worry any more about anything. (49 RT 7371.)

2. Prior School Assault

a. Milton Solorzano (May 22, 1992)

The state presented evidence that on May 22, 1992, Milton Solorzano and appellant were both attending Valley View High School in Moreno Valley. (51 RT

7541.) Solorzano testified that appellant ran up to him while he was standing in the cafeteria line at lunch. Solorzano told the jury that when he moved out of the way, appellant hit his head against a wall. Solorzano was not injured. (51 RT 7544.) Solorzano testified that he then held appellant in a headlock until a teacher arrived. During this time, appellant was swinging at Solorzano and saying "I'm going to get you. Let me go." Appellant also struggled with the teachers as he was being led away. (51 RT 7545.) Solorzano testified that he had previous verbal confrontations with appellant -- that they had given each other dirty looks and had exchanged words. (51 RT 7545-7546.)

Claribel Bautista testified that she witnessed the cafeteria incident between appellant and Solorzano. (51 RT 7626.) According to Bautista, appellant approached Solorzano at a fast pace, tripped, and hit his head on the wall. (51 RT 7626-7627.) Bautista testified that Solorzano and appellant had each other in a bear hug. Bautista claimed she tried to grab appellant's hand to help him because he was her friend. (51 RT 7627.) Both Solorzano and appellant were trying to hit each other. (51 RT 7627-7628.) Bautista told the jury that she did not know who the aggressor was. She testified that the incident ended when a "narc" or security guard from the school broke up the fight. (51 RT 7625-7629.)

Bautista acknowledged during her testimony that in March 1996 she visited appellant in jail and that their conversation was recorded. (51 RT 7629.) The state introduced and played a tape recording of Bautista's conversation with appellant during her visit (People's Exhibit 442). In the recorded conversation, Bautista and

appellant spoke about the Solorzano incident at school. (51 RT 7629.) The jury was also given a transcript of the tape (People's 442A) while it was being played. (RT 7629-7631.) Bautista testified that the recording and tape were accurate. (RT 7631.)

3. Subsequent Jail Assaults

a. Richard Reyes (July 22, 1992)

Deputy Sheriff Alfonso Campa testified that he was working as a tank officer of tank 11/12 at the Riverside County Jail (Robert Presley Detention Center) on July 22, 1994. (51 RT 7550.) He noted that there were six 8-man cells in tank 11 and that at about 5:00 p.m., he responded to a call for help from cell 5. (51 RT 7551.) Campa testified that inmate Richard Reyes was standing at the bars of cell 11C5 and that he appeared shaken, nervous, and scared. Reyes was bleeding from his gums and lip and had red marks on his face. Reyes also had a puncture wound and was missing some front teeth. (51 RT 7551-7554.)

Campa stated that he pulled Reyes out of the cell and then conducted a knuckle check on the remaining inmates in the same cell. According to Campa, appellant, who was also in cell 5, was hesitant to come forward and have his knuckles checked. He was the last inmate to be checked. Campa testified that he observed some redness and a fresh cut or small puncture wound on one of appellant's knuckles. He stated that he believed appellant had just wiped his knuckle on something because there was little noticeable blood. Campa also informed the jury that he did not observe marks or injuries to the knuckles or

hands of any other inmate in the same cell as appellant and Reyes. (51 RT 7555-7556.)

Campa testified that he spoke further with Reyes after he had been pulled from the cell. (51 RT 7557.) Reyes told Campa that he had just put his food tray by the cell door and when he turned around, he was hit approximately four times in the face. Reyes also told Campa that it happened so fast he did not see who hit him. (RT 7557-7562.) Campa did not observe any redness on Reyes' knuckles. (RT 7562-7563.)

A tape-recorded conversation between appellant and his mother Maria Self, during a jail visit on July 24, 1994 (People's Exhibit 440), was played for the jury. The jury was given a transcript of the tape (People's Exhibit 440A) to review as the tape was being played. It was stipulated that the transcript was a true and correct transcription of the tape. (51 RT 7575, 7578.) During the conversation, appellant told his mother that he hit an inmate on the mouth and busted out two of his teeth. Appellant told his mother that he asked what the inmate was in for and was told spousal abuse. Appellant told his mother that he said, "Oh, are you one of those" and told the inmate that he did not want him in the cell. When the inmate told appellant he could not get him out, appellant hit him in the mouth as hard as he could. When other inmates asked appellant if they should jump him, appellant told them not to do so because the guy was leaving. (51 RT 7576.)

b. Oswaldo Vasquez (June 24, 1993)

Oswaldo Vasquez testified that on June 24, 1993, he was an inmate in the

Riverside County Jail. (51 RT 7662.) He was 5'8" and, at the time, weighed about 150 pounds. Vasquez was housed in cell 5B61 for a couple of weeks. Vasquez testified that at approximately 8:30 p.m., he was asked by inmate David Valenzuela to play dominos with him in cell 5B63. (51 RT 7662.) Vasquez told the jury that Valenzuela was very insistent. (51 RT 7669-7670.) Vasquez also testified that on several prior occasions, he had given Valenzuela a back massage. (51 RT 7669.) During the game, appellant and another inmate approached Vasquez. (51 7662-7663, 7669.) Vasquez identified appellant as one of the inmates who approached him. (51 RT 7664.) Vasquez testified that appellant and the other inmate asked Vasquez to give them a back massage, but Vasquez refused. Appellant threatened Vasquez with a sharpened pencil. He said that he would stick it in Vasquez's neck if he did not give them a massage. (51 RT 7663, 7670-7671.) Vasquez gave appellant a back massage. (51 RT 7665.)

Vasquez testified that after the massage, appellant then told him to suck his penis, using the Spanish word "*mamon*" (51 RT 7664-7665.) Vasquez told the jury that he refused. Appellant and two other inmates prevented Vasquez from leaving the cell and began hitting him all over his body. (51 RT 7666.) One of the inmates acted as a look-out through the cell door. Vasquez was cut on the left eyebrow. (51 RT 7666.) When Vasquez started bleeding, appellant and the other inmates left the cell. (51 RT 7666.) They told Vasquez not to tell anyone and threatened that something worse would happen to him if he did. (51 RT 7667.) The following day, Vasquez told a jail deputy what had happened after an

investigation was begun about how he got cut over his eye. Vasquez first said that he hit his head on a bunk because of the threats that had been made . (51 RT 7667.) Later, Vasquez reported what had actually happened. He identified a photograph of appellant and said he was one of the inmates who attacked him. (51 RT 7668-7669.)

Deputy Sheriff Bruce Blanck testified that he was assigned as a housing officer for Cell 5B at the Riverside County Jail on June 25, 1994. (51 RT 7674-7675.) At 6:55 a.m., Blanck observed that inmate Vasquez had a cut above his eye. (51 RT 7676-7677.) Vasquez had been housed in 5B61. (51 RT 7675.) Blanck told the jury that after securing all inmates in their cells, he spoke with Vasquez, who provided him some information about the incident and the number of the cell where the incident occurred. (51 RT 7677-7678.) After obtaining medical treatment for Vasquez, Blanck showed him photographs of the inmates who occupied cell 5B63. Vasquez identified appellant, David Valenzuela, and Armando Saenz as the inmates involved in the assault. (51 RT 7679.)

Blanck acknowledged in his testimony that Vasquez also told him that inmate Saenz had been armed with a pencil and that Saenz wanted him to give Valenzuela a frontal massage or he would kill him. (51 RT 7680.) Blanck told the jury that Vasquez also reported to him that appellant dropped the front of his jumpsuit and said "give me *mamon*" which, according to Blanck was slang in Spanish for oral copulation. Vasquez told Blanck that after he refused, Valenzuela covered the cell window with a towel. The only other inmates in the cell were

appellant and inmate Saenz, who then beat him up with their hands and feet. (51 RT 7681-7682.) Finally, Blanck testified that Vasquez said that he did not see who hit him. (51 RT 7681-7682.)

c. Mario Garcia (May 30, 1994)

Mario Garcia testified that on May 30, 1994, he was in tank 11, cell 5, of the Riverside County Jail. (51 RT 7606.) He had only been in the cell for five or 10 minutes. (51 RT 7606, 7608.) Garcia was being held for second degree burglary. (51 RT 7610-7611.) Garcia told the jury that three inmates assaulted him in the cell. (51 RT 7606-7607, 7610.) One inmate first hit him in the mouth, face, and left eye with a closed fist; two other inmates then joined in. (51 RT 7610-7611.) Garcia testified that when he yelled for help, he was pulled from the cell by a deputy. He needed six stitches to close the cut over his left eye. (51 RT 7608-7609.)

Garcia told the jury that within minutes of the incident, deputies showed him photographs of several inmates present in the same cell at the time of the assault. Garcia testified that he identified photographs of three inmates who participated in the assault. He identified appellant's photograph as the inmate who first hit him. (51 RT 7609-7610.) He recalled the name of the principal assailant as Chris Mendoza. (51 RT 7612.) Garcia did not know why appellant hit him. Garcia had just been transferred into the cell. At trial, Garcia again identified appellant as the inmate who hit him. (51 RT 7607.)

Deputy Sheriff Leo Marin testified that he was assigned to tanks 10 and 11 in the Riverside County Jail on May 30, 1994. At around 9:00 p.m., he heard and responded to a call for help from cell 11C5 in tank 11. (51 RT 7614.) He told the jury that he saw inmate Garcia at the cell door with a cut over his right eye and blood on his face. The inmate appeared nervous and shaken. (51 RT 7615-7616.) Marin explained that eight inmates were housed in the cell at the time. Marin recalled that he had just placed Garcia in the cell between 20 to 40 minutes before the assault. (51 RT 7613-7616.)

Deputy Swett testified that he was working in the jail on May 30, 1994. He investigated the assault involving inmate Garcia, who had been cut above the eye. (51 RT 7618.) Swett told the jury that Garcia informed him after the incident that he had been making his bunk after entering the cell. (51 RT 7619.) Garcia also reported that a couple of inmates started hitting him about the face and body with closed fists. (51 RT 7619.) Swett explained to the jury that he pulled booking photographs of all the inmates in the cell with Garcia and showed them to Garcia. (51 RT 7619.) Within 15 or 20 minutes of the assault, Garcia identified a photograph of appellant as one of the inmates who assaulted him. (51 RT 7620.) Swett also testified that Garcia also identified the photograph of a second inmate named Tobaline who was also involved. (51 RT 7621-7623.) Garcia only picked two of the photographs shown to him. (51 RT 7621-7622.)

Finally, Swett testified that according to jail records, appellant was in cell 11C5 from April 23, 1994 until June 11, 1994. (51 RT 7623-7624.) He was one of

the inmates housed in cell 11C5 at the time of the incident involving Garcia. (51 RT 7624.)

d. Jacob Aramburo (June 4, 1994)

Deputy Sheriff Manuel Correa testified that at approximately 1:00 a.m. on June 5, 1995 he was working as a tank officer of tanks 11/12 at the Riverside County Jail (Robert Presley Detention Center). On responding to an inmate's cry for help, Correa found inmate Jacob Aramburo lying balled-up on the floor next to the door of cell 11C5. (51 RT 7565.) Other inmates in the cell were standing toward the back near the toilet area. (51 RT 7566-7567.) Correa told the jury that he removed Aramburo from the cell. He noticed a small cut on the back of Aramburo's head, swelling on the right side of his face, and scrapes on his back and chest. Aramburo complained of pain about his left shoulder and lower back. (51 RT 7568.) Correa testified that he then conducted a knuckle check on the other inmates in the cell, including appellant. (51 RT 7568.) On removing appellant from the cell, Correa noticed that all of his knuckles were red, and he had a small cut on the middle finger of his right hand. Correa testified that inmate Christopher Nevarez also had red knuckles but no cuts on his hands. (51 RT 7568-7570.) Correa recalled that none of the other inmates had any redness or injury to their knuckles. (51 RT 7570.)

Correa testified that Aramburo reported that he fell off his bunk. (RT 7571.) Aramburo later told Correa that he did not want prosecution or anything

done about what happened to him. (51 RT 7571-7572.)

4. Possession of Weapons in Jail

a. Possession of Sharpened Toothbrush (September 19, 1993)

On September 19, 1993 – his third day of work -- Deputy Sheriff Gregory Harrell was assigned to the day shift floor operations at the Riverside County Jail. At 9:30 a.m., Harrell was working the clothing exchange detail for tank 11, cell 6, which involved exchanging dirty inmate clothing for clean clothing. The detail also included a search of the cells. Appellant was one of eight inmates in cell 6 at the time. (51 RT 7648-7649.)

On searching appellant's property box, Harrell found a toothbrush that had been sharpened to a point at the end of the handle. (51 RT 7650.) The toothbrush looked as though it had been rubbed on the wall or floor. The toothbrush was the first shank he had found on the job. (51 RT 7650-7651.) It was apparent to Harrell that the sharpened toothbrush was capable being used as a weapon. (51 RT 7655-7656.) Harrell filled out an inmate disciplinary marker for appellant. (51 RT 7652.) After the marker had been filed, the toothbrush was destroyed. (51 RT 7646-7653.)

It was stipulated that if called to testify, Sergeant Odgaurd would testify that the shank was destroyed after a disciplinary citation had been issued to appellant. The destruction of weapons was matter of jail routine and security. (51 RT 7604-7605.)

b. Possession of Other Shanks (November 25, 1994)

On November 25, 1994, Correctional Sergeant David Durazo was working as a pod officer in charge of C pod at the Riverside County Jail Southwest Detention Facility (SDF). (51 RT 7632-7633.) Durazo testified that, on that date, appellant was being housed in single-cell C47 in C pod. He had been there about a month. (51 RT 7633.) All cells in C pod were searched once a week. In a prior search, Durazo observed that a two- to three-inch piece had been cut from a plastic cup in appellant's cell. (51 RT 7633-7634.)

Searching appellant's cell on November 25, Durazo found a paper clip attached by thread to a pencil. The point of the paper clip had been ground to a point and extended about one inch from the end of the pencil. (51 RT 7636-7637.) Durazo also found the piece of plastic that he had previously observed missing from the cup in appellant's cell. The piece of plastic had been sharpened to a point and was taped to the metal bunk. (51 RT 7638-7641.) Durazo also found a sharpened pork chop bone underneath the toilet. One end of the bone had been sharpened to a point, and the point was sharp to the touch. The bone appeared to have been ground down. (51 RT 7641-7642.)

In Durazo's opinion, all three items were shanks or weapons capable of causing bodily harm to another person. (51 RT 7638, 7641-7643.) Durazo cited appellant with a disciplinary marker. (51 RT 7643.) The items found in appellant's cell were subsequently destroyed. (51 RT 7644.)

B. Defense Evidence in Mitigation

Appellant called several family witnesses in mitigation, including his mother, Maria Self; his brother, Anthony Self; his cousin, Sheila Torres; high school art teacher; and a Riverside county Deputy Sheriff who worked in the county jail where appellant was housed.

At the time of appellant's arrest, Maria was working as a bilingual teacher's aide. (52 RT 7749-7750.) She had worked as an aide for several years. (52 RT 7750.) In 1992, Maria and appellant's stepfather, Phillip Self, had been married for about 12 years. (32 RT 5044; 52 RT 7698.) Previously, Maria had been married to Orlando Gene Romero, Sr. She married Orlando Gene Romero, Sr. in 1968 when she was 17 years old. (52 RT 7698.) After their marriage, Maria and Romero, Sr. lived in a shack in Perris, Riverside County, for about 6 years. Romero, Sr. ran around with other women; he was an alcoholic and drug user. Romero Sr. never worked. During the marriage, Maria frequently got drunk and used narcotics, including methamphetamine. She was depressed a lot. (52 RT 7699-7700, 7721.)

Maria had four sons by Romero Sr. -- Anthony, codefendant Romero, Timothy, and appellant. (52 RT 7699.) She, as well as Romero, Sr. and his friends, used drugs in front of the children all the time. (52 RT 7701-7704.) She hit and beat the children; she did not want them around and never showed them any affection. (52 RT 7704.) Maria often left the children with either the maternal or paternal grandparents or with her family, including brothers Joe and Ernie

Valenzuela, who were particularly violent and themselves abusive. (52 RT 7736-7737.)

Maria frequently invited men home and had affairs with them in front of the children. (52 RT 7705.) These trysts led to confrontations between Romero, Sr. and Maria; he beat her up many times. These incidents were witnessed by appellant and the other children. Once, Romero, Sr. held a gun to Maria's face and threatened to kill her. (52 RT 7705-7707.) Just before appellant was born, Maria left Romero, Sr. after he tried to kill her. She and the children moved to Modesto. (52 RT 7697-7707.) She filed for divorce on April 23, 1974. (52 RT 7701, 7707, 7745.)

Maria and the children first lived with her niece, Sheila Torres, in Modesto. (52 RT 7709.) They stayed in Modesto about four years. (52 RT 7709.) Maria testified that, during this period, she used drugs even more, taking anything that she could get her hands on. (52 RT 7709.)

From the time of her divorce, until she remarried, Maria had relationships with about 10 different men. (52 RT 7725.) All of them were abusive. (52 RT 7739-7740.) One boyfriend was addicted to heroin. Both Maria and her boyfriends used drugs in her children's presence. Because of the pressure of dealing with four boys, Maria was probably more violent toward them in Modesto than when they lived with Romero Sr. (52 RT 7710.) She locked the children in their room; she did not want anything to do with them. (52 RT 7710.) Money from public assistance was spent on drugs. (52 RT 7710.)

After an incident in which Maria hit the children and slashed appellant's face with a fly swatter, she sought assistance from the Department of Mental Health in Modesto. (52 RT 7712-7713, 7751.) The children were removed from her custody and declared wards of the court. (52 RT 7712, 7750-7751.) Maria's mother took appellant and Timothy; her sister took coappellant Romero and Anthony. (RT 7751-7752.) Romero Sr. was drunk when he appeared in court. (52 RT 7712-7714.) While living with his maternal grandparents, appellant was again exposed to Maria's abusive brothers, Joe and Ernie Valenzuela. (52 RT 7738-7739.) They kept guns in the grandparents' house and used to shoot them in appellant's presence. (52 RT 7741.)

During the period when the children were taken away, Maria was permitted only supervised visitation. (52 RT 7711-7712.) After about a year and a half, Maria got her children back. (52 RT 7713-7714.) Thereafter, she moved first to Turlock and then to Stockton. She took up a relationship with a man who did not want the boys around. He was abusive toward the children. On one occasion, after appellant soiled his pants, Maria's boyfriend made appellant stand in the corner with feces on his head. (52 RT 7727.) She still used alcohol and drugs, even more so during this time. The children took care of themselves. (52 RT 7715.) In Stockton, she lived with a heroin addict. When she was not on drugs, she was shaky and just could not seem to hold herself together. She told the children she hated them, to leave her alone, and just to stay out of her way. (52 RT 7716.) She did not show them any love or affection. She never went to visit their

schools. (52 RT 7715-7717.)

From Stockton, Maria moved back to Riverside. She was still using drugs. When sober or off drugs, Maria continued to abuse her children because she did not want them. (52 RT 7719.) Shortly after returning to Riverside, Maria began her relationship with Phillip Self. Eventually, she and the four boys moved in with him. Appellant was about five years old at the time. Self was good to her and the boys; he treated the children as his own. (52 RT 7753-7754.) He tried to get Maria to stop using drugs; he was very much against drug use. (52 RT 7755.) Self provided a stable, non-abusive home for the children. Maria had two daughters with Self. (52 RT 7755-7756.)

When he was about 14 years old, appellant moved in with his father, Romero, Sr. After a time, he moved back home. Because of friction with his mother, appellant then went to live with Maria's niece, Bernice, for several months. (52 RT 7776.) Unhappy, appellant moved back home. Appellant started using drugs and alcohol around this time. Maria asked him to leave home because he was bringing drugs and alcohol into the house. (52 RT 7778.) She enrolled appellant in a rehabilitation center, but he stayed only for two weeks. After leaving the rehabilitation center, appellant started using drugs and alcohol again. (52 RT 7779.) He went to several different high schools and was home schooled for a time, but he continued to use drugs. (52 RT 7779-7780.) Maria made arrangements to have appellant live with a friend in Los Angeles. (52 RT 7780-7781.) When that did not work, appellant went to live with his grandmother in

Mead Valley. (52 RT 7782.)

Maria recalled that during his early school days, appellant liked art. While in high school, he worked on a mural at Perris High School in memory of a well-liked teacher who died. (52 RT 7742-7743.) The defense also called as a witness Perris Union High School art teacher Margaret Louie. Louie had appellant in her art class when he was a sophomore or junior. Louie testified that appellant participated in creating a mural in memory of a teacher who had died during the school year. Louie identified a photograph of the mural (Defense Exhibit DD) on which appellant worked. Louie told jurors that appellant had volunteered his time during and after class to work on the mural. Appellant also volunteered to design the school logo, and he submitted a cover design for the school literary magazine. In Louie's opinion, appellant was very talented. Louie provided the art supplies delivered to appellant in jail. (53 RT 7859-7865.)

Maria acknowledged on cross-examination that she told a defense investigator that she never smoked, drank, or used drugs during her pregnancies. (52 RT 7748.) She said she was out of the house a lot and tried to find a reliable babysitter. She tried to shield the children from drug use and encouraged them to stay away from drinking and drugs. (52 RT 7761, 7767-7768.) The prosecutor elicited testimony that she taught them to be polite and well-mannered and to be respectful toward their elders. (52 RT 7762-7763.) She took them to church; all of the boys went through First Communion. She wanted them to know about God. (52 RT 7764.) She told them not to fight. (52 RT 7763-7764.) She had them do

their school work, although she did not monitor what they did. (52 RT 7765.) Both appellant and codefendant Romero were very bright, but they got bad grades in both elementary and high school. (52 RT 7766.) Maria acknowledged that in ninth grade, appellant got an A in history and English and a B in math. (52 RT 7767.) By the time he got to tenth grade, appellant was not doing the work. (52 RT 7767.)

California Deputy State Labor Commissioner Sheila Torres was Maria Self's niece. (53 RT 7894.) She knew Romero Sr. and had seen him drunk, passed out, in his house. Appellant and his brothers were left completely unattended. (53 RT 7895-7896.) Based on conversations with Maria, Torres was aware that she was running around with other men. When Maria and two of her children came to live with her, Maria took up with a heroin dealer. Later, she associated with other drug dealers and users. She was in that culture. (53 RT 7897-7898.) Maria was always punishing her children for something; she threw things at them, and she was mean to them. Either she was "riding them for something or not paying any attention to them." (53 RT 7898-7899.)

The entire family was violent. Torres' brother hanged himself; a niece was beaten to death. (53 RT 7898-7899.) An uncle was convicted of murder and sent to San Quentin. Everyone believed when they were growing up that Maria was suffering from some kind of depression or psychological problems. She acted crazy. Maria was aggressive and disrespectful of men, including Romero Sr. Maria was always telling Torres that men were no good, her husband was no good,

her boyfriend was no good; Maria talked to her sons in the same way. Maria never left her children with anyone. When Maria was out, Torres and her family had to go look for the children. (53 RT 7903-7906.)

Torres was acquainted with Phillip Self. (53 RT 7910.) He undertook to be a stepfather to appellant and his brothers. (53 RT 7910.) In Torres' opinion, Phillip Self was not particularly helpful in raising the children. (53 RT 7910-7911.)

Anthony Self, appellant's oldest brother, was serving in the United States Army at Fort Bragg, North Carolina. He had enlisted in 1988 when he was 18. As a combat engineer, paratrooper, and as senior enlisted NCO, Anthony supervised other troops. He helped clear mines in the Gulf War. (53 RT 7910-7911, 7920-7926.) Anthony recalled that when his mother was living with Bobby Guzman when he was about 8 years old, Guzman was strict. He treated appellant very hard. On one occasion, Guzman made appellant stand in the corner for hours with soiled underwear on his head. (53 RT 7913-7914.)

All the brothers were reunited when Maria married Phillip Self. (53 RT 7914-7915.) The boys liked him. The children pretty much grew up in poverty with Maria until she met Phillip Self. (53 RT 7919-7920.) Phillip Self was the best man Maria had been with. (53 RT 7915.) Self was very good to the boys after "he came in the picture." He helped support the family, took the kids fishing, and did things with the children. However, Self did not take part in disciplining the children as "he was too hot tempered." He did not give them advice. (53 RT

7921.) Maria herself was strict with the children. She made sure Anthony did his homework and wanted the boys to attend school. She told him not to use drugs. (53 RT 7923.) At the same time, she was very violent. She threw objects and used to hit appellant with a fly swatter, broom, or anything she had in her hand. (53 RT 7916-5917.) If the children upset her, she would lash out with whatever she had in her hand. They got used to it and tried to avoid her at any cost. (53 RT 7917.)

Anthony experimented with marijuana and heroin in high school. He gave appellant heroin once when appellant was in elementary school.(53 RT 7915.) Anthony took alcohol from his mother's cabinet, but appellant got blamed. Although he denied the accusation, appellant was punished anyway as they did not believe him. (53 RT 7916.) Anthony and his brothers used to send appellant to go fight their neighbor across the street "to see what he could take" and to see "what they could put him through." The fighting went on for a number of years. (53 RT 7918-7919.)

Deputy John Bianco worked at the Riverside County Jail (Robert Presley Detention Center) in downtown Riverside. Appellant was being housed in a single cell. (RT 7802.) While permitted out of his cell for two hours a day, appellant was given art supplies. Deputy Bianco obtained three pieces of artwork from appellant (Defense Exhibits FF through HH) that were given to a defense investigator. (52 RT 7802-7804.)

Special art supplies were not ordinarily given to inmates. (52 RT 7814.)

Inmates were allowed standard pencils and paper but could write or draw anything they wanted. Inmates were able to send drawings out with letters. They were also permitted to draw on envelopes. (52 RT 7815.) The paper used by inmates, however, was 3" x 6." (52 RT 7815.)

C. Rebuttal Evidence in Aggravation

Defense investigator Robin Levinson interviewed Maria Self in 1993 and prepared a transcript of the taped interview. (53 RT 7936-7937.) Maria told Levinson that although she went out a lot, she did not use drugs around her children. (53 RT 7937.) She may have had a drink or two around the children, but did not recall ever getting "plastered" in front of them. Maria tried to "shield them from that." (53 RT 7937.) She did not spend a lot of time with the children. She tried to find babysitters. (53 RT 7937.)

A. Guilt Trial Issues and Assignments of Error

I

THE JUROR QUESTIONNAIRE ADOPTED BY THE TRIAL COURT OVER APPELLANT'S OBJECTIONS LED TO THE IMPERMISSIBLE AND IMPROPER DISCHARGE OF PROSPECTIVE JURORS BASED ON RACE AND ETHNICITY, AND RESULTED IN THE SELECTION OF A BIASED JURY THAT DENIED APPELLANT'S RIGHT TO AN IMPARTIAL JURY REPRESENTING A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF ARTICLE I, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION AND THE FIRST, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

On October 2, 1995, the prosecutor filed a proposed jury questionnaire to be used during jury selection in appellant's trial. (See 5 CT 919-949.) The proposed 28-page questionnaire consisted of 132 questions, often calling for or requiring highly detailed, written explanations. The questionnaire was designed "to elicit information with regard to [the] qualifications [of each prospective juror] to sit as a juror in [appellant's] case." (5 CT 921.) Included were questions requiring every prospective juror to specify his or her race and ethnic origin (Question 1d). In addition to background questions, generally, (Questions 1-6), the questionnaire also sought highly detailed, often intimate, and personal information about education (Questions 7-8), employment (Questions 10-14), military experience (Question 15), knowledge of or familiarity with participants

(Questions 16-20), attitudes and involvement in judicial and criminal system (Questions 21-29), impact or awareness of crimes of violence (Questions 30-36), other personal and attitudinal questions (Questions 37-93) and highly detailed questions about each prospective juror's views and attitudes toward the death penalty (Questions 94-132). Finally, the questionnaire included an explanation sheet with space to provide additional information if any of the questions were not fully answered because of the space limitations on the questionnaire.

Appellant objected to the use of the jury questionnaire on December 11, 1995. (4 CT 1080-1081; 10 RT 2021.) He objected to the inclusion of a question on the O.J. Simpson trial (Question 41). (11 CT 2049-2086.) Defense counsel argued that while the court and parties had the right to question prospective jurors, any such inquiry should be done in open court with other jurors present. (10 RT 2022.) Agreeing with the prosecutor, the trial court ruled that a questionnaire would be used "to solicit the juror's views *before* we conduct the voir dire with them." (10 RT 2025 [italics added].) As further stated by the court:

> I think it will not only save time, but I also believe that it's going to give us a more accurate picture of the juror's proposed -- or the juror's views on a number of issues that counsel needs to know about in order to determine whether or not the particular individual jurors are right for this case or not. It gives counsel

> information that they need about the juror's views on many, many important issues.
>
> (10 RT 2025.)

Appellant continued to object to the proposed questionnaire, advocating an open forum to discuss and evaluate each prospective juror's views on the death penalty. On appellant's behalf, defense counsel declined to participate in revising or modifying the questionnaire as suggested by the court for the purpose of "com[ing] up with something that you [defense counsel] feel is more -- is better suited to your client's interests." (10 RT 2026.) Defense counsel further objected to the use of a questionnaire, stating that "what the questionnaire does is identify those few jurors to the People who have some reservations about the death penalty. That's really what it does. And of course in [an] open forum where everybody can discuss these issues in the open, and in a courtroom situation, we can also have a way of identifying those people. But it's a way also of discussing why maybe a person has these reservations. [P] They can listen to what other people have to say regarding the death penalty. And we can make a determination, both the prosecution and the defense. It's a fair means of doing so. We do it in every other type of case." (10 RT 2026.) The court responded to appellant's objections that "we would be doing it anyway [voir dire], wouldn't we, in open court?" (10 RT 2026.) Defense counsel replied

that the procedure to be followed would result in "anybody that expresses even a minimal reservation about imposing the death penalty will be struck by the People. Even if that person was the type of person who might change their opinion, or who might in an open forum discuss their reasons and ultimately change their minds, or indicate that they can be fair to both sides ... that doesn't happen, because we don't reach to those people. Once they are identified in the means of this questionnaire -- by means of the questionnaire, it's my firm belief that the prosecution will strike any juror that expresses even, again, a slight reservation to imposing the death penalty. [P] So, we never get a chance to discuss with those jurors in open court their views ... ." (10 RT 2026-2027.)

Coappellant Romero joined in appellant's objections, arguing that the proposed death qualification process would not merely result in "death qualifying the jury, but death -- serve a death certain jury. That what we end up with is a jury that is only that further closer to the -- to being able to render a death verdict." (10 RT 2027.) Appellant's counsel added he additionally opposed the jury questionnaire because in the process "we single out those that have some possible reservation but who can also still consider the death penalty and allow them to be stricken from the jury. So, that's why I'm not propounding a questionnaire in this case." (10 RT 2028.)

The trial court ruled that the information sought in the questionnaire

would come out anyway during the voir dire process, stressing that "I think that the juror's views with regard to the death penalty, if they are expressed in the questionnaire, then provides for follow-up during the voir dire process, if necessary." (10 RT 2031.) The court also emphasized in its ruling that the questionnaire would be beneficial "in that it provides the views of jurors on many important issues, even before the voir dire process, so the attorneys can then pinpoint those areas where they feel that they need follow-up." (10 RT 2031.)

With but few modifications, the questionnaire to be given prospective jurors was finalized on January 11, 1996. (See 10 RT 2044-2045; 11 RT 2049-2050.) On the same date, the court again overruled appellant's objections to the use of the jury questionnaire. (5 CT 1080.) The trial court then explained to counsel how the court would be conducting voir dire. (11 RT 2054.) Significantly, the court informed counsel that "all of the jurors which will be voir-dired will have filled out the questionnaire." However, the court also informed counsel that not all prospective jurors who filled out questionnaires would be subject to voir dire.

> "Um, what I suggest is that we spend a little bit of time in the morning before we undertake voir dire and see if we can agree together that certain of the jurors have stated cause to be excused and that no further voir dire of those jurors need be done just based upon the answers that they put into the questionnaire. I would imagine in every group we will have

> some jurors that fit in that category. If all of us can agree, we will just excuse them for cause at that time. Now, after we've selected or agreed upon those jurors under *Hovey* stated cause to be excused, then the group that we have left, we will undertake voir dire with."
>
> (11 RT 2055.)

The court thus emphatically made it clear to counsel its views that the questionnaire responses of some prospective jurors would suffice. "Some prospective jurors, if they have stated cause [in the questionnaire], there is no reason for us to spend any of our precious time on voir dire." (11 RT 2057.) The court further explained as follows: "I mean if there is no reason to examine this person because this person clearly is unacceptable for this jury, they have stated cause, I think that at that time we just agree that person should be excused for cause. We stipulate the person should be excused for cause, and we bring in the 15 prospective jurors [in each group], and then tell them, okay, the following individuals have been excused. Thank you very much. ... Then with the group that is left over, you're conducting your voir dire." (11 RT 2057.)

After the court informed counsel of the procedure to be followed during voir dire, including excusing jurors for cause based solely on questionnaire responses, counsel to coappellant Romero objected to the contents of the questionnaire, offering that the questionnaires were going to

identify "people who may be on the fence and have some room to consider things with more of an open mind." (11 RT 2059.) Counsel for appellant joined in these objections. (11 RT 2060.) After further colloquy on the propriety of certain questions propounded in the questionnaire, appellant's defense counsel again emphasized that he preferred an open forum and voir dire to determine the views of prospective jurors. (11 RT 2067.) In the end, the court noted the objections but agreed with the prosecutor, adding a revised, multi-part Question No. 41 [formerly proposed Question 46] about prospective jurors' views on the recently-concluded O.J. Simpson trial (11 RT 2066) and the following, additional queries as subparagraphs (G) and (H) to the already multi-part, interminably long, and convoluted Question 76 about views on the death penalty: "Would your feelings about the death penalty prevent or substantially impair your ability to conscientiously consider the imposition of the death penalty where appropriate? Would your feelings about the death penalty prevent or substantially impair your ability to conscientiously consider the imposition of the penalty of life without possibility of parole where appropriate?" (11 RT 2069.)

Jury selection for appellant's jury began on February 26, 1996. (See 22 RT 3564.) Groups of prospective jurors were summoned and sworn. The trial court gave introductory remarks about the nature of the case, the charges, length of trial, scheduling, and discussed with each group requests for hardship and the completion of a jury questionnaire by those

prospective jurors who were not seeking to be excused on hardship grounds. The court informed each group of prospective jurors that since the death penalty potentially was involved, each prospective juror should give "serious consideration" to the issue of capital punishment before completing the questionnaire. (See, i.e., 22 RT 3571, 2582, 3598, 3609, 3643.) The court informed each group of prospective jurors when and where to return depending on whether hardship would be claimed or the questionnaire filled out. After all financial, medical, and other hardship claims were heard and resolved (see 22 RT 3648-3650; 22 RT 3676-3677; 22 RT 3696-3698; 22 RT 3709-3711) and after all other jurors had completed their questionnaires, the court scheduled voir dire of prospective jurors in groups of 15.

On March 4, 1996, the trial court began voir dire of prospective juror's in appellant's case. As the trial court previously informed counsel, before each group of prospective jurors were voir dired, the court asked counsel if they would stipulate "that certain individuals have stated cause to be excused from service on this jury and that it is not necessary to conduct voir dire of them." At the prosecutor's request, and on stipulation of defense counsel, an initial group of prospective jurors -- LaDonna Flamminio, Adrianne Flores, Olga Varela, and Frank Dinka -- were discharged for cause solely on the basis of their responses to the juror questionnaire. (23 RT 3731.) Thereafter, other prospective jurors were also discharged for cause solely on the basis of their questionnaire

responses. Carol Pickard, Frank Bacon, Yolanda Baum-Moss,[106] Mary Leonti, Charles Miller, and Anna Gilmore were excused for cause on March 4, 1996 (23 RT 3797, 3799-3801.) On March 5, 1996, the trial court excused for cause prospective jurors Bernice Vivanco, Joshua Valles,[107] Jeffrey Lewis,[108] Robert Stevens,[109] John Young,[110] and Rochelle Plaxco. (24 RT 3871-3872.) On March 6, 1996, Timothy Murdick, Manuel Munoz, and Marlene Rosales were excused for cause solely on the basis of questionnaire responses. (24 RT 4008, 4015.) In the afternoon session of March 6, 1996, Lorraine Goodland, Kay Tartaglia, Nadine Jackson, Peggy Koehn,[111] John Esquivel were excused for cause on the basis of their questionnaire responses.[112] (25 RT 4091.) On March 7, 1196, the court

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[106]/ The trial court told counsel that Baum-Moss did not state grounds to be excused for cause but nevertheless excused her anyway solely on the basis of her questionnaire. (23 RT 3799.)

[107]/ The trial court told counsel that he did not have Mr. Valles listed to be excused for cause but nonetheless agreed to excuse him for cause anyway. (24 RT 3868.)

[108]/ Jeffrey Lewis was excluded on the prosecutor's request based on a "weirdness standard" and because some of his answers were "unusual." (24 RT 3868.)

[109]/ Robert Stevens indicated he was opposed to the death penalty. (24 RT 3868.)

[110]/ Young indicated he was opposed to the death penalty. (24 RT 3868.)

[111]/ The prosecutor sought to remove Koehn because "[h]er indication as to the *Witherspoon*, that she would not be sure if she could -- she was unsure if she would automatically vote against the death penalty" and because indicated "a preference for LWOP." (25 RT 4090.) Koehn indicated she disagreed with the felony murder rule and would vote for life without parole in such a case. The court agreed to discharge her for cause even though her views and the nature of her opposition to the death penalty were never explored in voir dire. (25 RT 4090.)

excused for cause prospective jurors Joseph Flores, Cynthia Bradley, Michael Jermain, Beatrice Mejia,[113] Mathew Fagan, and Randi Douthitt based on their responses to the questionnaire without conducting voir dire. (26 RT 4164-4166.) In the afternoon session of March 7, 1996, prospective jurors Gloria Roberts[114] and Emma Koivisto were excused for cause by the trial court on the basis of their questionnaire responses alone. (4243.) On March 11, 1996, Pamela Campbell,[115] Brian Sheridan,[116] Randy Murphy,[117] Ron Uharriet,[118] Richard Bergeron, George D'Angelo,[119] Michael Horton, Steve Naples, and Kimberly Pavlick[120] were discharged for cause on the

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[112]/ Although excusing Kay Tartaglia for cause (25 RT 4087), the court observed "she hasn't said anything to us in court or in her questionnaire that would justify her removal for cause." (25 RT 4088.)

[113]/ The court noted that he only listed Mejia, an Hispanic, "as possible cause." (26 RT 4162-4163.) Mejia was nevertheless discharged for cause without follow-up voir dire.

[114]/ The court agreed with the prosecutor's request to excuse Roberts for cause, noting she indicated opposition to the death penalty. (26 RT 4240.)

[115]/ On excusing Campbell, the court noted her responses indicated "she would have a difficult time imposing the death penalty." (27 RT 4314.)

[116]/ The prosecutor sought to remove Sheridan for cause because he was "uncomfortable" deciding between life and death and because he indicated "he was automatically LWOP on felony murder." However, the information alleged premeditated and deliberate murder and the multiple murder special circumstance, and the prosecutor later argued that appellant was the shooter in two of the murders (27 RT 4314.)

[117]/ Granting the prosecutor's request to discharge Murphy, the court noted that he said in his questionnaire "that he would have a problem in that the defendants are brothers. He also had a *problem* to Witt questions." (27 RT 4315.) There was no follow-up voir dire before Murphy was discharged.

[118]/ The prosecutor sought to discharge Uharriet because her answers were "bizarre and unusual." (27 RT 4315.)

[119]/ D'Angelo was opposed to the death penalty. (27 RT 4315.)

[120]/ Pavlick was opposed to the death penalty. (27 RT 4315-4316.)

basis of their juror questionnaire responses.[121] On March 12, 1996, the court excused for cause Ronald Smith, Raul Haro, Andrew Hruska, and Richard Jones based solely on their responses to the questionnaire. (28 RT 4430, 4439.) On the afternoon of March 12, 1996, the court excused for cause Armanda Allen-Mitchell, Thomas Wilson, Eduardo Perez, and Katherine Mackey-Larson based solely on their questionnaire responses. (28 RT 4508-4509, 4512.) On March 14, 1996, Rosaicela Salcido, Theola Hess, Linda Morris, Timothy Lampman, Gary Lee, Vera Gonzales, and Laura Snider were discharged for cause based on their questionnaire responses.[122] (29 RT 4572-4573, 4575.)

After the trial court had qualified 100 prospective jurors, further disqualifications and voir dire were discontinued. From this panel of 100 prospective jurors, appellant's jury was selected. (See 29 RT 4649.)

During final jury selection, the prosecutor exercised three peremptory challenges, eliminating prospective jurors Anne Briggs, Sharon Garten, and Tracy Wristen. Defense counsel did not exercise a single

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[121]/ Horton did not complete the questionnaire, particularly the "*Witherspoo*n and *Witt* questions" as noted by the trial court. (27 RT 4315.) Although the court asked other prospective jurors in other sessions to complete their questionnaires or agreed to voir dire other prospective jurors on omitted questions, the court did not bother to do so in Horton's case, excusing him for cause instead. (See 27 RT 4318.)

[122]/ Robert Gonzales was discharged for cause based on his questionnaire responses which indicated he was a correctional officer and knew "everything about" both defendants from working in the county jail. (29 RT 4573.)

peremptory challenge. (See 30 RT 4758-4762.) On selecting the alternate, the prosecutor peremptorily challenged Linda Lamarre, Isabel Rolon, Ronald Faulkner, Burma Manns (30 RT 4768.)

Immediately challenged by the prosecutor, Rolon was the only Hispanic in the group from which the alternates were selected. Defense counsel peremptorily challenged Nathaniel Glover, a Los Angeles County Deputy District Attorney, Jill Middleton, Patricia Coolman, and Deborah Uebel Matteson. (30 RT 4769, 4775.)

The jury selected was strikingly homogeneous in character and make-up: all 12 regular jurors initially selected were Caucasian. Of the 5 alternates, 2 were Caucasian and 3 were Black. In a county with a substantial Hispanic population, there were no Hispanics on appellant's jury, either seated or alternate jurors.

B. The Questions on Race and Ethnicity Resulted in the Nonrepresentation of Hispanics on Appellant's Jury and the Selection of a Biased Jury in Violation of Appellant's Rights to a Fair Trial, Trial by Jury Drawn From a Representative Cross-Section of the Community, and Due Process Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Section 16 of the California Constitution

One accused of a crime has a fundamental constitutional right to a trial by impartial jurors drawn from a representative cross-section of the community. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258, 265.) As previously stated by this

Court, the right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution. (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) In short, "[t]he right to a fair and impartial jury is one of the most sacred and important guarantees of the Constitution." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283; accord *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1075 ["Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors'"].) "It is therefore the responsibility of the courts to insure that this guarantee not be reduced to a hollow form of words, but remain a vital and effective safeguard of the liberties of California citizens." (*People v. Wheeler, supra*, 22 Cal.3d at p. 272.)

The right to a trial by impartial jurors drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the United States Constitution and by article I, section 16 of the California Constitution. (*People v. Sanders* (1990) 51 Cal.3d 471, 491.) As discussed in *People v. Bell* (1989) 49 Cal.3d 502, whether systematic exclusion of a cognizable class of prospective jurors has been established, the federal and state jury trial guarantees are coextensive. (*Id.* at p. 525, fn. 10.)

The right to a jury drawn from a representative cross-section under the Sixth Amendment is a fundamental, substantive right. Its violation removes "from the jury room qualities of human nature and varieties of

human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude ... that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. (*Peters v. Kiff* (1972) 407 U.S. 493, 503-504.) "The injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (*Ballard v. United States* (1946) 329 U.S. 187, 195.) As elsewhere observed by the United States Supreme Court, "[t]endencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group" undermine processes, weaken the institution of jury trial, and should be "sturdily resisted." (*Glasser v. United States* (1942) 315 U.S. 60, 86.)

Hispanics, or those with Spanish surnames, constituted a distinctive group entitled to be represented fairly and without disproportionate under-representation on appellant's jury. (See *Castaneda v. Partida* (1977) 430 U.S. 482, 495; *People v. Morales* (1989) 48 Cal.3d 527, 543.)

Even assuming, but without conceding, for purposes of argument that Riverside County's jury selection criteria were neutral with respect to race and ethnicity, the use of race and ethnicity questions in the jury questionnaire in this case led both to the systematic exclusion and

complete nonrepresentation of Hispanics on appellant's jury. Such nonrepresentation alone constituted a prima facie violation of appellant's fundamental right to fair trial by a jury comprised of a representative cross-section of the community and to due process of law. The use of questions on race and ethnicity also created "the opportunity for discrimination," (*Batson v. Kentucky* (1986) 476 U.S. 79, 95) manifested in the selection of a biased jury (see Argument VIII, *infra*) and by the impermissible and improper targeting of Hispanic prospective jurors by the prosecutor during voir dire (see Argument II, *infra*). This, in turn, contributed to the selection of a biased jury and the nonrpresentation of Hispanics on appellant's jury. (See *People v. Bell, supra*, 49 Cal.3d at p. 524.)

The use of race and ethnicity questions in the jury questionnaire was inconsistent with the representative cross-section right of the Sixth Amendment, the right to a fair trial by impartial jury of the Sixth Amendment, and to due process of law guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. For the additional reasons discussed, *infra*, and in Arguments II and VIII, *infra*, race and ethnicity questions as used in appellant's jury questionnaire should be categorically and unequivocally condemned by this Court.

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C. In the Absence of Voir Dire Examination, Reliance Upon Juror Questionnaires Alone to Discharge or Disqualify Prospective Jurors Violated Appellant's Rights to a Fair Trial by Jury, Due Process, a Reliable Guilt and Penalty Determination, and Equal Protection of the Laws Guaranteed by Article I, Sections 15 and 16 of the California Constitution and the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

1. Introduction

At the time of appellant's trial in 1996, the California Code of Civil Procedure section 223 provided in part that, "In a criminal case, the court shall conduct an initial examination of prospective jurors." Nothing in section 223 contemplates or sanctions the substitution of written questionnaires and review of them outside the presence of the prospective jurors for the required examination in open court. As this Court recently pointed out in *People v. San Nicolas* (2004) 34 Cal.4th 614, section 223 gives the trial court discretion in the manner in which voir dire is conducted, so long as it takes place in open court. (*Id.* at p. 632 and fn. 3.)

Despite this clear exposition of the law, however, at appellant's trial, the trial court found over 50 prospective jurors to be substantially impaired under *Witherspoon/Witt* (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright* v. *Witt* (1985) 469 U.S. 412) solely on the basis of their written answers to questionnaires distributed to them by the trial court, without conducting any examination whatsoever in open court. The trial court in appellant's case used the written questionnaires to excuse these prospective

jurors from the venire, which meant that they were excluded from the examination process normally used in voir dire proceedings -- and used with respect to *all other members of the venire* -- literally *to inquire of and seek to elicit from jurors* information relevant to their qualifications to serve.

The jurors improperly excused by the court's constitutionally invalid procedure were denied the opportunity to explain, or discuss their answers on the questionnaire, and they were never asked any questions that permitted the trial court to determine if their views substantially impaired their fitness to serve as jurors in appellant's trial. The trial court's truncated procedure denied appellant the process due to him under the United States Constitution and state law; violated his right to equal protection; to be tried by an impartial jury; as well as the full panoply of trial rights to which he was entitled under state and federal law. It was tantamount to a quasi-secret process for selecting the jury that is insupportable in the criminal justice jurisprudence of this country, and that violated appellant's rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. Argument

Section 191 of the California Code of Civil Procedure unequivocally states that "trial by jury is a cherished constitutional right, and ... jury service is an obligation of citizenship." Moreover, "[i]t is the policy of the State of California that all persons selected for jury service shall be selected

at random from the population of the area served by the court; [and] that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state ... ." Indeed, the commitment to representative juries is reflected in California Code of Civil procedure section 197, subdivision (a), which provides in pertinent part that, "[a]ll persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court." Juries in criminal trials are formed in the same manner as juries in civil trials. (Code Civ. Proc. § 191.)

These standards apply to jury selection in a capital case under both the federal and state constitutions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1246, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 and *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Heard* (2003) 31 Cal.4th 946, 958.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Jones, supra,* 29 Cal.4th at p. 1246.)

Appellant was entitled under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, sections 15 and 16 of the California Constitution to be tried by a fair, representative, and impartial jury, "a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required." (*Gray*

v. Mississippi (1987) 481 U.S. 648, 659, fn. 9; see also *id.* at pp. 658, 668; *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728.) The trial court at appellant's trial was obligated therefore to determine that the people selected to serve on the jury did not hold views concerning capital punishment that would "'prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath.'" (*Wainwright* v. *Witt, supra,* 469 U.S. at p. 424, quoting *Adams* v. *Texas* (1980) 448 U.S. 38, 45; U.S. Const., 6th & 14th Amends.; see also *Gray v. Mississippi, supra,* 481 U.S. at p. 668 ["*Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury"]; *Darden v. Wainwright* (1986) 477 U.S. 168, 178; *Witherspoon v. Illinois, supra,* 391 U.S. at p. 522, fn. 21; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.)

In the capital context, the United States Supreme Court has emphasized that, "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* 1986) 476 U.S. 162, 176.) The voir dire process is therefore essential to the court's ability to make these assessments of a juror's qualifications to serve.

The expectation that the critical process of examining jurors will take

place through "live" questioning in open court is well-settled in federal and state law. Moreover, this "open court" examination is integral to the constitutional validity and integrity of both the jury selection and trial process. The United States Supreme Court has repeatedly explained that the touchstone of a fair trial is an impartial trier of fact -- a jury capable and willing to decide the case solely on the evidence before it. (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) "Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." (*McDonough Power Equipment Inc. v. Greenwood* (1984) 464 U.S. 548, 554.) In addition, the High Court has observed that the trial court's determination of a prospective juror's bias "has *traditionally been determined through voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind ... [and] such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (*Wainwright v . Witt, supra,* 469 U.S. at p. 429 [italics in original; footnote omitted].) Thus, the literal *examination* of jurors verbally, in open court, so their demeanor may be observed and their views explored, is key to these determinations.

3. Federal Pronouncements Regarding Voir Dire

In *Morgan v. Illinois, supra,* 504 U.S. 719, the United States Supreme Court discussed at length the critical importance of voir dire to a reasonable

determination of juror bias. The court observed, inter alia, as follows:

> [I]t is true that '[v]oir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion."' *Ristaino v. Ross,* 424 U.S. 589, 594 [] (1976) (quoting *Connors v. United States,* 158 U.S. 408, 413 [] (1895)). The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. *Dennis v. United States,* 339 U.S. 162, 171-172 [] (1950); *Morford v. United States,* 339 U.S. 258, 259 [] (1950). 'Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' *Rosales-Lopez v. United States,* 451 U.S. 182, 188 [] (1981) (plurality opinion). Hence, '[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness.' *Aldridge v. United States,* 283 U.S. 308, 310 [] (1931)."
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> (*Morgan v. Illinois*, 504 U.S. at pp. 729-730 [footnotes omitted].)

The defendant's interests in this process are equally important and consequently, the High Court has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections, see, *e.g., Turner v. Murray,* 476 U.S. [28,] 36-37 [1986];

Ham v. South Carolina, 409 U.S. 524, 526-527 [] (1973)." (*Morgan v. Illinois, supra*, 504 U.S. at p. 730.)

The long line of United States Supreme Court opinions which set out the principles and procedures to be used in the selection of an unbiased jury in capital cases all contemplated actual voir dire of potential jurors by the trial court. (See *Gray v. Mississippi, supra,* 481 U.S. at pp. 651-657; *Ross v. Oklahoma* (1988) 487 U.S. 81, 83; *Darden v. Wainwright, supra,* 477 U.S. at pp. 175-178; *Wainwwright v. Witt, supra,* 469 U.S. at pp. 415-416; *Adams* v. *Texas, supra,* 448 U.S. at pp. 41-42; *Witherspoon v. Illinois, supra,* 391 U.S. 510, 514-515; see also *Lockhart v. McCree, supra,* 476 U.S. at p. 166; *Patton v. Yount* (1984) 467 U.S. 1025, 1027; *Davis v. Georgia* (1976) 429 U.S. 122 and *Davis v. State (Georgia)* (1976) 225 S.E.2d 241, 243; *Maxwell v. Bishop* (1970) 398 U.S. 262, 264-265; *Boulden v. Holman* (1969) 394 U.S. 478, 482-483; *Irvin v. Dowd* (1959) 359 U.S. 394, 397; *Reynolds v. United States* (1879) 98 U.S. 145, 156-157.)

There is no suggestion, direct or indirect, in any of these cases, that a written questionnaire could ever substitute for actual voir dire. On the contrary, the opinions have consistently emphasized the importance of the prospective jurors' physical presence in court for questioning so that the trial court can observe them.

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Patton v. Yount, supra, 467 U.S. 1025, is instructive on this point. There, the Supreme Court reflected on the federal statutory rule of deference to trial court determinations of venire members' bias as follows:

> There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only after an often extended voir dire proceeding designed specifically to identify biased veniremen. It is fair to assume that the method we have relied on since the beginning, e.g., *United States v. Burr*, 25 F.Cas. No. 14,692g, p. 49, 51 (No. 14,692g) (CC Va.1807) (Marshall, C.J.), usually identifies bias. Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'"
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> (*Patton v. Yount, supra,* 467 U.S. at p. 1038.)

Quoting from *In re Application of National Broadcasting Co.* (1981) 209 U.S.App.D.C. 354, 362, 653 F.2d 609, 617, the *Yount* Court observed that "'voir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner[.]'" (*Patton v. Yount, supra,* 467 U.S. at p. 1038, fn. 13.)

The *Yount* Court also noted that "Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding

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what a potential juror is saying. Any complicated voir dire calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible." (*Id.* at p. 1038, fn. 14.) Clearly, the live examination of jurors in open court is integral to the jury selection process.

Thus, in *Wainwright v. Witt, supra*, 469 U.S. 412, 429, the Supreme Court opined that "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." Implicit in this observation is the *Witt* Court's assertion that "determinations of juror bias cannot be reduced to question-and-answer sessions that obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply

the law. For reasons that will be developed more fully *infra,* this is why *deference must be paid to the trial judge who sees and hears the juror.*" (*Id.* at pp. 424-426 [footnote omitted; italics added]; see also *Darden v. Wainwright, supra,* 477 U.S. at p. 178 [trial court aided by observing prospective juror's demeanor].)

The *Witt* Court emphasized that a party who seeks to exclude a potential juror because of bias must demonstrate, through questioning, that the potential juror lacks impartiality. (See *Reynolds v. United States,* 98 U.S. at p. 157. As explained in *Witt*, the trial judge must then determine whether the challenge is proper. (*Wainwright v. Witt, supra,* 469 U.S. at pp. 423-424.) That is also the standard and procedure outlined in *Adams v. Texas, supra*, 448 U.S. 38, but it is equally true of any situation where a party seeks to exclude a biased juror. (See, *e.g., Patton v. Yount, supra,* 467 U.S. at p.1036 [where a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply 'did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed'].)

In *Morgan v. Illinois, supra,* 504 U.S. 719, the United States Supreme Court specifically focused on the necessity of voir dire in the context of *Witherspoon* concerns, stating that "the principles first propounded in *Witherspoon v. Illinois,* 391 U.S. 510 [] (1968) ... demand inquiry into

whether the views of prospective jurors on the death penalty would disqualify them from sitting." (*Id.* at p. 731 [fn. and parallel citations omitted].)

The United States Supreme Court opinions in *Boulden v. Holman, supra,* 394 U.S. 478 and *Maxwell v. Bishop, supra,* 398 U.S. 262, elucidate this point. These pre-*Witherspoon* trials, in which voir dire had been conducted, reached the High Court post-*Witherspoon*, and the Court found the voir dire inadequate because it did not sufficiently explore the jurors' attitudes beyond their simple answers.

The *Boulden* Court found that jurors had been wrongfully excluded because the voir dire was insufficient to determine whether, in spite of statements that they had a fixed opinion against capital punishment or did not believe in it, those excluded were "able as [jurors] to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman, supra,* 394 U.S. at pp. 482-484.)

Similarly, in *Maxwell,* the High Court held that it was constitutionally impermissible to dismiss seven prospective jurors, including one who stated during voir dire that his or her conscientious scruples against the death penalty might prevent him from returning a death verdict even if "convinced beyond a reasonable doubt at the end of [the] trial that the defendant was guilty and that his actions had been so shocking that they would merit the

death penalty" (*Maxwell v. Bishop, supra,* 398 U.S. at p. 264), and another who answered that he did "not believe in capital punishment" when asked if his feelings against capital punishment would prevent him, or make him have feelings about, returning a death sentence even if he "felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence." (*Id.* at p. 265.) These cases make clear that more than the juror's answer, it is the thoroughness of the questioning that is the sine que non of a constitutionally-valid voir dire process.

If, as these cases make clear, an *actual* voir dire examination can be constitutionally insufficient to make the determination required by *Witherspoon*, it necessarily follows that sole reliance on a written questionnaire to determine qualifications, without voir dire examination, is implicitly insufficient. *Boulden* establishes that the crucial inquiry is not what the individual thinks or feels about the validity of the death penalty as a philosophical question (as posed in the questionnaire used in appellant's case), but whether the juror can follow the court's instructions and give fair consideration to the death sentence in a particular case. In appellant's case, no such inquiry was ever made of those summarily excused by the trial court.

The notion that in-person questioning of potential jurors is basic to a constitutionally-valid determination of fitness to serve is not new. Over 120 years ago in *Reynolds v. United States, supra*, 98 U.S. 145, the United States

Supreme Court let stand the trial court's ruling not to exclude an apparently biased juror following voir dire, observing that potential jurors sometimes even "seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." (*Id.* at pp. 156-157.) Indeed, the literal questioning and examination of jurors is so crucial to the voir dire function of determining fitness to serve that even when jurors' answers are indicative of bias, the High Court has still found voir dire inadequate where the questioning is insufficient to fully explore the jurors' views.

4. California Pronouncements Regarding Voir Dire

Like the United States Supreme Court, this Court has emphasized that "a prospective juror who simply would find it 'very difficult' 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." (*People v. Stewart* (2004) 33 Cal.4th 425, 446.)

A review of the specific line of cases in which this Court has reviewed trial courts' evaluations of prospective jurors under *Wainwright*

establishes that actual voir dire has been the process consistently used in the trial courts to provide information sufficient for making a reliable determination of this nature. (*See, e.g., People v. Bolden* (2002) 29 Cal.4th 515; *People v. Boyette* (2002) 29 Cal.4th 381, 417-418; *People v. Farnam* (2002) 28 Cal.4th 107, 133; *People v. Ayala* (2000) 24 Cal.4th 243, 275.) In fact, in *Bolden*, this Court stated that "[t]he trial court may excuse for cause a prospective juror who on voir dire expresses views about capital punishment, either for or against, that 'would "prevent or substantially impair"' the performance of the juror's duties as defined by the court's instructions and the juror's oath.'" (*People v. Bolden*, supra, 29 Cal.4th at pp. 536-537.)

The trial court's duty with regard to jury selection under state law is the same today as it was when this Court defined it nearly a century ago:

> "It [is] the function of the trial court to determine the true state of mind of each member of the panel who [is] questioned touching his qualifications to serve as a juror. Frequently there is a conflict between different portions of the testimony given during an examination on voir dire, due not always to the lack of candor on the part of the person examined but to his misunderstanding of the questions asked and of the duties of a juror, until such duties are explained by the court. When such conflict occurs, the trial court must decide, if possible, which of the answers most truly reveals the state of the [venire member's] mind."
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> (*People v. Loper* (1910) 159 Cal. 6, 11.)

Thus, the law contemplates that each prospective juror will be examined regarding his or her views.

Six years before appellant's trial, in *Lesher Communications, Inc. v. Superior Court (Contra Costa)* (1990) 224 Cal.App.3d 774, a case involving public access to juror questionnaires, the Court of Appeal drew a distinction between the questionnaires of people questioned during voir dire and those who were not. In ruling that only the questionnaires of prospective jurors *actually questioned* are accessible to the public, the court explained that,

> "[W]e assume that these questionnaires play no role whatsoever until a prospective juror is actually called to the jury box. The *Press-Enterprise* Co.*[v. Superior Court* (1984) 464 U.S. 50] court rested its decision that voir dire must be open to the public on the interest of the public in open criminal trials. A review of the history and tradition of open criminal proceedings in English and American courts led to the conclusion that an open trial included an open voir dire. However, venire persons who are never called to the jury box do not play any part in the voir dire or the trial. They fill out the questionnaire only as a prelude to their participation in voir dire. *The questionnaire serves no function in the selection of the jury unless the person filling it out is actually called to be orally questioned."*
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> (*Id.* at p. 779 [italics added].)

This lends credence to appellant's view that the *literal verbal examination of members of the venire* is indeed the *sine que non* of the voir dire process. As the *Lesher* Court's prounouncement makes clear, without the actual

examination of prospective jurors, the voir dire process has neither substance nor legal significance.

Following *Lesher,* and on remand from this Court, the Court of Appeal in *Copley Press Inc. v. Superior Court* (1991) 228 Cal.App.3d 77, a case addressing the First Amendment rights of the public and the press, held that the public has the right of access to the questionnaires of venire members who actually are voir dired. (*Id.* at pp. 80, 87-88.)

Although in *People v. Brown* (2004) 33 Cal.4th 382, this Court relied on *Witt* to hold that it does not violate the constitution to "leave to the judgment of the trial court the determination whether a prospective juror's attitude toward imposing the death penalty will support an excusal for cause" (*id.* at p. 403 [citation to *Wainwright v. Witt, supra,* 469 U.S. at pp. 424-429 omitted]), this in no way vitiates appellant's position. In *Witt*, the trial court had conducted actual voir dire. *(Id.* at pp. 415-416.) Thus, as appellant asserts, the essence of voir dire is the questioning and the trial court's failure to conduct such questioning in his case violated appellant's rights under both the state and federal constitutions. Neither *Witt* nor any other United States Supreme Court case sanctioned the procedure used in appellant's case to discharge for cause those jurors whose personal views were unclear as articulated in their questionnaire responses, but who never categorically stated that their views -- either for or against the death penalty -- would actually prevent or substantially impair their performance or duties

as jurors in this case.

In the capital jury selection context, this Court has instructed that "given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death." (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 81.) The trial court in appellant's case utterly failed to safeguard the neutrality, diversity, or integrity of appellant's jury. Indeed, the trial court's conduct in this case completely undermined these laudable and constitutionally-mandated principles which are so crucial to ensuring and protecting a defendant's right to fair trial and due process. As a direct result of the trial court's errors in jury selection, appellant's jury -- including both regulars and alternate jurors -- was not neutral but biased; it was not diverse but striking in its nonrepresentation of Hispanics. (See also Arguments II and VIII, *infra.*)

Appellant was severely prejudiced by the improper procedure used by the trial court to strike prospective jurors without so much as a perfunctory voir dire examination. In appellant's case, the questionnaires impermissibly reduced the determination of bias to a set of questions and answers that attempted to "obtain results in the manner of a catechism," (*Wainwright v. Witt, supra,* 469 U.S. at p. 424) without the benefit of the trial court seeing and hearing the prospective jurors. Those who gave ambiguous responses or

who were less rigid in their views were summarily dismissed for cause on the basis of their questionnaire responses alone and thus wrongfully excluded from appellant's jury selection process. This procedure for excusing prospective jurors directly contravened the principles articulated in *Witt, supra*. It was wholly improper because it was insufficient to determine whether those jurors would be able to follow conscientiously the instructions of the trial court and consider fairly the imposition of the death penalty or whether their views would substantially impair their respective abilities to carry out their oaths and duties as jurors. As a result, otherwise qualified jurors were improperly discharged and the resulting jury was tainted and biased. (See Arguments II and VIII, *infra*.) This violation of appellant's fair trial and due process rights was further exacerbated by the prosecutor's misconduct with respect to his improper targeting of Hispanic jurors. Under these circumstances, it was impossible for appellant to receive a fair trial that comported with state and federal constitutional demands.

Where there has been no voir dire examination, the usual rule of appellate review requiring deference to a trial court's decision whether to exclude a potential juror for *non-Witherspoon* bias does not apply because there is nothing on which the reviewing court's deference can operate. Deference is conferred where the trial court actually engaged in a process which permits the court to observe a venireperson's demeanor and which is calculated to elicit evidence of impermissible or other substantial

impairment in a juror's ability to abide by his oath. Such proceedings would indeed generate evidence or information to which the reviewing court might well defer.

The long line of opinions by this Court that have established and relied on the rule of deference to trial court rulings concerning juror qualifications all involved determinations of bias made after personal questioning of the venire through voir dire. (*See, e.g., People v. San Nicolas*, *supra*, 34 Cal.4th at p. 634 [trial court considered questionnaire and asked follow-up questions in voir dire that "covered the range of issues necessary to establish bias and test the prospective jurors' feelings and attitudes toward the death penalty"]; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Fields* (1983) 35 Cal.3d 329, 354-355; *People v. Eudy* (1938) 12 Cal.2d 41, 44-45; *People v. Craig* (1925) 196 Cal. 19, 25-26 [trial court's "position" is superior to that of reviewing court whose examination is limited to record]; *People v. Loper, supra,* 159 Cal. at p. 11; *People v. Ryan* (1907) 152 Cal. 364, 371; *People v. Fredericks* (1895) 106 Cal. 554, 559-560; *People v. Wong Ark* (1892) 96 Cal. 125, 127.)

In appellant's case, therefore, the trial court's rulings with regard to the multitude of prospective jurors discharged for cause without voir dire are not entitled to deference. Consistent with this reasoning, in *People v. Stewart, supra,* 33 Cal.4th 425, this Court reversed a capital conviction for *Witherspoon-Witt* error because the trial court excused "five prospective

jurors for cause based solely upon their checked responses and written answers on a jury questionnaire." (*Id.* at p. 441.) This Court correctly concluded in *Stewart* that the requisite determination could not be made solely on the basis of the juror questionnaires, explaining that "[b]efore granting a challenge for cause concerning a prospective juror, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties ... ." (*People v. Stewart, supra*, 33 Cal.4th at p. 445, quoting from *Wainwright v. Witt, supra,* 469 U.S. at p. 424, and from *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

The procedure used in appellant's case is out of line with all the above-cited opinions and principles. Over 50 prospective jurors were discharged for cause on the basis of juror questionnaire responses alone. Some jurors -- including prospective jurors Baum-Moss, Lewis, Tartaglia, and Mejia -- were discharged even though the court itself indicated they had not stated sufficient cause in their questionnaire responses to warrant excusal. One juror was discharged simply because he was uncomfortable with the death penalty (Sheridan). Another juror was discharged because he would have a difficult time imposing the death penalty (Campbell). Still another juror was discharged because of a preference for life imprisonment (Koehn).

The procedure adopted and followed by the trial court in this case was inadequate and constitutionally deficient, because it did not sufficiently permit the exploration of prospective jurors' attitudes beyond their simple questionnaire responses before discharging them for cause. As a consequence, the use of questionnaire responses in this case denied appellant the right to be fairly tried by an impartial jury drawn from a representative cross-section of the community, to due process, the right to a reliable determination of guilt and penalty, and to equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

D. The Trial Court Erred in Excusing at Least Five Prospective Jurors Without Voir Dire Examination Despite Finding That Their Questionnaire Responses Alone Did Not Constitute Sufficient Cause Justifying Discharge

As argued in detail in the preceding sections, decisions of the United States Supreme Court and of this Court make clear that a prospective juror's personal or conscientious objection to the death penalty is not a sufficient basis for exclusion from jury service in a capital case. In *Lockhart v. McCree, supra,* 476 U.S. 162, for example, the High Court held that "[n]ot all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases as long as they

clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Id.* at p. 176.) Thus, a prospective juror may not be excused for cause simply because he or she has strong beliefs about the death penalty. (*Lockhart v. McGree, supra,* 476 U.S. at p. 176.)

This Court's pronouncements regarding juror qualifications and selection closely track federal rulings. A prospective juror who is personally opposed to the death penalty may nevertheless be capable of following his oath and the law and this Court has held that a prospective juror's personal or conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case. (*People v. Stewart, supra*, 33 Cal.4th at p. 446.) Even a juror whose opposition toward the death penalty may predispose him to assign greater than average weight to mitigating factors presented at the penalty phase may not be excluded for cause unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict. (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

A trial court's ruling regarding a prospective juror's qualifications must be supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558.) Thus, even assuming for purposes of argument that it is constitutionally acceptable for the trial court to excuse a prospective juror for cause solely on the basis of written questionnaire answers, such a determination must be supported by substantial evidence. Moreover,

"substantial evidence" surely involves more than a juror's initial response, particularly where the response is ambiguous or appears to reflect bias. As the case law make clear, even a juror's answers during voir dire may be insufficient to excuse him without thorough exploration of his responses.

In *Stewart,* this Court held that it was error to excuse four potential jurors whose responses indicated ambiguity in their attitudes toward the death penalty, concluding that those prospective jurors should have been subjected to voir dire "during which the court would be able to further explain the role of jurors in the judicial system, examine the prospective juror's demeanor, and make an assessment of that person's ability to weigh a death penalty decision." (*People v. Stewart, supra,* 33 Cal.4th at p. 448.) By the reasoning in *Stewart,* and under the controlling United States Supreme Court authority previously cited, the prospective jurors improperly and erroneously excused for cause in appellant's case should have been personally questioned to determine whether they could fulfill the duties of a capital juror. A fortiori, then, the procedure used in appellant's case was constitutionally infirm.

In appellant's case, no less than five prospective jurors were wrongfully excluded from the venire before voir dire proceedings began, based on the court's unilateral determination that their questionnaires contained inappropriate, ambiguous, or conflicting responses and answers.

Despite its concession that their answers did not justify removal for cause, the court nevertheless ordered the excusal of these jurors. Yet, there is no question that their questionnaires should have been followed up by voir dire examination in order to protect appellant's constitutional rights to due process and trial by an impartial jury. (*People v. Stewart, supra,* 33 Cal.4th at pp.451-452.)

For example, the trial court excused three prospective jurors from appellant's venire panel even though it found their questionnaire responses did not warrant excusal based on bias or substantial impairment of their ability to perform the duties of a juror in a capital case. The court excused Kay Tartaglia for cause (25 RT 4087), while conceding that "she hasn't said anything to us in court or in her questionnaire that would justify her removal for cause." (25 RT 4088.) Similarly, the court noted that he only listed juror Beatrice Mejia, an Hispanic, "as possible cause" (26 RT 4162-4163), but nevertheless discharged her for cause without follow-up voir dire. Finally, the trial court excused Pamela Campbell for cause, noting that her responses indicated only that "she would have a difficult time imposing the death penalty" (27 RT 4314), but still conducting no voir dire examination into Ms. Campbell's views or responses on the questionnaire regarding capital punishment.

Continuing in this vein, the court ruled that Yolanda Baum-Moss' questionnaire stated no grounds to excuse her for cause, but excused her

anyway, solely on the basis of the responses in her questionnaire. (23 RT 3799.) Although it was the prosecutor who sought to remove Peggy Koehn because "[h]er indication as to the *Witherspoon*, that she would not be sure if she could -- she was unsure if she would automatically vote against the death penalty" and because she indicated "a preference for LWOP" (25 RT 4090), it was the court that discharged her for cause without proper examination. The court made no attempt to determine if she could set aside her views or if they substantially impaired her ability to serve as a juror by conducting voir dire to explore the nature of her uncertainty about the death penalty. (25 RT 4090.) Based solely on questionnaire responses, then, no less than five prospective jurors were discharged by the court even though they never stated they were unwilling or unable temporarily to set aside their own beliefs and follow the law. (See *Lockhart v. McCree, supra*, 476 U.S. at p. 176.)

These rulings by the trial court in appellant's case fly in the face of United States Supreme Court decisions which clearly establish that a juror may not be excused solely because he or she expresses opposition to the death penalty. (See *Lockhart v. McCree*, *supra*, 476 U.S. 162.) Moreover, the verdicts of juries selected in violation of these principles will not stand:

> "[I]f prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their

> oaths, the death sentence cannot be carried out." (*Adams v. Texas*, *supra*, 448 U.S. at p. 48.) [I]t is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.
>
> (*Boulden v. Holman* (1969) 394 U.S. 478, 483-484.)

In *Witherspoon, supra,* decided in 1968, the Supreme Court held that a defendant cannot be sentenced to death if the jury that imposed the sentence 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. In *Witt*, the High Court clarified its decision in *Witherspoon* and held that a prospective juror may be excluded for cause because of his or her views on capital punishment if those views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the trial court's instructions and his or her oath. (Accord, *People v. Cunningham, supra,* 25 Cal.4th 926, 975.)

Neither *Witherspoon* nor *Witt*, however, requires that a prospective juror automatically be excused if he or she expresses a personal opposition to the death penalty. 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, supra,* 476 U.S. at p. 176; accord, *People v. Rodrigues, supra,* 8 Cal.4th at p. 1146.)

To exclude prospective jurors simply because of their uncertainty about, or reluctance to impose, the death penalty, with no exploration of their attitudes or views to determine their qualification to serve -- as did the trial court in appellant's case -- deprives a defendant of the right to the impartial jury to which he is entitled under the law. (*Adams v. Texas*, *supra*, 448 U.S. at p. 50.) Having failed to find sufficient cause to justify the discharge of prospective jurors Baum-Moss, Koehn, Tartaglia, Mejia, and Campbell, the trial court here erred in excusing them without voir dire examination, in violation of appellant's rights to a fair trial by a neutral and impartial jury, due process, and a reliable determination of guilt and penalty guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

E. Excusing Jurors for Cause Without Voir Dire in Open Court Also Violated the First Amendment

The United States Supreme Court has said that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." (*Press-Enterprise v. Superior Court* (1984) 464 U.S. 501, 505.) The underpinnings of this reasoning pre-date the

republic. Indeed, the open nature of criminal trial proceedings in England stretches back to before the Norman conquest. (*Id.*) Jury selection proceedings began to be conducted in public in the Sixteenth Century, and "[p]ublic jury selection thus was the common practice in America when the Constitution was adopted." (*Id.* at pp. 507-508).

In *Press-Enterprise,* the United States Supreme Court explained that, "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Press-Enterprise v. Superior Court, supra,* 464 U.S. at p. 510.) Finding that the presumption had not been overcome in that case, the High Court held that jury selection voir dire must be open to the public unless there is a compelling reason to close it and the trial court has reasonably concluded that there is no alternative. (*Id.* at pp. 510-511.)

At appellant's trial, in order to streamline the process of voir dire and jury selection, the trial court excused over 50 prospective jurors from the venire solely on the basis of their questionnaire responses without any further questioning in the presence of other venirepersons. This attempt at judicial efficiency violated appellant's constitutional rights. In *Copley Press v. Superior Court, supra,* 228 Cal.App.3d 77, for example, a case

addressing the First Amendment rights of the public and press to inspect the jury questionnaires of venire members, the Court of Appeal observed that, "[w]hile efficient judicial administration is a praiseworthy purpose and one we applaud, it does not reach constitutional dimensions. As much as we would like to see judicial proceedings run efficiently and expeditiously, we cannot give much weight to such a goal when compared to a constitutional interest." (*Id.* at pp. 84-85.)

Moreover, the purpose of voir dire is ". . . to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused." (*Press-Enterprise Co. v. Superior Court, supra,* 464 U.S. at p. 511, fn. 9.) If there was increased efficiency at appellant's trial because of the questionnaire procedure, it was achieved by violating the First and Fourteenth Amendment rights of the prospective jurors, as well as appellant's fundamental right to a constitutionally-valid jury selection process under the First and Fourteenth Amendments and to due process and a fair trial by an impartial jury drawn from a representative cross-section of the community under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

F. Counsel's Stipulations Did Not Waive Issues Raised in this Assignment of Error

Appellant's right to be tried by an impartial jury is a fundamental

constitutional right and no objection at trial was required to preserve the issue for appeal. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280; *Rose v. Clark* (1986) 478 U.S. 570, 578.)

Moreover, as a matter of federal and state constitutional law, the trial court did not have the power to dispense with the voir dire of prospective jurors, especially in a capital case where a heightened degree of due process was necessary. Trial counsel therefore could not have forfeited the issue or invited the error, because no act or statement of trial counsel could confer on the trial court the discretion which it did not legally have. Thus, the issue of the erroneous excusal of potential jurors based solely on their questionnaires is cognizable on appeal regardless of whether appellant objected sufficiently at trial.

In *People v. Benavides* (2005) 35 Cal.4th 69, this Court held that the defendant was barred on appeal from raising the issue of the trial court's discharge of prospective jurors for cause based solely on questionnaire responses, because counsel stipulated at trial to the excusals. (*Id.* at p. 88.) Appellant submits, however, that his situation is distinguishable from that presented in *Benavides*.

Although appellant's trial counsel stipulated to the discharge of over 50 prospective jurors for cause, the court itself ruled that, at least as to six prospective jurors, while their questionnaire responses did not provide

sufficient cause to excuse them, they should nevertheless be excused for cause. By the court's own findings, then, the evidence was insufficient to support the discharges, yet it conducted no voir dire whatsoever. Hence, even with counsels' stipulations, the court erred and abused its discretion.

Moreover, unlike in *Benavides*, it is indisputable that the trial court here did far more than merely pass on "the adequacy of trial counsel's stipulations." (*Id.* at p. 8.) The trial court itself initiated and fully participated in the selection and exclusion process. The trial court -- abandoning its role as a neutral arbiter of the trial -- independently identified jurors to be discharged for cause based on jury questionnaire responses. The court repeatedly made affirmative findings of substantial impairment based solely on its own review and assessment of the questionnaires and, on that basis, excused those jurors. In doing so, the court abused its discretion and violated appellant's rights under federal and state law. Any suggestion that counsel waived this error by stipulating to other excusals should be rejected on grounds of futility. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27.) Counsel repeatedly objected to the court's procedure, refused to participate in redrafting the questionnaire, and complained about the inability to rehabilitate arguably qualified jurors. When the court noted counsel's objections for the record and explicitly ruled that it would utilize the questionnaire procedure,

defense counsel's objections notwithstanding, any further objections were futile. In any event, the error complained of here does not implicate the excusals to which counsel stipulated, but those excusals which the court ordered sua sponte.

G. Reversal of the Entire Judgment is Required

As demonstrated in Subsection B, *supra*, the use of race and ethnicity questions in the jury questionnaire led to the systematic exclusion and complete nonrepresentation of Hispanics on appellant's jury. The nonrepresentation of Hispanics constituted a prima facie violation of appellant's fundamental right to fair trial by a jury comprised of a representative cross-section of the community and to due process of law. The use of questions on race and ethnicity also created "the opportunity for discrimination," (*Batson v. Kentucky, supra*, 476 U.S. at p. 95), manifested in the selection of a biased jury (see Argument VIII, *infra*) and by the prosecutor's impermissible and improper targeting of Hispanic prospective jurors during voir dire (see Argument II, *infra*). Together, the questionnaire and the prosecutor's voir dire tactics contributed to the selection of a biased jury and the nonrepresentation of Hispanics on appellant's jury. (See *People v. Bell, supra*, 49 Cal.3d at p. 524.)

As demonstrated (Subsection C, *supra)*, appellant was entitled under the Sixth and Fourteenth Amendments to the United States Constitution and

Article 1, sections 15 and 16 of the California Constitution to be tried by a fair and impartial jury. The trial court was obligated to determine that the people selected to serve on appellant's jury did not hold views concerning capital punishment that would prevent or substantially impair the performance of their duties as jurors in accordance with the instructions and their oath.

The United States Supreme Court has emphasized that jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic or racial bias or prejudice (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 1882), or predisposition about the defendant's culpability. (*Gomez v. United States* (1989) 490 U.S. 858, 873; *Powers v. Ohio* (1991) 499 U.S. 400, 411-412.) Moreover, the law is clear that the examination of jurors is the sine que non of the process. (See *Gray v. Mississippi, supra,* 481 U.S. at pp. 651-657; *Ross v. Oklahoma* (1988) 487 U.S. 81, 83; *Darden v. Wainwright, supra,* 477 U.S. at pp. 175-178; *Wainwwright v. Witt, supra,* 469 U.S. at pp. 415-416; *Adams* v. *Texas, supra,* 448 U.S. at pp. 41-42; *Witherspoon v. Illinois, supra,* 391 U.S. 510, 514-515; see also *Lockhart v. McCree, supra,* 476 U.S. at p. 166; *Patton v. Yount, supra,* 467 U.S. at p. 1027; *Davis v. Georgia, supra,* 429 U.S. 122 and *Davis v. State (Georgia), supra,* 225 S.E.2d at p. 243; *Maxwell v. Bishop* (1970) 398 U.S. 262, 264-265; *Boulden v. Holman, supra,* 394 U.S. at pp. 482-483; *Irvin v. Dowd, supra,* 359 U.S. at p. 397; *Reynolds v. United*

States, supra, 98 U.S. at pp. 156-157.) At appellant's trial, however, without any voir dire examination whatsoever, the trial court found over 50 prospective jurors to be substantially impaired under *Witherspoon/Witt* solely on the basis of their written answers to questionnaires distributed to them by the trial court. During jury selection, the trial court was duty-bound to determine the true state of mind of each prospective member of the panel. Yet, here, the trial court completely abandoned that obligation in respect to over 50 prospective jurors.

This Court repeatedly has instructed that when it comes to a jury's decision to take or spare a life, the trial courts must be vigilant in safeguarding the neutrality, diversity, and integrity of the jury. (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 81.) Here, the trial court failed to exercise this vigilance. Because of the trial court's improper use of jury questionnaires as a substitute for a thorough voir dire examination, appellant's jury was not neutral but biased; it was not diverse but strikingly homogeneous, without a single Hispanic in a county with a substantial Hispanic population.

The court's reliance upon questionnaires alone to determine *Witherspoon* bias in appellant's trial violated appellant's right to a fair trial by an impartial jury and due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments. Because this violation resulted in actual *Witherspoon* error in that qualified venire members were excluded by the

trial court from voir dire and, hence, from the jury, reversal of the entire judgment is required. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 660, 665.)

Further, the trial court's excusal, for cause, of prospective jurors Baum-Moss, Koehn, Tartaglia, Mejia, and Campbell, whose views did not justify their discharge, directly violated appellant's fundamental constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to due process, fair trial by an impartial jury, and a reliable determination of guilt and penalty. For these reasons as well, the entire judgment must be reversed. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 147-171.)

Finally, the prosecutor's impermissible use of the race and ethnicity information elicited by the questionnaire to target and disqualify Hispanic venirepersons tainted the entire jury selection process, as well as seated and alternate jurors who heard, observed, and witnessed this misconduct, in violation of appellant's Fifth, Sixth, and Fourteenth Amendment rights to trial by an impartial jury drawn from a representative cross-section of the community. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 537-538; *People v. Wheeler, supra,* 22 Cal.3d at p. 272; see also Argument II, *infra*.) As this Court stated in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 (overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046), "[t]he right to cross-section representation is a demographic requirement, which assures a criminal defendant a trial by a jury selected

without systematic or intentional exclusion of cognizable economic, social, religious, racial, political and geographical groups. (*Thiel* v. *Southern Pacific Co.* (1946) 328 U.S. 217, 220 []; *People v. Wheeler* (1978) 22 Cal.3d 258, 268 [].) It is designed to protect the right to be tried by an impartial jury. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 530 []; *People v. Trevino* (1985) 39 Cal.3d 667, 679 []; [*People v. Wheeler, supra*, [22 Cal.3d] at pp. 266-267.)" (*Hernandez v. Municipal Court, supra,* 49 Cal.3d at p. 716, fn. 1 parallel citations omitted].)

Both this Court and the United States Supreme Court have stated that if even a single anti-death penalty juror was improperly excluded from the death-qualified pool, appellant is entitled to a new penalty trial. (See *People v. Ashmus* (1991) 54 Cal. 3d 932, 962, citing *Gray v. Mississippi, supra,* 481 U.S. at pp. 666-667 and *Witherspoon v. Illinois, supra,* 391 U.S. at pp.521-523.) Relying on this reasoning, appellant submits that he is also entitled to reversal of the guilt verdict due to race and ethnicity discrimination, the nonrepresentation of Hispanics on his jury, and the elimination of prospective jurors without sufficient cause. These factors actually resulted in a biased jury, i.e., one that was more prone to find appellant guilty of the charged crime. (*Lockhart v. McCree, supra,* 476 U.S. at pp.184-206, dis. opn. of Marshall, J.)

It is significant that the majority in *Lockhart* assumed to be correct the premise that pro-death penalty jurors are more likely to convict, but

rejected the claim that a properly conducted *Witherspoon* voir dire denied the defendant a representative cross-section or an impartial jury. (*Lockhart v. McCree, supra,* 476 U.S. at p. 173.) In appellant's case, however, the *Witherspoon* voir dire was either improperly conducted or, worse still, not conducted at all. Given the racial and ethnic bias manifest in the jury questionnaires and the prosecutor's improper targeting of jurors based on race and ethnicity, appellant stood no chance of obtaining a fair or impartial jury in this case. Under these circumstances, the need for a reliable guilt determination and a heightened degree of due process in a capital case require reversal of the entire judgment. (*Beck v. Alabama* (1980) 447 U.S. 625; *Woodson v. North Carolina* (1976) 428 US 280, 305; *Gregg v. Georgia* (1976) 428 U.S. 153, 187.)

Moreover, even if this Court finds the procedure of excusing potential jurors on the basis of their questionnaires constitutionally permissible in the abstract, as a result of the prejudice to appellant's trial rights arising from the trial court's decision to excuse at least five prospective jurors for cause without finding that they manifested the requisite substantial impairment in their ability to serve, reversal is required in appellant's case under *Witherspoon/Witt*. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 660, 665.)[123]

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[123]/ Additionally, if this Court finds that appellant forfeited any of the issues presented in this assignment of error or invited any of the errors, it must find in this regard that trial counsel rendered appellant ineffective assistance of counsel under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. 1, §§ 15, 24; *Strickland v. Washington*

(1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) There was no possible reason for counsel to conclude that it was in appellant's best interest for people opposed to the death penalty and otherwise able to perform the duties of a juror, as found by the trial court, to be excluded from the venire. A reasonable tactical choice is one made with awareness of the applicable law. (*Strickland v. Washington, supra,* 466 U.S. at p. 691.) Defense counsel had a duty to be fully informed about the law. (See ABA Standards for Criminal Justice (3d ed. 1993) Standard 4-5.1; see also *Wiggins v. Smith* (2000) 539 U.S. 510, 522 [reiterating that ABA standards are the norms for counsel in capital cases & citing *Strickland*].)

There was no conceivable tactical or strategic reason for trial counsel to agree to the dismissal of at least five prospective jurors whom the trial court independently found potentially qualified to sit on the jury in this case. Any failure on trial counsel's part in this regard thus fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].) The prejudice caused by counsel's error is clear, since it resulted in *Witherspoon* error and the other statutory and constitutional violations enumerated above, a biased jury, and unreliable guilt and penalty verdicts. (*Strickland v. Washington, supra,* 466 U.S. at p. 687 [prejudice shown where capital trial's result is unreliable].) Appellant's rights to due process and a reliable determination of guilt and sentence under the Fifth, Fourteenth and Eighth Amendments to the United States Constitution are also implicated. The entire judgment must therefore be reversed.

While this Court has repeatedly expressed disfavor with ineffective assistance of counsel claims on appeal (see, for example, *People v. Dennis* (1998) 17 Cal.4th 468, 541 [in response to defendant's "array" of ineffective assistance of counsel claims, court utilizes deferential review "to avoid the distorting effects of hindsight"]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1140 [except in rare cases, an appellate court should not attempt to second-guess trial counsel]; *People v. Hillhouse* (2002) 27 Cal.4th 469 502 [noting failure to object establishes ineffective assistance on direct appeal only in rare cases]), out of an abundance of caution regarding potential state procedural bars, defendant asserts this claim of error and states that the facts plead here, if insufficient to warrant relief, will support, supplement and inform related facts and claims which are cognizable in habeas corpus proceedings and which will be presented in a petition for writ of habeas corpus to be filed on appellant's behalf. If, despite appellant's presentation of the operative law and facts of this claim known to him at this time, the Court is inclined to disregard or deny this claim solely because it appears in

Alternatively, if reversal of the entire judgment is not compelled, at the very least reversal of appellant's sentence of death is required. The erroneous exclusion of potential jurors for *Witherspoon* bias is constitutional error affecting the composition of the jury pool and requiring reversal per se of the death judgment. (*Gray v. Mississippi, supra*, 481 U.S. at p. 668.) The United States Supreme Court has said that "[t]he nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt exclusion* of a juror is harmless." (*Id.* at p. 665.) If it is reversible error per se under the Sixth and Fourteenth Amendments to exclude potential jurors who have given equivocal or contradictory answers in actual voir dire, then the exclusion of potential jurors without even questioning them in voir dire must be reversible by the same standard.

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a footnote rather than in the body of the opening brief, appellant requests leave of court and ample time to prepare and present the claim to the Court in a supplemental brief.

II

THE PROSECUTOR COMMITTED MISCONDUCT DURING TRIAL IN VIOLATION OF APPELLANT'S RIGHTS TO TRIAL BY JURY, FAIR TRIAL, AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE PROSECUTOR'S MISCONDUCT ALSO UNDERMINED THE RELIABILITY OF THE GUILT AND PENALTY DETERMINATIONS IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITTION

A. Introduction

Throughout the trial, the prosecutor repeatedly committed serious and prejudicial acts of misconduct. During jury selection, he repeatedly and unfairly targeted Hispanic prospective jurors with pretextual questions based on impermissible considerations of race and ethnicity, designed to disqualify them from service, thereby tainting all regular and alternate jurors who witnessed, heard, and observed his improper and unfair questioning. During jury selection, the prosecutor also repeatedly misrepresented the nature of mitigation, implied that the absence of mitigation constituted aggravation, and thereby insinuated that appellant bore some burden of proof with respect to mitigation. In so doing, he effectively misled the jury as to its role in sentencing. During guilt phase closing argument, the prosecutor repeatedly vouched for the testimony of the state's primary witness, co-defendant Jose Munoz.

When considered together, the prosecutor's misconduct tainted the

integrity of the jury selection process, led to the selection of a biased jury, undermined the state's burden of proof at both the guilt and penalty phases, and impermissibly inflamed the jury against appellant, in violation of his rights to a fair trial by impartial jury comprised of a representative cross-section of the community, due process of law, the effective assistance of counsel, equal protection of the laws, and to a reliable determination of guilt and penalty guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The prosecutor's misconduct was not harmless beyond a reasonable doubt, and reversal of the judgment of conviction is therefore required.

B. The Prosecutor Repeatedly Committed Misconduct

1. The prosecutor unfairly and improperly targeted all Hispanic prospective jurors during jury selection, thereby tainting and prejudicing the jury pool against Hispanics and facilitating the selection of a biased and nonrepresentative jury in which all Hispanics were excluded

Appellant's jury as selected was devoid of Hispanics. The complete nonrepresentation of Hispanics was no accident. Hardship claims led to the dismissal of many, otherwise qualified low or middle income Hispanic prospective jurors. As demonstrated in Argument I, *supra*, the written juror questionnaire with impermissible questions on race and ethnicity improperly and unconstitutionally further decimated the pool of Hispanic

prospective jurors who were otherwise qualified to sit on appellant's jury.

For those Hispanic prospective jurors who survived the initial screening and questionnaire process, the prosecutor then improperly and repeatedly focused on them. In tactics tantamount to exclusion based on race, Deputy District Attorney West concentrated his voir dire on seemingly well-qualified Hispanic prospective jurors after they had been initially screened and passed for cause. The prosecutor's goal in focusing on Hispanic prospective jurors during voir dire was clear -- the elimination of all eligible, qualified Hispanic prospective jurors from the final jury pool. These tactics proved successful. Only Caucasians were initially selected as regular jurors. No regular or alternate Hispanic jurors were selected. Even the lone Hispanic prospective juror who managed to survive the ethnic culling process and called to serve as an alternate was quickly dispatched by Deputy District Attorney West through a peremptory challenge.

In conducting voir dire, Deputy District Attorney West typically gave a brief introduction, using a flow chart to illustrate his comments regarding the guilt and penalty phases of trial, and to explain the four decisions, as he remarked, to be made by the jury, including guilt, degree of guilt, special circumstances findings, and penalty. (See, for example, 23 RT 3764-3765.) After these comments, West then asked Caucasian

prospective jurors one to three general questions regarding their thoughts about sitting on the jury. (See, for example, 23 RT 3766.) He typically asked whether they could return a "just and necessary verdict" of death (see, for example, 23 RT 3767), and whether they could vote to have appellant executed after spending "three months looking at Mr. Self, knowing that he may have family in the audience." (See, for example, 23 RT 3768).[124] Occasionally, he asked Caucasian prospective jurors about a particular questionnaire response and then followed up with questions about the guilt determinations, the burden of proof, the felony murder rule, or the jury's role in sentencing. (See 23 RT 3768-3772.) As to other Caucasian prospective jurors, Deputy District Attorney West followed up with questions regarding their responses to the questionnaires or voir dire responses during defense questioning, in order to rehabilitate them and place on the record their willingness to consider both aggravating and mitigating evidence or life imprisonment without the possibility of parole as an alternative to death. (See, for example, 23 RT 3773.)

In contrast to his questioning of Caucasian venirepersons, Deputy District Attorney West asked far more probing and detailed questions of

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[124]/ In one session after his introductory comments, West immediately targeted the lone Hispanic prospective juror -- "Let me ask Mr. Villarreal. Let me start with you" (25 RT 4048) -- asking if he thought he could impose the death penalty in this case. (25 RT 4049.) Jurors Nos. 1 and 5 were among the group that heard and observed West target the lone Hispanic prospective juror in their particular group. (See 25 RT 4015.)

Hispanic prospective jurors about the types of mitigating or aggravating evidence they would consider in determining whether or not to impose the death penalty. (See, for example, 23 RT 3780-3781.) Typically, West asked Hispanic prospective jurors far more detailed and specific questions about their backgrounds; their views on the death penalty and the specific types of evidence that might affect guilt or penalty determinations; their views on the burden of proof; and their ability or willingness to deliberate. The explanations sought from prospective Hispanic jurors were far more detailed and probing than those sought from Caucasian venirepersons. (See 23 RT 3780-3783.) For example, Hispanic prospective juror Guzman[125] was asked 19 detailed and specific questions.[126] Caucasian prospective juror Green, who immediately followed Guzman, was asked but three. (See 23 RT 3783-3784.) Similarly, prospective juror Gezewski, also Caucasian, was asked but two. (23 RT 3786-3787.)

The same pattern was repeated over and over during voir dire. Deputy District Attorney West routinely targeted Hispanic prospective jurors during voir dire, asking them many more questions than any of the Caucasian prospective jurors. Before questioning Hispanic prospective juror Mendoza,[127] for example, Deputy District Attorney West asked two

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[125]/ In his juror questionnaire, Samuel Guzman indicated he was a 28-year-old Hispanic (Mexican). (See 19 Supp CT 5461-5497 [questionnaire].)
[126]/ Juror No. 7 was among the group that heard and observed the prosecutor target Hispanic prospective juror Guzman. (See 23 RT 3728.)

Caucasian jurors relatively brief questions about whether they could impose the death penalty. In contrast, prospective juror Mendoza was asked 19 detailed questions about the circumstances that would justify a verdict of death, the kinds of victims that would call for the death penalty, and his views on the burden of proof.[128] (See 23 RT 3830-3832.) After briefly questioning two non-Hispanic prospective jurors after his introductory remarks, Deputy District Attorney West launched into Hispanic prospective juror Parra,[129] asking her at least 38 questions.[130] (25 RT 4129-4135.) After discussing the felony murder rule and accomplice liability (25 RT 4147-4150), West asked but a single question each of Caucasian prospective jurors Blankenship and Arnold. Turning then to Hispanic prospective juror Rolon,[131] West asked her 15 questions about the felony murder and

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[127]/ In his questionnaire, Vietnam veteran Frank Mendoza indicated he was an employed, married, 49-year-old Hispanic (Mexican). (See 31 Supp CT 8830-8866 [questionnaire].)

[128]/ Juror No. 2 was among the group that heard and observed the prosecutor target Hispanic prospective juror Mendoza. (See 23 RT 3803.)

[129]/ In her questionnaire, Deborah Parra indicated she was a 38-year-old Mexican American with four children. (See 23 Supp CT 6424-6460 [questionnaire].)

[130]/ Juror No. 11 was among the prospective jurors in this particular group that heard and observed the prosecutor target Hispanic jurors Parra and Rolon. (See 25 RT 4092.)

[131]/ In her questionnaire, 33-year-old Isabel Rolon indicated she was Hispanic (Mexican). She worked as a clerk for the Los Angeles County Sheriff's Department; he spouse was a deputy sheriff. (See 22 Supp CT 6313-6349 [questionnaire].) As the sole Hispanic prospective juror among the final pool of potential alternates, she was immediately peremptorily challenged by Deputy District Attorney West.

accomplice liability. (25 RT 4151-4153.) None of the Caucasian prospective jurors was questioned as extensively.

Even when the questioning involved matters other than jurors' views on the death penalty, the prosecutor repeatedly returned to Hispanic prospective jurors to ask additional, follow-up questions. The prosecutor repeatedly returned to prospective juror Mendoza, for example, asking at least seven additional questions beyond his initial examination. (See 23 RT 3840, 3842, 3856.) Similarly, he initially asked Hispanic prospective juror Avalos[132] seven detailed questions about testimony from witnesses with different backgrounds and lifestyles, whether those witnesses could be truthful, and whether she would weigh and consider their testimony. (23 RT 3838-3840.) After questioning several other prospective jurors, the prosecutor returned to Avalos with nine additional questions regarding whether she could return a verdict of death; the views of her Catholic religion and background; and information regarding her church attendance. (See 23 RT 3849-3851.) These questions were not asked of any non-Hispanic prospective jurors.[133]

West also targeted prospective juror Zapata[134] in the same manner as

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[132]/ In her questionnaire, Rose Avalos indicated she was a married, 46-year-old Hispanic (Mexican). She worked as a judicial services supervisor for the Riverside Consolidated Courts. (See 31 Supp CT 8793-9092 [questionnaire].)

[133]/ Juror No. 2 was also among the group that heard and observed the prosecutor target Hispanic prospective juror Avalos. (See 23 RT 3802.)

Avalos, initially asking nine questions about his views on the burden of proof as to both guilt and penalty, eyewitness testimony, and coconspirator testimony. (See 24 RT 3983-3985.) He returned to Zapata again with further questions about the burden of proof and penalty (see 24 RT 3996), followed by a volley of seven more questions on felony-murder, accomplice liability, and penalty. (24 RT 4000-4001.) None of the Caucasian prospective jurors was questioned in this manner or to the same extent.[135]

Moreover, unlike Hispanic prospective jurors, vague or non-responsive answers given by Caucasian prospective jurors were not followed by further questioning. Virtually identical, or even clearer, responses by Hispanic prospective jurors invariably were followed with detailed and probing questions by the District Attorney. For example, prospective juror Guzman was asked, "What kind of things would you look for to determine whether or not the death penalty is appropriate?" (23 RT 3780.) After Guzman's specific response about evidence of planning, Deputy District Attorney West followed with several additional, voir dire questions. Yet when Caucasian prospective juror Gezewski answered the

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[134]/ In his questionnaire, Richard Zapata indicated he was a married, 32-year-old Hispanic claims adjuster with two years of college. (See 26 Supp CT 7423-7459 [questionnaire].)

[135]/ Juror No. 9 was among the group that heard and observed the prosecutor target Hispanic prospective juror Zapata. (See 24 RT 3947.)

same question with an ambiguous and indecipherable reply, stating "The special circumstance, checking the special circumstances, whether they consisted of -- or how it came about or whatever, to that which way I will go one way or the other, death or parole -- without parole," West asked Gezewski not one follow-up question, instead, immediately turning to question another prospective juror. (See 23 RT 3786-3787.) Beyond any doubt, Hispanic prospective jurors were targeted by West and treated in a markedly different and unfair manner during jury selection than were Caucasian prospective jurors. This misconduct has constitutional dimension because appellant Self is Hispanic.

Appellant was entitled under the state and federal constitutions to be tried by an impartial jury drawn from a representative cross section of the community, and to protect that right, racial discrimination in the selection of his jury was prohibited. (U.S. Const., 6th, 14th Amends.; Cal. Const. art I, § 16; *Powers v. Ohio* (1991) 499 U.S. 400; *Batson v. Kentucky, supra,* 476 U.S. at pp. 84-89; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277.) As stated by this Court in *People v. Wright* (1990) 52 Cal.3d 367, 394-395, defendants should be "provided with juries constituting as nearly as reasonably possible a random cross-section of the community."

Because racial prejudice can strongly compromise a juror's impartiality (*Miller v. State of N.C.* (4th Cir. 1978) 583 F.2d 701, 706;

United States ex rel. Haynes v. McKendrick (2d Cir. 1973) 481 F.2d 152, 157; *People v. Bain* (1971) 5 Cal.3d 839, 849), even neutral, nonderogatory references to race are improper absent compelling justification. (*United States v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 25, fn. 63; *McFarland v. Smith* (2d Cir. 1979) 611 F.2d 414, 416-417, 419.)

Clearly, in certain cases, the questioning of prospective jurors on racial prejudice must be undertaken. (See, for example, *Aldridge v. United States* (1931) 283 U.S. 308 [reversible error for a federal court to fail to inquire into racial prejudice in a case involving a Black defendant accused of killing a White police officer]; *Ham v. South Carolina* (1973) 409 U.S. 524 [reversible error to fail to question prospective jurors on racial prejudice in the trial of a Black civil rights activist].) Here, however, racial or ethnic prejudice was not in issue. Thus, while prospective jurors could have been properly questioned during jury selection on the issue of racial or ethnic bias (*Turner v. Murray* (1986) 476 U.S. 28, 36-37), there is no authority permitting the prosecutor to use race and ethnicity in a deliberately unfair and impermissible manner, as it did in this case with respect to the Hispanic venirepersons on appellant's jury. The result was the absence of any member of that group on the jury and the selection of a biased jury. As the High Court said in *Miller-El v. Dretke* (2005) 545 U.S. 231, quoted in *People v. Johnson* (2003) 30 Cal.4th 1302, 1327,

"[h]appenstance is unlikely to produce [such a] disparity." (See also *People v. Hall* (1983) 35 Cal.3d 161, 168-169 [disparate treatment of jurors who differ only in ethnicity strongly suggestive of bias].)

As shown by the transcript of voir dire in this case, the targeting of Hispanic prospective jurors involved a sustained and continuous effort by the prosecutor who manifestly assumed that all Hispanic prospective jurors were biased, either against the death penalty or perhaps in favor of the defendants, who are also Hispanic. As this Court held in *People v. Johnson* (1989) 47 Cal.3d 1194, 1215, "[g]roup bias is a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." Here, the improper use of race and ethnicity by the prosecutor during jury selection was neither brief nor isolated and should not go unaddressed by this Court. If the fact that a jury included members of a group allegedly discriminated against may appropriately be considered in determining prosecutorial good faith respecting issues of race prejudice or bias (*People v. Ward* (2005) 36 Cal.4th 186, 203), the opposite should also follow. Thus, the District Attorney's clear targeting of Hispanics for removal should also be considered in assessing the prosecutor's good faith as it relates to impermissible race and ethnic considerations in jury selection.

All persons, including Hispanic prospective jurors called to serve in

appellant's case, were entitled to equal treatment regardless of race or ethnicity, yet no Hispanic was selected to serve on appellant's jury. (See *People v. Jones* (1962) 205 Cal.App.2d 460, 465-466, cited with approval in *People v. Cudjo, supra*, 6 Cal.4th 585, 626 at fn. 8.) Through juror questionnaire questions on race and ethnicity (see Argument I, *supra*) and by the District Attorney's repeated and selective targeting of Hispanic venire members for more intrusive and extensive questioning during voir dire, a nonrepresentative, biased jury was selected (see Argument VIII, *infra*) to try appellant's cause. The prosecutor's tactics manifested an attitude of racial and ethnic discrimination that amounted to misconduct under the circumstances of this case.

2. The prosecutor repeatedly vouched for the credibility and truthfulness of accomplice Jose Munoz

During opening statement, after discussing the three murders and the other crimes with which appellant was charged, Deputy District Attorney West referred to Jose Munoz' interrogation by police, asserting that he initially lied but "then he just broke." (31 RT 4923.) Continuing in this vein, West asserted:

> [Munoz] told them everything that he knew about these carjackings. He told them everything about the Lake Mathews double [murder], Joey Mans and Jimmy -- Timothy Jones. He told

> them about [Jose] Aragon. He told them about Mills. And he told about Christopher Self. He told about Gene Romero, and about Danny Chavez. *He told essentially what I have been telling you.*
>
> (31 RT 4923.)

Elsewhere in his opening statement, Deputy District Attorney West again vouched for the truth of Jose Munoz' testimony, asserting as follows:

> You're going to hear from an eyewitness who was at all the murders, and the attempt murders. Now, as we talked about before, who can an eyewitness be when all the innocent people are dead? Who is left to tell you what happened? One of the people is guilty.
>
> You will hear from Jose Munoz. Jose Munoz has agreed to testify truthfully in exchange for a deal ...
>
> He will tell you that he understands that his deal, such as it is, is only good if he testifies truthfully. And he takes that very seriously, because nine months after the arrests there was the crime that we did not know abut. He knew about it, the defendants knew about it. But we had not linked it up. Because he was afraid that we would find out about that independently of him and revoke his deal, he brought it up on his own, nine months after the fact, nine months after the arrest, nine months after his initial statement.
>
> He told us about Paulita William, ...

> He knows that his deal is only good if he testifies truthfully. ...
>
> (31 RT 4925-4926.)

During closing argument, Deputy District Attorney discussed the Mills-Ewy shooting and again vouched for the truth of Jose Munoz' testimony as follows:

> From the very beginning he said that's what happened. And who would make a story like that up? Who would make it up? ... .
>
> Why would he make up some story like somebody leaning out the window and shooting over the car? He would know that that wouldn't fit anything. If he were inclined to like in that manner, he would have just said that was Chris Self sitting in that seat with a shotgun. He would have blamed Chris Self. He would have just switched places. He wouldn't have come up with this leaning out of the car business.
>
> * * *
>
> One final point about this. Munoz is the first person to ever mention this incident. When he was being interviewed, the officers didn't know -- didn't even know about this incident. ... And I would submit he did because he knew he wasn't the one that had fired the shotgun. ...
>
> (45 RT 6724-6725.)

These were not brief, passing references to the importance of Munoz' testimony, but exhortations to the jury to believe Munoz because the prosecutor said he was truthful.

During his closing argument, the prosecutor asked and answered his own question: "Should you believe Munoz?" "I submit to you that he was frank and straightforward about his life and about what he did and what he saw. ... [Y]ou should believe him because "his testimony" is consistent with what the other evidence is showing you, and with things that he has said before." (45 RT 6738-6739.) Referring to Munoz' first interview with police, the prosecutor asserted that they wanted the truth from him. (45 RT 6742.) "I would submit he was too scared to be making the thing up as he went along." (45 RT 6742.) Again referring to the first interview, prosecutor West asserted, "I would submit there comes a point with some people where they just break, and he broke, and he wasn't able to think of things -- he wasn't able to think of lies fast enough, so he told the truth." (45 RT 6743.) Still again, West vouched for Munoz: "Thank God for Munoz. ... His testimony will help you in knowing what occurred so that you can do justice." (45 RT 6750.)

Generally, "doubts about the credibility of [an] in-court witness should be left for the jury's resolution." (*People v. Cudjo, supra,* 6 Cal. 4th at p. 609.) It is thus well-settled that the attempt to bolster a witness's

credibility constitutes prosecutorial vouching and is improper. (*People v. Frye* (1998) 18 Cal.4th 894, 975; *People v. Turner* (2004) 34 Cal.4th 406, 431 [prosecutor improperly vouched for credibility of court-appointed experts in competency hearing on basis of facts outside record, consisting of his personal knowledge of those experts and his prior use of them]; *People v. Hill* (1998) 17 Cal.4th 800, 828 [prosecutor may not go beyond the evidence in his argument to the jury].)

Improper vouching for the strength of the prosecution's case involves an attempt to bolster a witness by reference to facts outside the record. (*People v. Williams* (1997) 16 Cal.4th 153, 257.) It is thus misconduct for prosecutors to vouch for the strength of their cases by invoking the prestige or reputation of their office by offering the impression that he has taken steps to assure a witness's truthfulness at trial. (See, e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 288; *People v. Medina* (1995) 11 Cal.4th 694, 756-758.) It is also improper for the prosecutor to argue based on his experience with people and witnesses, implying superior knowledge about witness credibility or veracity from sources unavailable to the jury. (*People v. Bolton* (1979) 23 Cal.3d 208, 213

The United States Court of Appeals also has addressed the issue of improper vouching in a number of decisions. In *United States v. Frederick* (9th Cir. 1996) 78 F.2d 1370, 1378, the Court of Appeals for the Ninth

Circuit restated the rule as follows: "The Ninth Circuit rule on vouching is clearly expressed in *United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, cert. denied (1981) 452 U.S. 942). It is improper for the prosecution to vouch for the credibility of a government witness." In *Roberts*, the Court of Appeals emphasized:

> Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. The first type of vouching involves personal assurances of a witness's veracity ... .
>
> The second type of vouching involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record. It may occur more subtly than personal vouching, and is also more susceptible to abuse.
>
> (*Id.* at 533.)

See also *United States v. Sarkisian* (9th Cir. 1999) 197 F.3d 966, 989-990; *United States v. Jackson* (9th Cir. 1996) 84 F.3d 1154, 1158, cert. denied, (1996) 519 U.S. 986; *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224.

Although here, the prosecutor disclosed and discussed the terms of Jose Munoz' the plea agreement in accordance with his obligation to disclose to the jury any inducements made to a prosecution witness to testify (*People v. Morris* (1988) 46 Cal. 3d 1, 24-34), the prosecutor went

far beyond reference to the facts of this case or to the precise terms of the agreement with Munoz in order to aid the jury's evaluation of his credibility.

During argument to the jury, Deputy District Attorney West repeatedly referred to Jose Munoz' testimony and asked, "Did Munoz come in and testify truthfully?" (45 RT 6791.) Page after page of the prosecutor's argument was devoted to assertions of his belief in the veracity and credibility of Jose Munoz. (See, for example, 45 RT 6791-6794.) The prosecutor repeatedly asserted, "What you got from Munoz was the evidence. And you know that that's true." (45 RT 6794.) Referring to the Paulita Williams shooting, Deputy District Attorney stated, "I would submit that he was telling you about the things he did, ..." (45 RT 6795.)

The prosecutor also repeatedly told the jury that Munoz was obligated under his plea agreement to tell the truth or suffer its revocation. The prosecutor explicitly stated that his office had ways -- not disclosed to the jury -- of determining whether Munoz was telling the truth in his testimony. As stated by the prosecutor, the deal with Munoz was not going to be revoked, because he -- the prosecutor -- knew and believed that Munoz had told the truth in his testimony at trial. By virtue of these statements, the prosecutor intended that the jury should give credence to Munoz because of his (the prosecutor's) special knowledge and

information. These assertions crossed the line of proper argument by suggesting both that a determination had been made that Munoz was telling the truth and that the prosecutor's office was privy to information bearing on Munoz' veracity not admitted at trial. Without any doubt, the prosecutor invoked the prestige and reputation of his office, offering the impression that he had taken steps to assure Jose Munoz' truthfulness at trial and personally believed as well that Munoz was telling the truth in his accomplice testimony at trial. Thus, the prosecutor committed both types of improper vouching discussed by the Ninth Circuit in *Roberts*. By his remarks, the prosecutor intended the jury to believe that additional inculpatory evidence to support Munoz' veracity, known only to the prosecution, had been withheld from them. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 35.) Such argument was manifestly improper. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 571.)

Prosecutorial vouching constitutes both a deceptive and reprehensible method employed by the prosecution to persuade the jury to convict. This is particularly true in this case where the prosecutor vouched for and gave his personal endorsement of the most crucial prosecution witness without whose testimony appellant could not have been convicted on virtually every count.

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3. The prosecutor repeatedly misrepresented the nature of mitigation evidence, improperly insinuated that appellant bore a burden of proof as to mitigation, and insinuated that the absence of mitigating evidence of the sort described by the prosecutor might amount to aggravation

During jury selection both defense counsel and the prosecutor were permitted to voir dire the jury. As part of his voir dire, Deputy District Attorney West offered introductory remarks to every group of prospective jurors. In his remarks, West described guilt and penalty phases of trial in the event that the jury convicted appellant of murder and found one or more special circumstances to be true. West then discussed the penalty trial and the nature of aggravating and mitigating evidence. In respect to mitigating evidence, Deputy District Attorney repeatedly committed misconduct by erroneously characterizing the nature mitigation evidence:

> You may hear evidence in mitigation, things, perhaps the defendant was a war hero. Perhaps he saved his platoon in the Persian Gulf and received a Silver Star. Perhaps he once pulled a family from a burning car. Perhaps he once gave bone marrow in a transplant so that a child could survive. Perhaps you may hear evidence that would make you have sympathy for him, all of which you can consider in making your [penalty] decisions.
>
> And there is only one decision to make when you are in the penalty phase, that is between life without parole or

> death. There is no other option in the penalty phase.
>
> (23 RT 3765-3766.)

In the same vein, the prosecutor described to other prospective jurors, including Jurors Nos. 8 and 14 (see 24 RT 3873-3874), the following erroneous nature of mitigating evidence:

> You can also hear evidence of a mitigating nature about the defendant. Perhaps one time he pulled a family out of a burning car; perhaps he once was a bone marrow donor; maybe he was a war hero; maybe he was a soccer coach and a Scout leader and had a positive effect on young people.
>
> (23 RT 3903.)

To prospective jurors, including Jurors Nos. 1 and 5 (see 25 RT 4015), the prosecutor stated :

> In mitigating evidence, you can hear evidence that may militate towards life without parole. Perhaps the defendant was a war hero, perhaps he was a soccer coach, perhaps he once pulled a family out of a burning house, *or something like that.*
>
> (25 RT 4047.)

In discussing factors or circumstances to prospective jurors during voir dire, including Juror No. 11 (see 25 RT 4092), the prosecutor stated:

> You can consider evidence in mitigation. Some examples of mitigating evidence might be that the defendant was a soccer coach or he was a Scout leader and had a good effect on young men. Perhaps he served his country in the military. Maybe he went to the Gulf War *or something like that.*
>
> (25 RT 4126; see also 26 RT 4210 [where prosecutor made virtually same comments to prospective juror, including Jurors No. 3, 16, and 17].)

In discussing factors or circumstances in mitigation to the group of prospective jurors that included Juror No. 12 (see 27 RT 4319), the prosecutor stated:

> You also have the opportunity to hear mitigating evidence, evidence that would tend to reflect well on the defendant, to help you make a choice between death and life without parole. Perhaps he was a war hero. Perhaps he once pulled a family out of a burning car. Maybe he was a Scout leader and had a good effect on young men's lives. You may have the opportunity to hear evidence that may make you tend to feel sympathy for him, all of which [you] can consider in determining between life without parole and death.
>
> (27 RT 4402.)

In discussing factors or circumstances in mitigation to the group of prospective jurors that included Juror No. 1 (see 28 RT 4513), the

prosecutor stated:

> You have the opportunity to hear mitigating evidence, things favorable to him. Maybe he was a youth soccer coach and had a positive impact on young people. Maybe he was a Scout leader, maybe he served his country in the armed forces, something like that, which would reflect well on him, Perhaps you would hear things calculated for you to have sympathy for him. All of these things can be considered in making your decision between death and life without parole.
>
> (28RT 4541-4542.)

In discussing factors or circumstances in mitigation to the group of prospective jurors that included Juror No. 15 (see 28 RT 4576), the prosecutor stated:

> You can hear factors in mitigation, or mitigating circumstances, things that would tend to reflect well on the defendant. Perhaps he was a Scout leader and had a good effect on young boys, or he was a Little League coach. Perhaps he once saved somebody from a burning building. Perhaps he served his country in the military. You may hear things that are -- that would tend to provoke you to sympathy for the defendant, all of which you can consider and weigh against the aggravating evidence in making your decision here. ...
>
> (29 RT 4612.)

It is well-settled that neither the prosecution nor the defense has the burden of proof in the penalty phase of a capital trial. (*People v. Daniels* (1991) 52 Cal.3d 815, 890.) As held by this Court in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1190-1191, there is no statutory or constitutional duty to instruct on the prosecutorial burden at the penalty phase of a capital trial. As the Court further explained in *People v. Carpenter* (1997) 15 Cal.4th 312, 417 and *People v. Bonillas* (1989) 48 Cal.3d 757, 790, because capital sentencing is a moral and normative process, it is not necessary to give instructions associated with the usual fact-finding process. Precisely because there is no burden of proof, the jury being the "final sentencer" (*Walton v. Arizona* (1990) 497 U.S. 639, 653), it is crucial that the jurors be properly informed about their role, as well as aggravation and mitigation, at all stages of the trial and not be misled regarding the sentencing process.

Consequently, the Eighth Amendment's cruel and unusual punishment clause and the Fourteenth Amendment's due process clause, as construed in *Lockett v. Ohio* (1978) 438 U.S. 586, 604, generally require that the jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

In the capital sentencing scheme in effect in this state, jurors are

permitted individually to decide each question relevant to the penalty decision. (See *People v. Breaux* (1991) 1 Cal.4th 281, 314.) Thus, the manner in which the state argues mitigation has tremendous and critical impact on the jury's sentencing determination.

Here, the prosecutor's repeated statements about mitigation to prospective jurors during voir dire and to sitting jurors at trial were highly misleading and improper . These statements permitted the jury to infer that only highly or strongly mitigating evidence would be worthy of consideration in deciding penalty and that appellant was required to introduce strong and compelling evidence of mitigation to counter any evidence in aggravation to establish that he did not warrant death in this case. Thus, not only did the prosecutor mislead the jury as to the nature of mitigating evidence, he improperly insinuated by his comments that appellant somehow bore a heavy burden of proof in order to obtain a sentence less than death -- a burden that did not exist.

The prosecutor's statements to prospective jurors in this case were prejudicially misleading because they set forth an unconstitutionally high standard in defining "mitigation." By the very nature of the prosecutor's comments during jury selection, it is more than reasonably likely that the jury later applied his remarks in a way that prevented the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S.

370, 380.)

In his statements, the prosecutor repeatedly departed from the language of section 190.3, factor (k), effectively urging the jury to disregard the mitigating evidence presented by appellant. The prosecutor's examples of mitigating circumstances purposely and impermissibly "set the bar" too high, a tactic designed to undermine appellant's evidence and to characterize him as unworthy of the jury's consideration or of a sentence less than death. Each of the prosecutor's examples involved an extreme circumstance that the prosecutor knew to be inapplicable to appellant, in theory and in fact.

The mitigation presented by appellant included, in part, evidence of his deprived and difficult childhood, the hardships endured by his mother in raising appellant and his brothers, his interest and talent in art, and the fact that his family continued to care for him. All of this evidence qualified as mitigation under section 190.3. (*Lockett v. Ohio, supra,* 438 U.S. at p. 604). Indeed, in *Tennard v. Dretke* (2004) 542 U.S. 274, the United States Supreme Court noted that "'[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Id.* at p. 284, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440-441.) Moreover, a fundamental principle in capital cases is that the Eighth

Amendment requirement of reliability in the penalty determination requires that the jury consider and give effect to all mitigating circumstances surrounding the individual accused. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.) As emphasized by this Court, "a sentencing jury may 'not be precluded from considering as a mitigating factor, *any aspect of a defendant's character* or record and any of the circumstances of the offense *that the defendant proffers as a basis for a sentence less than death.*'" (*People v. Easley* (1983) 34 Cal.3d 858, 877-878; see also § 190.3, subd. (k).)

Based on prosecutor's definition of mitigation in appellant's case, it was more likely than not that none of appellant's penalty phase evidence was given mitigating effect. Because each of the hypothetical defendants presented in the prosecutor's examples was so extreme in its inapplicability to appellant, it is more than reasonably likely that the jurors believed they could not consider evidence presented by appellant as mitigating unless it was similarly dramatic. In other words, the prosecutor's extreme examples distorted "reasonableness" within the meaning of *Tennard v. Dretke*, *supra*, 542 U.S. at p. 284, and *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 440-441. (See *Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, 1051.) His closing argument exacerbated the prejudicial impact of his improper statements during jury selection by referring dismissively to appellant's

artwork, to testimony of appellant's mother and cousin, and to the fact that, in essence, appellant had done nothing of import in his life. (See *Coleman v. Calderon*, *supra*, 210 F.3d at p. 1051.)

Under these circumstances, there is a reasonable likelihood that the prosecutor's statements during jury selection, coupled with his closing argument at the penalty trial, misled the jurors as to what validly constituted mitigating evidence. This improper conduct effectively precluded them from giving effect to the evidence presented by appellant in his penalty trial. While it must be presumed that the jury followed the trial court's instructions, the prejudicial impact of the prosecutor's argument cannot be denied. (*People v. Hardy* (1992) 2 Cal.4th 86, 208.) In *Darden v. Wainwright* (1986) 477 U.S. 168, 181, the United States Supreme Court held that the due process clause requires reversal of a conviction when the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Here, because the prosecutor's remarks occurred so early in the trial, they undoubtedly prejudiced the jurors' perceptions of both appellant and the nature of mitigating evidence throughout the entire trial.

This error was not cured by any of the instructions actually given by the trial court. CALJIC No. 8.88 informed the jury that "[a] mitigating circumstance is any fact, condition, or event which as such, does not

constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." Based on the prosecutor's earlier comments at the beginning of trial, the jury likely concluded that any such "fact, condition or event" had to be as extreme as the prosecutor's examples even to be considered. Thus, the prosecutor's statements, repeated throughout voir dire, violated appellant's constitutional rights to due process, a fair trial, and a reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogues.

Appellant acknowledges that in *People v. Seaton* (2001) 26 Cal.4th 598, also a Riverside case, the prosecutor also used language similar to the prosecutor's remarks in the present case. During voir dire, as here, to illustrate mitigating evidence, the prosecutor also repeatedly mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, or had saved someone's life. (*Id.* at p. 635.)

Relying on (and quoting) *People v. Medina, supra,* 11 Cal.4th at p. 741, where the prosecutor gave illustrations similar to those used in *Seaton*, the Court stated: "The prosecutor's statements, though somewhat simplistic, were not legally erroneous, and defendant had ample opportunity to correct, clarify, or amplify the prosecutor's remarks through

his own voir dire questions and comments. [P] Moreover, as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct 'prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it.'" (*Id.* at p. 636)

The Court's rulings in both *Medina* and *Seaton* on this point should be reexamined. The Court's premise in *Medina* (*People v. Medina, supra*, 11 Cal.4th at p. 741), that prosecutorial statements are unlikely to affect or unduly influence a jury's verdict, is speculative and unsupported either by empirical evidence or decisional law. Moreover, neither the *Medina* nor the *Seaton* Court addressed the more fundamental objections to the prosecutor's statements which, as in appellant's case, impacted not only the burden of proof as to evidence in aggravation and mitigation, but also permitted the jury to infer that the absence of the noble circumstances in mitigation described by the prosecutor could never overcome the circumstances in aggravation.

C. Appellant Was Prejudiced by the Prosecutor's Misconduct

Prosecutorial misconduct implies the use of deceptive methods to attempt to persuade the trier of fact. (*People v. Strickland* (1974) 11 Cal.3d

946, 955.) Crucial to a claim of prosecutorial misconduct is not the good faith of the prosecutor but the potential injury to the defendant. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Indeed, an appellant need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of the conduct, nor is a claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith. (*People v. Bolton, supra,* 23 Cal.3d at p. 214; *People v. Price* (1991) 1 Cal.4th 324, 447.)

Because the misconduct in this case necessarily impacted, inter alia, appellant's rights to fair trial by a jury representative of the cross-section of the community, due process, the effective assistance of counsel, equal protection, and a reliable determination of guilt and penalty guaranteed by the Fifth, Sixth, Eighth, Fourteenth Amendments to the United States Constitution, as discussed in Subsection D, *infra*, the harmless error standard articulated in *People v. Watson, supra*, does not apply.

In *Chapman v. California, supra,* 386 U.S. 18, the United States Supreme Court made it clear that before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. The *Chapman* test also requires the reviewing court to consider the entire record as a whole. (*United States v. Hasting* (1983) 461 U.S. 499, 509.)

In *People v. Barnett, supra,* 17 Cal.4th at p. 1133, this Court held that a defendant's conviction will not be reversed for prosecutorial misconduct unless it is "reasonably probable" that a result more favorable to the defendant would have been reached without the misconduct. (See also *People v. Cummings* (1993) 4 Cal.4th 1233, 1303.)

In this case, not only was there a "reasonable probability" that the jury misconstrued and misapplied the prosecutor's improper and impermissible statements and conduct, the error could not have been harmless beyond a reasonable doubt. The numerous instances of improper misconduct revealed a prosecutor bent on selecting a biased jury (see Argument VIII, *infra*) and convicting and imposing a death sentence on appellant at all costs.

Although a partisan advocate for a particular point of view, (see *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585), the prosecutor here engaged in wide-ranging misconduct from the very beginning to the end of trial, designed to affect not only the composition of the jury, but also the jury's determination of guilt and sentence. The prosecutor repeatedly targeted virtually every Hispanic prospective jurors during voir dire, infecting all other jurors present with notions of racial and ethnic prejudice against Hispanics. The targeting of Hispanic prospective jurors both tainted the jury selection process and surely affected the jury's deliberations

as to both guilt and penalty. As previously noted by the United States Supreme Court, "because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate." (*Turner v. Murray, supra,* 476 U.S. at pp. 30-31.) By targeting Hispanic prospective jurors during voir dire, the prosecutor facilitated the selection of a biased guilt and penalty jury and encouraged racial and ethnic prejudice against appellant, who is also Hispanic.

Against this backdrop of racial and ethnic discrimination directed at Hispanics, the prosecutor also repeatedly mischaracterized the nature of mitigating evidence during voir dire, implying that the absence of mitigating factors as described by him might be considered evidence in aggravation and, furthermore, that appellant bore a nonexistent burden of proof that subjected him to execution if he failed to meet it. Finally, the prosecutor repeatedly vouched for the credibility of his key witness, who was an accomplice to virtually every crime with which appellant was charged and whose credibility was essential to the state's successful conviction of appellant in this case.

The instances of misconduct cited by appellant did not occur sporadically during the trial. Rather, throughout the course of the trial as a whole the prosecutor intentionally engaged in these improper tactics, the very purpose of which was to influence and inflame the jury against

appellant, improperly to embellish the evidence of guilt, and to skew the jury's determination of penalty toward death.

Whether viewed separately or cumulatively, the prosecutor's racial and ethnic bias toward Hispanics, exacerbated by his improper conduct, and insinuations prejudiced appellant's state and federal constitutional rights. The several acts of misconduct could only have been understood by the jury to mean that appellant, as an Hispanic, was guilty and deserving of death. The prosecutor's misconduct was pervasive and ongoing and cannot fairly be characterized as "isolated instances" in a lengthy and otherwise well-conducted trial. (See *People v. Bonin* (1988) 46 Cal.3d 659, 690.)

When the entire range of misconduct is considered in light of the record as a whole, there was a reasonable likelihood that the jury's guilt and penalty deliberations were adversely affected by the prosecutor's misconduct. Moreover, the prosecutor's misconduct during jury selection and during the guilt trial contributed to the jury's verdict in the subsequent penalty trial.

Even under the traditional *Watson* test, which asks whether the misconduct "helped secure [the] convictions" (*People v. Hayes* (1989) 49 Cal.3d 1260, 1270), or, whether it is reasonably probable the verdict was thereby affected (*People v. Watson, supra*, 46 Cal.2d at p. 836), surely the answer must be in the affirmative and the misconduct deemed prejudicial in

this case. Racial and ethnic discrimination should have played no role in the selection of appellant's jury. Most of the seated jurors and alternates were witnesses to the targeting of Hispanic prospective jurors by the prosecutor during jury selection. Such targeting of Hispanic prospective jurors in the presence of other prospective jurors was no accident, as appellant was himself Hispanic. No Hispanics were represented on appellant's jury, and the jury ultimately selected was obviously biased (see Argument VIII, *infra*).

Other than Jose Munoz, there were no eyewitnesses to most of the charged crimes. As to the murders, appellant's role and participation were detailed only by Munoz. The prosecution's case was largely based on circumstantial evidence and the testimony of an accomplice and fellow-murderer. Through his repeated acts of misconduct, including vouching for the credibility and truthfulness of Jose Munoz, the prosecutor improperly skewed the jury's guilt and penalty deliberations. As a result of this misconduct, appellant was denied due process and the full panoply of his rights under the state and federal constitutions. By any measure, the several and cumulative acts of misconduct committed by the prosecutor cannot be deemed harmless.

The reversal of a criminal judgment based on prosecutorial misconduct is not designed to punish prosecutors but to protect the fair

trial, due process, and other constitutional and statutory rights of defendants. (*People v. Bolton, supra,* 23 Cal.3d at p. 214; see also *People v. Turner* (1983) 145 Cal.App.3d 658, 678.) The actions of the prosecutor in this case undermined appellant's fundamental constitutional rights, and improperly prejudiced the jury against appellant. Considering the nature and substance of the prosecution's case against appellant and the reasons advanced for death, there was more than a reasonable possibility the misconduct influenced the verdicts in this case. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1240; *People v. Cain* (1995) 10 Cal.4th 1, 79.)

In *People v. Hill, supra*, 17 Cal.4th at p. 819, this Court addressed the standard of review for prosecutorial misconduct as follows:

> The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Espinoza* [1992] 3 Cal.4th [806], at p. 820.)

In summary, the targeting Hispanic prospective jurors during jury selection, the mischaracterization of the nature of mitigating penalty evidence, and the improper vouching for the credibility and truthfulness of Jose Munoz injected improper racial and ethnic bias into jury selection, resulted in the selection of a nonrepresentative and biased jury. Individually and collectively, the District Attorney's tactics constituted deceptive and reprehensible prosecutorial misconduct designed to persuade the jury to convict appellant and sentence him to death in violation of state law. (*People v. Hill, supra*, 17 Cal.4th at 819.) Additionally, by injecting impermissible racial and ethnic bias into jury selection, introducing the subject of punishment and penalty into the guilt phase, and improperly vouching for the credibility of the key prosecution witness, the District Attorney engaged in pattern of misconduct which resulted in an unfair trial by a biased and nonrepresentative jury. Appellant's conviction and sentence were obtained in violation of due process and the full panoply of trial rights to which he was entitled under the state and federal constitutions. (*Id.*) Accordingly, the judgment of conviction must be reversed.

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D. The Prosecutor's Misconduct Also Violated Appellant's Rights to a Fair Trial by an Unbiased Jury Representative of the Cross-Section of the Community, Due Process, the Effective Assistance of Counsel, and to Reliable Determinations of Guilt and Penalty Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

As noted by the United States Supreme Court, improper conduct by a prosecutor can "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright, supra,* 477 U.S. at p. 181; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642; *People v. Morales* (2001) 25 Cal.4th 34, 44.) By repeatedly mischaracterizing the nature of mitigating evidence during voir dire, thereby implying that the absence of mitigating factors as described by the prosecutor might be considered evidence in aggravation and that appellant bore a nonexistent burden of proof in order to obtain a sentence less than death; by repeatedly targeting virtually every Hispanic prospective juror during voir dire, thereby tainting all other jurors present with notions of racial and ethnic prejudice against Hispanics and facilitating the selection of a nonrepresentative and biased jury; and by repeatedly vouching for the credibility of accomplice and murderer Jose Munoz, the prosecutor engaged in a pattern of misconduct so pervasive that it infected the integrity of the guilt and the reliability of the penalty proceedings. For the reasons discussed above, the prosecutor's actions during voir dire and trial

amounted to an egregious pattern of misconduct that rendered appellant's trial fundamentally unfair in violation of appellant's constitutional rights to a fair trial, due process, and a reliable determination of guilt guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING SEVERANCE OF THE INFLAMMATORY MAGNOLIA CENTER INTERIORS BURGLARY AND VANDALISM COUNTS 11 AND 12 FROM ALL OTHER CHARGED CRIMES; DENIAL OF SEVERANCE UNDER THE CIRCUMSTANCES OF THIS CASE DENIED APPELLANT A FAIR TRIAL BY AN IMPARTIAL JURY AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND PRODUCED AN UNRELIABLE DETERMINATION OF GUILT AND PENALTY ON ALL COUNTS IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

Before trial, appellant moved to sever the three alleged murder and special circumstances counts from all other unrelated, non-capital counts. (6 CT 1216.) Appellant argued that joinder of all alleged counts substantially prejudiced him and undermined his rights to a fair trial and due process of law on the capital charges. (6 CT 1216-1222.)

Opposing appellant's severance motion, the prosecution argued that all of the counts were connected together in their commission, involved the same class of crimes, and entailed "substantial" cross-admissibility of evidence. (6 RT 1207.) The prosecutor asserted that there was no undue prejudice from joining all offenses involving appellant and co-defendant Romero "because their activities were horrible and inhuman." (6 CT 1214.) According to the prosecutor's argument, if appellant wanted to create a

more favorable impression with the jury, he should not have committed so many crimes. Finally, the prosecutor urged that "[a] jury's righteous disapproval" of appellant's activities did not constitute undue prejudice. (6 CT 1214-1215.)

A hearing on appellant's severance motion was held on March 14, 1996. (See 29 RT 4683.) At the hearing, appellant conceded cross-admissibility of evidence. "No doubt the court would make a finding to that effect looking at the evidence that would be presented in many of these cases." (29 RT 4684.) However, appellant stressed that severance should be granted to protect appellant's rights to a fair trial, because the evidence of all non-related crimes would likely overwhelm the jury when considering both appellant's guilt and penalty for the alleged murders. (29 RT 4684.)

The trial court denied appellant's severance motion. The court noted that defense counsel had conceded cross-admissibility as to a "substantial amount" of the prosecution's evidence. (29 RT 4688.) Finding that all of the crimes were of the same class and the evidence cross-admissible except as to counts 11 and 12 involving Magnolia Center Interiors (29 RT 4690-4692), the court denied appellant's severance motion as to all counts. In respect to burglary and vandalism counts 11 and 12, the court stated:

With regard to Counts 11 and 12, they are not of the same class of crimes as the other charges. This is the burglary and the vandalism charge. I note in regard to those two counts, and again, they are not part of the assaultive crimes against a person, and so therefore are unrelated to the other incidents, but they involved a burglary and extensive vandalism, painted graffiti stating "666," "Now you die," and "All shall die and live forever in flame," and a sonogram of the owner's unborn son which had been removed from his desk, stabbed with scissors, and had written upon it "Now you die."

I would further note that there was strong evidence of the defendants' involvement, the defendants' involvement in this crime. The stolen items were found in the defendants' house, Mr. Romero's fingerprints were found on a piece of glass at the scene, the graffiti matched other graffiti by Self found in the Colt and in his automobile, and Mr. Self's trademark "BK" tennis shoe print was found in the fire extinguisher dust.

I don't think it can be argued that the incident is significantly less inflammatory than the others, in that the sonogram is extremely inflammatory, that the evidence of these two offenses is significantly stronger or weaker than that of the others, or that this incident did not involve intent to feloniously obtain property.

So I find a common thread running through all of the crimes including Counts 11 and 12, and that's the felonious intent to obtain property.

So therefore the motion to sever is hereby denied.

(29 RT 4691-4692.)

Accordingly, as summarized in the Statement of Facts, *supra*, the prosecutor introduced evidence at trial of appellant's alleged involvement in the Magnolia Center Interiors burglary and vandalism. Owner James Murphy testified that on November 14, 1992 he discovered that his store in Riverside had been vandalized. A glass panel on the rear door had been broken, permitting entry.

In addition to photographs of BK shoeprints linking appellant to the break-in, the prosecutor introduced other evidence showing that the shop and office areas had been spray-painted and tagged with graffiti. Through other testimony and photographs taken by police investigating the burglary, the prosecutor sought to demonstrate that Murphy's store had been left in shambles by the burglars. Office and other reupholstered customer furniture had been cut or sliced with scissors. Other items, including office furniture, copier, computers, fax machine, and telephones had been sprayed with glue, permanently damaging most of the equipment.

Murphy testified at trial that a set of keys to shop buildings and locks, coins from his desk, a dummy World War II grenade, and a scorpion encased in Lucite were missing from the store. Other testimony was introduced to show that all but one of the missing keys from Murphy's business were found in appellant's bedroom after his arrest.

More significantly, Deputy District Attorney West presented

photographs of graffiti left inside the store which included such expressions as a "sad place in hell see u there" and other references to the devil, death, and dying. Graffiti in block letters, similar in format and style to graffiti allegedly made by appellant and discovered after his arrest, included a drawing of what appeared to be a flower and the number "666" -- apparently a commonly known or understood reference to satanism. The bathroom toilet was tagged with "now you die," "now is then," and "67."

In what was by far the most inflammatory testimony, Murphy was permitted to describe that a sonogram of his unborn son had been removed from its frame and stabbed with a pencil or scissors. He described how the phrase, "You're going to die," was written on the sonogram of his then unborn son. A photograph of the defaced sonogram was introduced into evidence and shown to the jury.

Contrary to his original theory of admissibility, the prosecutor did not argue that the Magnolia Center Interiors helped prove a common plan, scheme, or motive, intent, or identity connecting appellant and codefendant Romero to the capital murders. Rather, the prosecutor argued that the Magnolia Center Interiors burglary and vandalism showed the nature of appellant's character and his propensity for violence. In referring to the burglary and vandalism during closing argument, the prosecutor argued only that:

> One of the things that is so instructive about Magnolia Interiors, even though it's just a burglary, and a burglary pales in comparison to the other crimes that he is accused of, but it's a burglary and a vandalism that are completely about destruction, destroying things, scaring people, taking glue and spraying it into computers, writing, "See you in hell. Sad day in hell. 666." It's a case where the sonogram of an unborn child is stabbed with scissors and written on it, "Now you die."
>
> That little burglary teaches us a lot about Mr. Self. ...

(45 RT 6703.)

B. Joinder, Generally

Penal Code section 954 authorizes the state to join two or more offenses of the same class of crime in one pleading, subject to a trial court's authority to order separate trials. A trial court should exercise this authority when necessary to accord a criminal defendant the fundamental rights to due process and a fair trial. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 448.) For example, joinder is preferable when consolidating charges will avoid harassment of the defendant or the waste of public funds involved in placing the same general facts before different juries. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 408.)

The fact that joinder may be preferable does not mean that it is acceptable in all circumstances. Severance may be constitutionally

compelled if joinder would be so prejudicial as to deny the defendant his Fifth and Fourteenth Amendment rights to a fair trial. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244; see *United States v. Lane* (1985) 474 U.S. 438, 446, fn. 8.) The concept that a consolidated trial may deprive a defendant of due process has been long-recognized in this state. (See *In re Anthony T.* (1980) 112 Cal.App.3d 92, 101-102; *People v. Burns* (1969) 270 Cal.App.2d 238, 252.)

The decision whether to join or sever counts is within the trial court's discretion. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1154 [in reviewing denial of severance motion, court applies "the familiar standard of review providing that the trial court's ruling may be reversed only if the court has abused its discretion]; *People* v. *Cummings* (1993) 4 Cal.4th 1233, 1284 [denial of severance reviewed for abuse of discretion].)

Four factors have traditionally been used to assess whether a trial court's refusal to sever counts constituted an abuse of discretion. An abuse of discretion may be found where (1) evidence of the jointly-tried crimes would not be cross-admissible at separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a weak case has been joined with a strong case so that the spillover effect of aggregate evidence on several charges might alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty

or joinder of them turns the matter into a capital case. (*People* v. *Sandoval* (1992) 4 Cal.4th 155, 172-173; see *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454 [exercise of discretion viewed with highest degree of scrutiny where joinder itself gives rise to special circumstance allegation of multiple murder].)

Overall, the test is a simple one. A court should order separate trials of otherwise joinable offenses when it appears that severance is required in the interest of justice. (*People* v. *Bean* (1988) 46 Cal.3d 919, 935.) Severance "may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial." (*Id.*) Thus, the criteria developed by appellate courts may be of aid in arriving at the ultimate decision regarding whether to sever or join offenses, but the final test is whether a denial of severance, or the granting of joinder, denied the defendant a fair trial.

The burden is on the defendant to demonstrate a clear showing of potential prejudice arising from the trial court's order granting consolidation or denying severance. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) Essentially, assuming the lack of cross-admissibility, this determination revolves around the likelihood of whether a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one of the charged offenses might permit the knowledge of the other

charged offenses to tip the balance so that it convicts the defendant. (*People v. Bean*, *supra*, 46 Cal.3d at p. 936.)

Additionally, even if it was not an abuse of discretion for the trial court to deny a motion to sever counts, reversal may still be required if consolidation resulted in gross unfairness amounting to a denial of due process. (*People v. Arias* (1996) 13 Cal.4th 92, 127.) This due process principle is also acknowledged by the federal courts. For misjoinder of counts to be reversible error under federal constitutional law, the consolidation must have resulted in prejudice so great that it denied the defendant a fair trial. (*United States v. Lane, supra,* 474 U.S. at p. 445, fn. 8; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083.) Thus, as noted by the Court of Appeal in *People v. Grant* (2003) 113 Cal.App.3d 579 (discussing and quoting *Lane* and *Bean*), error involving misjoinder affects substantial rights and requires reversal if it results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. (*Id.* at p. 587.)

In making this determination, the reviewing court looks at each count separately to decide if the trial of one count was rendered unfair because of the joinder of that count with one or more of the other counts. (*Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1149.)

In *Bean v. Calderon, supra*, for example, the defendant was tried and

convicted for the murders of Beth Schatz and Eileen Fox. The murders occurred three days apart and under similar yet distinct circumstances. The court reversed the defendant's conviction for the Fox murder, for several reasons. First, the evidence on the two murder charges was not cross-admissible, because there was insufficient evidence of a common modus operandi. Second, the prosecution repeatedly urged the jury to consider the two sets of charges in concert. Third, referencing the trial court's acknowledgement that the offenses evinced "considerable similarity," the Ninth Circuit faulted the trial court for failing to instruct the jury that it could not consider the evidence on one charge in determining the defendant's guilt on the other. Fourth, the evidence that the defendant murdered Schatz was significantly stronger than the evidence that he murdered Fox. Based on all these factors, the *Bean* Court held that the defendant had been denied a fair trial. (*Id.* at pp. 1084-1086.)

The federal courts have thus recognized the high risk of prejudice that ensues when the consolidation of counts permits evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible. (See *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.) This risk exists because jurors at a joint trial cannot adequately compartmentalize damaging information about the defendant; thus, a joint trial often prejudices the jurors' conceptions of the defendant

and of the strength of the evidence against him or her on each of the counts. (*United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) Also, jurors are prone to regard a defendant charged with multiple crimes with a more jaundiced eye, and to conclude that the defendant must be bad to have been charged with so many offenses. Thus, they may improperly convict on one count based on evidence which only applies to another count. (*United States v. Ragghianti* (9th Cir. 1975) 527 F.2d 586, 587; *United States v. Smith* (2nd Cir. 1940) 112 F.2d 83, 85; *United States v. Lotsch* (2nd Cir. 1939) 102 F.2d 35, 36; see also Argument VI, *infra*.)

C. The Trial Court Erred and Abused Its Discretion by Refusing to Sever the Magnolia Center Interiors Burglary and Vandalism Counts from the Charged Murders

The first step in assessing whether a combined trial would have been prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. Evidence of one crime is cross-admissible if the evidence "would [] have been admissible in the trial of the other [crime] had they been tried separately." (*People v. Gray* (2005) 37 Cal.4th 168, 222.) Joinder is less appropriate where the evidence is not cross-admissible. (See *United States v. Lewis*, *supra*, 787 F.2d at p. 1322.) Cross-admissibility tends to negate prejudice, but it is not essential for that

purpose. Although the Court has previously held that cross-admissibility ordinarily dispels any inference of prejudice, it has never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice. (*People v. Sandoval, supra*, 4 Cal.4th 155, 173; *People v. Bradford* (1997) 15 Cal.4th 1229, 1314-1316.)

Severance was warranted in this case because there was no "significant" cross-admissible evidence concerning the separate Magnolia Center Interiors burglary and vandalism and the charged murders. Stolen keys and other Magnolia Center Interiors property had been found in appellant's room and residence. That evidence alone linked appellant to the charged burglary and vandalism. Additional evidence pertaining or linking appellant to the charged murders was not probative of any other contested factual issue relative to Magnolia Center Interiors. Moreover, the fact that graffiti or BK shoeprints were found inside Magnolia Center Interiors did not render that evidence significantly cross-admissible in the trial of the charged murders. Neither the graffiti nor the BK shoeprints left inside the Magnolia Center Interiors materially assisted in proving either appellant's role or intent in the charged murders.

Evidence in the other crimes charged against appellant already linked him to the BK shoeprints found at the scene of the Mans-Jones murders. BK shoeprints were found at the scene of the Feltonberger

shooting, and, at the time of appellant's arrest, he was wearing that type of shoe. Feltonberger identified appellant as the person who shot him, and a sabot round was used in both the Feltonberger and Aragon shootings. Graffiti in appellant's name was found inside a briefcase taken from robbery victim Meredith; that briefcase contained an empty box of sabot shells. Thus, there was some degree of cross-admissibility as related to the murder charges and the other alleged counts.

In stark contrast, evidence pertaining to the Magnolia Center Interiors charges had no link with or similarities to the murders or the issues in dispute with respect to those charges. Yet, evidence of the graffiti left on the walls and the defacement and destruction of the sonogram of the owner's unborn son was so inflammatory, appellant was likely to suffer unfair prejudice at a joint trial which included those charges. (*Id.* at pp. 444-445; see *People v. Bradford, supra,* 15 Cal.4th at p. 1315 [defendant required to make a "clear showing of prejudice" in support of motion for separate trials].) Thus, even assuming that some of the evidence pertinent to the charged murders would have been admissible at a separate trial on the Magnolia Center Interiors burglary and vandalism, or vice versa, it was still an abuse of discretion to deny severance. The effect of refusing to sever these charges was that the jury heard highly inflammatory evidence from the burglary and vandalism that would have been largely irrelevant or

cumulative at a separate trial of appellant on the charged murders. Therefore, under this Court's four-part test, the trial court abused its discretion in ordering a joint trial on these charges, and the guilt verdicts and death judgment must be reversed. (See *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 452.)

Evidence of separate charges may also be cross-admissible if an "evidentiary connection" exists between the charges, i.e., if they have distinctive "common marks" which support inferences about identity, motive, or another material fact (*People v. Bean*, *supra*, 46 Cal.3d at pp. 936-938; *People v. Johnson* (1988) 47 Cal.3d 576, 588), or if evidence on one charge "logically support[s]" an inference of guilt on another one. (*People v. Arias*, *supra*, 13 Cal.4th at p. 128.) There were no such connections here. As found by the trial court, the three murder counts and the charged Magnolia Center Interiors crimes were not of the same class of crimes under section 954. The charged murders had virtually nothing at all in common with the Magnolia Center Interiors burglary and vandalism that involved only property damage. They were totally dissimilar crimes.

The charged murders and the Magnolia Center Interiors burglary and vandalism involved unrelated offenses with different settings, victims, and alleged motivations. The Magnolia Center Interiors crimes involved the theft of property, property damage, and vandalism. While the murders

and other charged assaultive crimes were generally similar in purpose and intent, sharing a common modus operandi that included the use of firearms, there was nothing like that degree of similarity -- as between the murders and the Magnolia Center Interiors offenses -- that justified joinder.

For evidence of separate crimes to be cross-admissible on the issue of identity, the manner in which they were committed must be so similar as to "amount to a signature." (*People v. Kipp* (1998) 18 Cal.4th 349, 370; *People v. Catlin* (2001) 26 Cal.4th 81, 111.) For evidence of separate crimes to be cross-admissible to show a common plan or design, they must have "such a concurrence of common features that [they] are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 111, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) The Magnolia Center Interiors crimes clearly did not meet those standards, because they involved few, if any, "distinctive marks" in common with the charged murders. The only arguably common feature between the Mans-Jones homicides and the Magnolia Center Interiors offenses was the BK shoeprints, but this was hardly distinctive since the "BK" brand was widely available. There were no common distinctive features between the Aragon killing and the Magnolia Center Interiors property crimes.

Evidence of crimes that are not distinctively similar can still be

cross-admissible if that evidence has independent evidentiary significance as to each crime, i.e., if the crimes have some factual connection that is probative of a disputed issue. (See *People v. Arias*, *supra*, 13 Cal.4th at pp. 127-128; *People v. Catlin*, *supra*, 26 Cal.4th at pp. 111-112; *People v. Price* (1991) 1 Cal.4th 324, 388.) In *Arias*, this Court held that murder and robbery charges from one incident were properly joined with kidnap and robbery charges from another incident which occurred two weeks later because the latter charges were "an outgrowth" of the defendant's "desire to flee apprehension" for the earlier crimes. Thus, the murder "supplied evidence of [the] motive" for the kidnapping, while the kidnapping and robbery "indicated consciousness of guilt" as to the murder. (*People v. Arias, supra*, 13 Cal.4th at pp. 127-128.)

Here, none of the evidence about the homicides had independent significance as to the Magnolia Center Interiors burglary and vandalism, and vice versa. None of the evidence as to the Aragon killing helped prove that appellant committed the Magnolia Center Interiors burglary and vandalism. Although BK shoeprints were found at the scene of the Mans-Jones killings, that evidence did not directly link appellant to the buglary and vandalism charged in counts 11 and 12. Appellant was wearing BK shoes when arrested, and that evidence -- not BK shoeprint evidence at the Mans-Jones crime scene -- and his possession of property stolen from

inside Magnolia Center Interiors linked him to those crimes. Thus, none of the evidence found inside or pertaining to the Magnolia Center Interiors helped prove that appellant killed any of the three murder victims or shed any light on his role, identity, motive, signature, or intent in those crimes.

D. The Prejudice From Refusing To Sever These Charges Outweighed the Benefits

This Court must weigh the prejudicial effect of joinder against its benefits, a "highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case." (*Williams v. Superior Court, supra*, 36 Cal.3d at pp. 451-452; *People v. Smallwood* (1986) 42 Cal.3d 415, 425-426.) In doing that weighing, the Court must consider the factors used to determine whether joinder poses a substantial risk of prejudice, including whether "certain of the charges are unusually likely to inflame the jury against the defendant; . . . and [] any one of the charges carries the death penalty." (*People v. Cunningham* (2001) 25 Cal.4th 926, 985.) Here, those factors indicated that joinder would be highly prejudicial. Although the trial court may have correctly recognized the law's preference for joinder, it improperly exercised and, therefore, abused its discretion in denying appellant's severance motion.

While, as discussed above, cross-admissible evidence "is not the sine qua non of joint trials" (*People v. Marquez* (1992) 1 Cal.4th 553, 572), no

court has said that charges must be tried jointly simply because they involve some cross-admissible evidence. Such a rule would conflict with the purpose behind severance of counts -- avoiding undue prejudice. (See *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 447.) The dispositive question is whether a joint trial will be prejudicial to the defendant. Here, even assuming that these charges did involve some cross-admissible evidence, joining them was still an abuse of discretion, because the effect was that the jury heard highly inflammatory evidence concerning the Magnolia Center Interiors burglary and vandalism that would have been irrelevant and inadmissible at a separate trial of the charged murders, and vice versa.

In deciding appellant's guilt of the charged murders, it was only because these charges were tried jointly that the jury heard testimony that appellant had left graffiti with references to death, dying, and Satan inside the Magnolia Center Interiors shop. Only because the charges were tried jointly was the jury permitted to hear in deliberating the charged murders that a sonogram of the Magnolia Center Interiors' owner had been stabbed with scissors and defaced with graffiti saying "you're going to die." Conversely, in deciding appellant's guilt on the burglary and vandalism charges, it was only because the charges were jointly tried that the jury was permitted to hear that appellant also participated in the shooting deaths of three young men.

Had appellant been tried separately on the charged murders, there would have been no conceivable evidentiary value in introducing the Magnolia Center Interiors graffiti or the sonogram of the owner's unborn son. Similarly, had appellant been tried separately on the Magnolia Center Interiors burglary and vandalism, there would have been no conceivable evidentiary value in introducing evidence of appellant's role and participation in three murders. The burglary and vandalism graffiti particularly was extremely inflammatory and likely to stir the passions of the jury and cause strong feelings of anger and indignation. That evidence, which was completely irrelevant to any of the issues concerning the charged murders, was highly prejudicial. In deciding appellant's culpability for the charged murders, the jury undoubtedly was influenced by the inflammatory Magnolia Center Interiors evidence.

The trial court was required, but failed, to assess and weigh the potential prejudice against the benefits of joinder (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 430), and should have realized that a joint trial would not yield any substantial benefits. These cases involved only a few common witnesses, and since the evidence of the charges was not cross-admissible in any significant way, "there simply was no significant judicial economy to be gained from joinder." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 430.)

Moreover, even if separate trials would have involved more time or expense than a joint trial, they would have been *more* efficient because they

would have produced verdicts untainted by the prejudicial effect of admitting "other crimes" evidence. (See *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428.) Even the prosecutor's argument at the conclusion of trial vividly illustrated that the Magnolia Center Interiors burglary and vandalism had not been offered for any probative purpose other than to inflame the jury. As stressed by the prosecutor, the graffiti and vandalism evidence were only revelatory of appellant's character -- a penalty-phase issue -- not his guilt. Thus, it was an abuse of discretion to deny appellant's severance motion as to counts 11 and 12.

E. The Denial of Severance of the Magnolia Center Interiors Crimes Rendered the Trial of the Charged Murders Fundamentally Unfair; Reversal of Guilt and Penalty Determinations is Required

Even if the Court decides that the trial court's denial of the severance motion was correct at the time it was made, it must reverse the judgment if appellant shows that the joint trial actually resulted in gross unfairness amounting to a denial of due process. (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.) The general law regarding the standards that apply in making this determination is discussed in Subsection B, *supra*. Application of those standards to this case reveals the type of gross unfairness that compels reversal.

Appellant was actually prejudiced by the joinder. As previously

discussed by this Court, where two crimes or, as here, two sets of crimes, are tried jointly and the evidence of one set would not have been admissible in the trial of the other had they been tried separately, the potential for prejudice is increased. "This is because the jury in a joint trial will be exposed to additional evidence of the defendant's criminal behavior, raising the possibility the jury will be swayed by the evidence of the defendant's bad character." (*People v. Gray, supra,* 37 Cal.4th at p. 222; *People v. Memro* (1995) 11 Cal.4th 786, 850.) That is precisely what occurred here, particularly considering the prosecutor's guilt phase argument inviting the jury to use the Magnolia Center Interiors crimes as evidence of appellant's bad character and disposition contrary to the explicit provisions of Evidence Code section 1101, subdivision (a).

In ruling on appellant's severance motion, the trial court should have been aware that, in a joint trial, the jurors deciding whether appellant committed three robbery-murders would be improperly influenced by the inflammatory testimony, graffiti, and other evidence relating to the Magnolia Center Interiors burglary and vandalism. Any testimony or repugnant graffiti evidence about death, dying, Satan, and the stabbing of a sonogram of an unborn child defaced with "you're going to die" graffiti would be inherently inflammatory and would adversely affect the outcome of the trial on unrelated charges. No jury could compartmentalize such evidence, particularly when crimes unrelated to the Magnolia Center

Interiors involved the alleged murders of three young men. This case is thus a prime example of the "spillover effect" that can render the failure to sever charges fundamentally unfair. (See *United States v. Lewis*, *supra*, 787 F.2d at p. 1322; *Drew v. United States* (D.C. Cir. 1964) 331 F.2d 85, 88.) The refusal to sever the Magnolia Center Interiors crimes permitted the state to use evidence from an unrelated case to convince the jury that appellant committed three murders and deserved to die. That fundamentally unfair procedure violated appellant's right to a fair trial, due process, and to a reliable determination of guilt and penalty guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Untied States Constitution.

Both this Court and the United States Court of Appeals have found reversible error in conducting a joint trial involving murder charges where there was no cross-admissible evidence and where the procedure deprived the defendant of a fair trial or due process of law. (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 425-426; *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1083-1087; *People v. Turner* (1984) 37 Cal.3d 302, 313, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104; *Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337, 341 [reversible error to join homicide and firearm possession charges because the jury heard prejudicial evidence about defendant's prior counterfeiting conviction that was only relevant to the possession charge].) This Court should do so again, and reverse appellant's convictions, special circumstances findings, and death

sentence.

Trying the murder charges with the Magnolia Center Interiors burglary and vandalism also violated appellant's right to be tried by an impartial jury, under article I, section 16 of the California Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution, which is a structural defect requiring reversal per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 265-266; *Gray v. Mississippi* (1987) 481 U.S. 648, 663-668.) Further, given the prejudicial effect of the denial of severance in this case, the jury's verdict cannot be considered reliable, and therefore cannot stand in the face of the Eighth Amendment prohibition against cruel and unusual punishment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

IV

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S COUNT 15 ROBBERY CONVICTION (KNOEFFLER) IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, A RELIABLE DETERMINATION OF GUILT, AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

As set forth in the Statement of the Case, *supra*, appellant was charged in count 15 with the November 20, 1992 robbery of beekeeper Albert Knoeffler in Riverside in violation of section 211.

As summarized in the Statement of the Facts, *supra*, beekeeper Albert Knoeffler testified that he was robbed while tending his bees in Riverside. He was approached first by a man who struck up conversation with him about bees. After awhile, the man left but soon returned armed with a shotgun. Pointing the shotgun directly at Knoeffler and saying he was not going to hurt him, the man said he needed the keys to Knoeffler's pickup. According to Knoeffler, the man seemed liked a pretty nice guy. Knoeffler handed over his keys. At this point, another man wearing a ski mask then appeared, having come down the road. Knoeffler did not see another vehicle in the immediate area. The man in the mask got into Knoeffler's truck while Knoeffler continued working with his bees. The man who demanded Knoeffler's keys handed the shotgun to the masked

man and then approached Knoeffler again, saying he needed money for gas. Knoeffler pulled some money out of his wallet and handed over about $40 or $50. Both men then drove away in Knoeffler's truck.

Knoeffler was unable to identify anyone at the preliminary hearing or at trial. (34 RT 5348.)

Jose Munoz in his testimony stated that he, Daniel Chavez,[136] appellant, and codefendant Romero were driving around Riverside on the day of the Knoeffler robbery. Codefendant Romero was driving Sonia Alvarez's car. Munoz did not remember where appellant was seated in the car. Although Munoz testified that their purpose was "to go out stealing again" (39 RT 5958), he did not attribute in his testimony any specific statements to appellant showing that it was appellant's idea to commit the robbery or that appellant actively encouraged or participated in the robbery in any manner. (See 40 RT 6225.)

Munoz did not testify that appellant carried or used a mask during the robbery. (40 RT 6226.) While Munoz recounted in detail what Romero said, he offered no testimony as to any statements specifically uttered by appellant before, during, or after the robbery. Munoz did not testify that appellant ever got out of Alvarez's car or helped facilitate the robbery in any

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[136]/ Following his separate trial, Chavez was acquitted of the Knoeffler robbery, although he purportedly served as a getaway driver and thus, unlike appellant, played some role in committing the crime. As in appellant's case, the only evidence of Chavez's role and involvement was through Jose Munoz' uncorroborated accomplice testimony.

way. (40 RT 6137, 6227.)

Munoz did not testify that appellant was at any time armed while in the car or that appellant handled either weapon before, during, or after the robbery. Munoz testified that only he and codefendant Romero handled the two weapons involved. (40 RT 6137.) Appellant did not drive either Knoeffler's truck or Sonia Alvarez's car after the robbery. Indeed, Munoz testified that Daniel Chavez drove Alvarez's car after the robbery. (39 RT 5964.) Munoz recalled that only he and codefendant Romero abandoned Knoeffler's truck in an open field. Appellant stayed in Alvarez's car. Munoz did not testify that appellant helped in disposing of Knoeffler's truck after the robbery. (39 RT 5965.) Nor did Munoz testify that money taken from Knoeffler was ever divided, given to appellant, or that appellant otherwise benefited or received money in connection with the crime. Although Munoz, codefendant Romero, Chavez, and appellant went to the store some time after the robbery, Munoz did not testify that appellant ever handled, received, or personally spent any of the money obtained from Knoeffler. (39 RT 5966.)

B. Standard of Review

In evaluating a criminal conviction challenged as lacking evidentiary support, a reviewing court must consider the whole record in the light most favorable to the judgment to determine whether it discloses substantial

evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) A judgment should be upheld if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Miranda* (1987) 44 Cal.3d 57, 86.) In addition, in reviewing the sufficiency of the evidence of a robbery conviction, all inferences must be drawn in support of the verdict that can reasonably be deduced from the evidence.

The same standard of review applies to cases in which the prosecution has relied mainly on circumstantial evidence (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) In addition, the reviewing court must accept logical inferences that the jury might have drawn from the circumstantial evidence. (*Id.* at p. 11.) However, the judgment must be supported by "substantial evidence," which has been defined as evidence that reasonably inspires confidence and is of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 139; *People v. Javier A.* (1985) 38 Cal.3d 811, 819.)

C. Constitutional Due Process Standards

A conviction that is not supported by sufficient evidence violates both the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of article I, section 15 of the

California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) This rule flows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [italics omitted].) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, the reviewing court similarly inquires whether a "'reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" (*People v. Memro* (1985) 38 Cal.3d 658, 694-695, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The evidence supporting the conviction must be substantial, i.e., evidence that "reasonably inspires confidence" (*People v. Bassett, supra,* 69 Cal.2d at p.139, cited with approval by *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value." (*People v. Green* (1980) 27 Cal.3d 1, 55; see *People v. Bolden* (2002) 29 Cal.4th 515, 533.) Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes*

(1974) 12 Cal.3d 486, 500.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not ... limit its review to the evidence favorable to the respondent." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577 [internal quotations omitted].) Instead, it "must resolve the issue in light of the whole record -- i.e., the entire picture of the defendant put before the jury -- and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*Ibid.* [italics omitted]; see *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 ["all of the evidence is to be considered in the light most favorable to the prosecution" (italics omitted)].)

D. Insufficiency of the Evidence

Substantial evidence must support each essential element of an offense. If the circumstances reasonably justify the jury's verdict, the reviewing court will not interfere with the jury's determination. However, if evidence or testimony is lacking in indicia of reliability, an appellate court must not hesitate to reverse the judgment of conviction. (*People v. Lang* (1974) 11 Cal.3d 134, 139.)

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The element of force or fear is satisfied if the force or fear caused the victim to

give up his or her property. (*People v. Briton* (1991) 232 Cal.App.3d 316, 325.) Here, there was absolutely no direct or circumstantial evidence -- and no testimony by Jose Munoz -- that appellant actually committed the Knoeffler robbery, or was even present when Knoeffler was confronted and robbed. Since the prosecution never sought to prove, and did not argue, that appellant personally robbed Knoeffler, his liability could only have been predicated on an aiding or abetting theory.

An aider and abettor is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense; (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 561.) In this regard, there was no evidence proving, or corroborating the testimony of Jose Munoz, that appellant was even in the car or otherwise present at the scene on the day Knoeffler was robbed. Even if it is conceded, arguendo, that appellant was in the car, there was no direct or circumstantial evidence -- and no testimony by Munoz -- that appellant was armed or that he furnished or handled the weapons used by codefendant Romero and Munoz. There was no evidence that appellant knew that codefendant Romero and Munoz were going to rob Knoeffler, nor evidence of any sort that he did anything to facilitate or encourage them, or by act or advice aided, promoted, instigated, or

encouraged them, with the requisite intent to rob beekeeper Knoeffler as charged in count 15.

Even Munoz testified that appellant effectively did nothing to facilitate the robbery. He did not drive the car; he did not serve as a getaway driver. He did not act as a look-out. He did not approach codefendant Romero, as did Munoz, to try to hurry commission of the crime, nor did he even approach the victim.

To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) In respect to count 15, review of the entire record in this case is not sufficiently persuasive to permit the conclusion that any rational trier of fact could have found either that appellant personally committed the robbery of Knoeffler or aided and abetted the commission of that crime. There was no evidence corroborating Jose Munoz' testimony that appellant was present in the car when the robbery was committed or that he in any manner aided, assisted, encouraged, or facilitated the robbery. Absent any evidentiary support, appellant's count 15 conviction also violated Fifth and Fourteenth Amendment due process under the United States Constitution, as well as the due process clause of

article I, section 15 of the California Constitution. (*People v. Rowland, supra,* 4 Cal.4th at p. 269.) Appellant's conviction on this count also violates Eighth Amendment reliability principles.

V

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS ON COUNTS 5-7 (MILLS-EWY) IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, A RELIABLE DETERMINATION OF GUILT, AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

As set forth in the Statement of the Case, *supra*, appellant was charged with and convicted on counts 5 through 7 of three crimes involving Kenneth Mills and Vicky Ewy that occurred on October 22, 1992: one count of willful, deliberate, and premeditated attempted murder in violation of sections 664/187, subdivision (a) (count 5); one count of aggravated mayhem in violation of section 205 (count 6); and one count of attempted robbery in violation of sections 664/211 (count 7).

As discussed in the Statement of Facts, *supra*, Mills and Ewy were driving a two-door Nissan along Moreno Beach Drive in Moreno Valley on the night of October 22, 1992. At the intersection of Moreno Beach Drive and John F. Kennedy Drive, Mills, who was driving, looked over his left shoulder. He saw the silhouette of a car and a person leaning out of the passenger window and pointing a gun. Mills saw the muzzle blast from a shotgun. The blast blew out a hole in the driver's side window where Mills was sitting, blinding him in the right eye, tearing off his right eyelid, and

damaging his left eye. (33 RT 5191-5196.) Although barely able to see from his left eye, Mills drove away on JFK Dr. with the other car in pursuit. (33 RT 5196-5197.) Mills stopped at some model homes and then drove onto a golf course path to nearby homes. The other car left the area after Mills turned onto the golf cart path.

Initially, Mills was unable to describe the car involved in the shooting or its occupants. While in the hospital, he reported that the other car was a late-model, 1980s hatchback, either dark gray or blue in color. (33 RT 5202.) He told police that he saw a man from the waist up pointing a gun; he also said he saw the muzzle blast but not the gun. The blast seemed to come from the front passenger window. He recalled seeing possibly two occupants in the other car, at least a driver and front passenger. Mills was unable to describe the occupants. (33 RT 5211-5214.)

Pieces of lead and pellets recovered from the Mills-Ewy vehicle were identified as shotgun pellets. The gauge of the shotgun could not be determined from the size of the pellets. However, plastic shotgun wadding recovered from Mills-Ewy vehicle was identical to one-piece wadding from a 20-gauge Remington shot shell.

According to Jose Munoz, he, codefendant Romero, and appellant drove Sonia Alvarez's car in the area of Moreno Beach Drive on the night of October 22, 1992. Munoz told the jury that appellant was seated in back; Romero was driving; and he was sitting in the front passenger seat. Munoz

was armed with a .22 single shot rifle; appellant was armed with a sawed-off 20 gauge shotgun. (39 5926-5929; 40 RT 6102-6103, 6106.)

Munoz testified that Romero pulled alongside Mills' vehicle. Munoz pointed the .22 rifle out of the car window at the other driver. Romero told him to shoot. Before Munoz could shoot, appellant fired the shotgun loaded with birdshot at the driver over the top of the car from the rear left passenger side. Munoz testified that in order to shoot, appellant put his head and body out of the rear car window and positioned his upper body and arms over the top of the car, facing Mills' vehicle. Appellant only had one shell. Munoz said he did not shoot. (39 RT 5929-5933; 40 RT 6103-6117, 6185-6190.)

After the shooting, Romero continued to follow Mills' vehicle to an area near some apartments and a hospital. While in pursuit, Munoz fired once from his rifle at the fleeing vehicle. When Mills started honking his horn near apartments, Romero drove away and returned to Munoz' house. (39 RT 5933-5934.)

B. Standard of Review

In evaluating a criminal conviction challenged as lacking evidentiary support, a reviewing court must consider the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond

a reasonable doubt. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 496.) A judgment should be upheld if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Miranda, supra,* 44 Cal.3d at p. 86.) In addition, in reviewing the sufficiency of the evidence of a robbery conviction, all inferences must be drawn in support of the verdict that can reasonably be deduced from the evidence.

The same standard of review applies to cases in which the prosecution has relied mainly on circumstantial evidence (*People v. Rodriguez, supra,* 20 Cal.4th at p.11.) In addition, the reviewing court must accept logical inferences that the jury might have drawn from the circumstantial evidence. (*Id.* at p. 11.) However, the judgment must be supported by "substantial evidence," which has been defined as evidence that reasonably inspires confidence and is of solid value. (*People v. Bassett, supra,* 69 Cal.2d at p. 139; *People v. Javier A., supra,* 38 Cal.3d at p. 819.)

C. Constitutional Due Process Standards

A conviction that is not supported by sufficient evidence violates both the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of article I, section 15 of the California Constitution. (*People v. Rowland, supra,* 4 Cal.4th at p. 269.) This rule flows from the requirement that the prosecution must prove

beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship, supra,* 397 U.S. 358, 364.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra,* 443 U.S. at p.319 [italics omitted].) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, the reviewing court similarly inquires whether a "'reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" (*People v. Memro, supra,* 38 Cal.3d at pp. 694-695, quoting *People v. Johnson, supra,* 26 Cal.3d at p. 576.) The evidence supporting the conviction must be substantial, i.e., evidence that "reasonably inspires confidence" (*People v. Bassett, supra,* 69 Cal.2d at p. 139, cited with approval by *People v. Morris, supra,* 46 Cal.3d at p.19) and is of "credible and of solid value." (*People v. Green, supra,* 27 Cal.3d at p. 55; see *People v. Bolden, supra,* 29 Cal.4th at p. 533.) Mere speculation cannot support a conviction. (*People v. Marshall, supra,* 15 Cal.4th at p. 35; *People v. Reyes, supra,* 12 Cal.3d at p. 500.)

Although the evidence is viewed in the light most favorable to the

judgment, the reviewing court "does not . . . limit its review to the evidence favorable to the respondent." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577 [internal quotations omitted].) Instead, it "must resolve the issue in light of the whole record – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*Ibid.* [italics omitted]; see *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 ["all of the evidence is to be considered in the light most favorable to the prosecution" (italics omitted)].)

D. Insufficiency of the Evidence

No conviction can be had upon the testimony of an accomplice unless such testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. (§ 1111.) Because Jose Munoz was an accomplice, section 1111 required that his testimony had to be corroborated by independent evidence of appellant's guilt. Section 1111 serves to ensure that a defendant, as appellant, will not be convicted solely upon the testimony of an accomplice because an accomplice, as Munoz, is likely to have self-serving motives. (*People v. Davis* (2005) 36 Cal.4th 510, 547; *People v. Belton* (1979) 23 Cal.3d 516, 526.)

Under section 1111, there had to be evidence tending to connect appellant with the crimes charged in counts 5 through 7 without aid or assistance from the testimony of Munoz. Such independent evidence "need

not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth." (*People v. Perry* (1972) 7 Cal.3d 756, 769.)

Here, other than Munoz' accomplice testimony, there was no direct or circumstantial evidence placing appellant in Alvarez's car together with codefendant Romero and Munoz when the shooting occurred. There was no evidence of identity or linking appellant in any way to these crimes. There was no independent evidence even establishing appellant's presence at the scene or showing that he was the shooter. There was no evidence that appellant ever made any statements to any person about his role or participation in the Mills-Ewy shooting.

Significantly, Munoz' testimony was refuted in key respects by Mills at trial and hence insufficiently corroborated as required by law. Munoz said that he, codefendant Romero, and appellant were in the car. Mills said he saw only two occupants Mills testified that when he looked over his left shoulder, he saw the silhouette of a car and a person leaning out of the front passenger window and pointing a gun. Munoz said he, not appellant, was sitting in the front passenger seat. Mills never testified that

there was a third person in the car or corroborated Munoz' testimony in this regard.

After the shooting, Mills was unable to describe the car involved in the shooting or its occupants. While in the hospital, however, Mills, reported that the other car was a late-model, 1980s hatchback, either dark gray or blue in color. (33 RT 5202.) Notably, Mills told police that he saw a man from the waist up pointing a gun; he also said he saw the muzzle blast but not the gun. He reported that the blast seemed to come from the front passenger window, not from the rear as Munoz had testified. Mills also recalled seeing two occupants in the other car -- the driver and front passenger -- and not three as Munoz had stated. (33 RT 5211-5214.)

Mills' statements to police after the shooting and his testimony at trial were thus totally at odds with Munoz' trial testimony. Mills said he saw only two occupants; Munoz said there were three. Mills said the shooter fired from the right front passenger window; Munoz testified appellant fired the shotgun over the top of the car from the left, rear window of the car.

In *In re Stephen P.* (1983) 145 Cal.App.3d 123, 129-130, the Court of Appeal discussed the meaning of the phrase "other evidence tending to connect the defendant with the crime." The court also noted that the section 1111 phrase was defined by this Court in *People v. Perry, supra,* 7 Cal.3d 756, which stressed that corroborating evidence must do more than raise a

conjecture or suspicion of guilt. In *In re Stephen P.*, the court pointed to other evidence that established the minor's presence at the scene of the crime. (*Id.* at p. 131.)

Other than Munoz' testimony, there was no evidence as to appellant's presence at or participation in the Mills-Ewy shooting. No evidence placed appellant in Alvarez's car or at the scene of the shooting; nothing corroborated Munoz' testimony that appellant was the shooter. There was no evidence that appellant was seen with or was in the presence of codefendant Romero or Munoz either before or after the shooting. There was no evidence that appellant was armed that night, before or after the shooting. Appellant never at any time made any statement to anyone or to the police which directly or indirectly implicated him in these crimes. There was no consciousness of guilt evidence.

Substantial evidence must support each essential element of an offense. If the circumstances reasonably justify the jury's verdict, the reviewing court will not interfere with the jury's determination. However, if evidence or testimony is lacking in indicia of reliability, an appellate court must not hesitate to reverse the judgment of conviction. (*People v. Lang, supra,* 11 Cal.3d at p. 139.)

In light of the of the entire record, the absence of any evidence corroborating the testimony of Jose Munoz, and the absence of direct or

circumstantial evidence of appellant's presence or participation in these crimes, the evidence is not sufficiently persuasive to permit the conclusion that any rational trier of fact could have found that appellant was present, fired a shotgun blast, or personally committed attempted murder, attempted robbery, and mayhem as charged in counts 5 through 7. Appellant's convictions on these counts also violated both the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of article I, section 15 of the California Constitution. (*People v. Rowland, supra,* 4 Cal.4th at p. 269.) The convictions also violated Eighth Amendment reliability principles.

VI

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY SUA SPONTE NOT TO AGGREGATE EVIDENCE OR INCIDENTS TO CORROBORATE THE ACCOMPLICE TESTIMONY OF JOSE MUNOZ AND TO DETERMINE GUILT; THE ERROR VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, UNANIMOUS VERDICT, DUE PROCESS OF LAW, AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CALIFORNIA CONSTITUTIONAL COUNTERPARTS

A. Introduction

Appellant was charged with 19 separate crimes, including three murders, involving ten separate incidents. The crimes and incidents have been described in detail in the Statement of Facts, *supra*. At the conclusion of trial, the court instructed the jury in the language of CALJIC No. 17.02 as follows: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." (7 CT 1473; 45 RT 6859.)

Although the trial court's instruction pursuant to CALJIC No. 17.02 advised jurors that they were to decide each count separately, the instruction did not address the more critical issues regarding whether the jurors could rely on or consider evidence pertaining to one crime or incident to corroborate the testimony of Jose Munoz as to the other counts charged against appellant. Given the numerous offenses charged against appellant and the different evidence required to prove each offense, the failure to instruct the jury properly in this regard left it free

to consider any given offense as proof that appellant was guilty of the other offenses charged against him.

For example, the evidence at trial showed that the counts 1 and 2 murder victims Joe Mans and Timothy Jones were killed by .22 caliber bullets. However, the bullets retrieved from the bodies of Mans and Jones did not match any of the other bullets or weapons used in any of the other shootings or incidents. Yet, in the absence of a proper limiting instruction, the jury would conclude that because Jose Aragon was shot with both .22 caliber bullets and a sabot shotgun shell, and the evidence linked appellant to the weapons and bullets used in the Aragon killing, appellant also must have been involved in the murder of Timothy Mans, who was also killed with .22 caliber ammunition. In other words, it was more likely than not the jury would treat evidence of appellant's involvement on some counts as evidence of his guilt on other, unrelated counts charged against him.

The same danger also arose in respect to the accomplice and accomplice corroboration instructions given by the trial court. Accomplice testimony, for good reason, has historically been viewed with great suspicion. Although the rules of evidence generally provide that the testimony of any one witness is sufficient proof of any fact, there is an exception for accomplice testimony. Section 1111 provides in part as follows: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the

circumstances thereof ... ."

The prosecution has the burden of producing independent evidence to corroborate the testimony of an accomplice. (*People v. Cooks* (1983) 141 Cal.App.3d 224.) An accomplice's testimony must be sufficiently substantiated so as to establish his credibility and satisfy the jury that he is telling the truth. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Szeto* (1981) 29 Cal.3d 20, 27; *People v. Martinez* (1982) 132 Cal.App.3d 119, 132.) Because an accomplice "has a natural incentive to minimize his own guilt before the jury and to enlarge that of his cohorts; accordingly, the law requires an accomplice's testimony be viewed with caution to the extent it incriminates others." (*People v. Brown* (2003) 31 Cal.4th 518, 555.)

The corroborative evidence "must relate to some act or fact which is an element of the crime" so that it directly connects the defendant to the charged offense. (*See e.g., People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1128; *People v. Zapien* (1993) 4 Cal.4th 929, 982). It must be sufficient, without aid from the testimony of the accomplice, to implicate the defendant. If the remaining evidence requires interpretation and direction by the accomplice's testimony to give it value, the corroboration is not sufficient. (*People v. Reingold* (1948) 87 Cal.App.2d 382, 392-393; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.)

Corroboration of an accomplice's testimony as to non-inculpatory facts is also insufficient because 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. (*People v. Morton* (1903) 139 Cal. 719, 724.).

Evidence that only gives rise to a suspicion, even a "grave" suspicion, of guilt will not corroborate an accomplice's testimony. (*People v. Szeto*, *supra*, 29 Cal.3d 20, 43.) Extrajudicial statements of accomplices are also insufficient to corroborate accomplice testimony because, although the out-of-court statement is not part of the testimony, it still "comes from a tainted source." (*People v. Andrews* (1989) 49 Cal.3d 200, 214; *People* v. *Belton* (1979) 23 Cal.3d 516, 524-526.)

Evidence of mere opportunity to commit a crime is not sufficient corroboration. (*People v. Boyce* (1980) 110 Cal.App.3d 726, 737.) Accomplice testimony may be corroborated by "direct physical evidence that does not rely on witness credibility." (*People v. Narvaez* (2002) 104 Cal.App. 4th 1295, 1305.)

In accordance with the above principles and in respect to the testimony of Jose Munoz, the trial court instructed the jury on accomplices, generally, in the language of CALJIC No. 3.10 as follows: "An accomplice is a person who is subject to prosecution for the identical offense charged in all counts except XI-XIV,[137] XVI, XVII,[138] XX-XXIII,[139] or by otherwise being a principal in the charged offense against the defendant on trial by reason of aiding and abetting." (6 CT 1419; 45 RT 6823.) The court also instructed the jury in the language of

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[137]/ Counts 11 and 12 involved Magnolia Center Interiors; counts 13-14 involved the kidnapping and robbery of Alfred Steenblock.
[138]/ Count 16 and17 involved the robbery of Jerry Mills, Sr. and son.
[139]/ Counts 21-23 pertained only to coappellant Romero.

CALJIC No. 3.11 (1990 Revision) as follows: "A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense. [P] Testimony of an accomplice includes any out of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated was true," (6 CT 1420; 45 RT 6823.) The trial court also instructed the jury in the language of CALJIC No. 3.12 as follows:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact *related to the crime* which, if believed, by itself and without aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case.
>
> You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime,
>
> If there is not such independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated.
>
> If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.
>
> (7 CT 1422; 45 RT 6823-6824.)

Next, the trial court instructed the jury in the language of CALJIC No. 3.16

as follows with regard to the testimony of Jose Munoz and his status as an accomplice: "If the crimes charged in the Information except counts XI-XIV, XVI, XVII, XX-XXIII was committed by anyone, the witness Jose Munoz was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration." (7 CT 1423; 45 RT 6824.) Finally, the court instructed the jury in the language of CALJIC No. 3.18 that the testimony of an accomplice "ought to be viewed with distrust." (7 CT 1424; 45 RT 6824.)

The trial court's accomplice corroboration instructions, given in conjunction with CALJIC No. 17.02, failed to inform the jury that evidence corroborating Jose Munoz' accomplice testimony was required for each specific count and each incident-related count. Instead, by virtue of the accomplice corroboration instructions, including CALJIC No. 3.12 which referred to "some act or fact related to the crime," the jury could well have believed that accomplice corroboration as to a single count satisfied the accomplice corroboration requirement as to all counts.

The trial court's failure to provide an instruction informing jurors they could not use evidence pertaining to a particular crime or each group of incident-related counts to corroborate Jose Munoz' accomplice testimony or to prove appellant's guilt on other counts or in respect to other charged crimes violated appellant's rights to a fair trial, unanimous verdict, and due process of law guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, subdivision (a), and 15, of the California

Constitution. The trial court's instructional failure also deprived appellant of his right to an unbiased jury and his right to a fair and reliable penalty determination. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 15, 16, and 17.). Finally, by permitting the use of evidence on one count to support a conviction on a separate and distinct count, the trial court impermissibly and improperly undermined the accomplice corroboration instructions pertaining to Jose Munoz and lowered the prosecution's burden of proof in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. The Trial Court Erred By Failing to Instruct the Jury Sua Sponte That All of the Evidence Introduced Pertaining to All Counts Could Not Be Used to Corroborate Jose Munoz' Accomplice Testimony or Determine Appellant's Guilt on Each Separate Count or Incident-Related Counts

The most significant general legal principle that governed the jury's consideration of these consolidated charges was that where a defendant is tried in a proceeding that includes more than one charge, a conviction for each charged offense may be rendered only when the conviction is based upon evidence that is relevant to that particular offense. The Courts of Appeal have specifically rejected an argument that because two or more counts may be properly joined for trial, the fact finder may consider all of the evidence in assessing guilt on all of the charges. The state made this argument in *In re Anthony T.* (1980) 112 Cal.App.3d 92. The Court of Appeal held that each count in a pleading charges a separate and distinct offense, and the trier of fact may not consider the supporting evidence in one case

when rendering a judgment on the other case. (*Id.* at p. 101.)

This concept has been recognized by subsequent Court of Appeal decisions addressing the notion that consolidation of charges is acceptable because of the assumption that cases will be tried in a manner that effectuates this principle. For example, the Court of Appeal has recognized that it is arguably inappropriate for a prosecutor to make an argument to a jury that asks jurors to aggregate the evidence when considering guilt on separate counts which are being tried together. (*People v. Stewart* (1985) 165 Cal.App.3d 1050, 1057, fn. 9.)

Courts also indulge the presumption that the reason it is permissible to try separate offenses together is because reasonable efforts will be made to impress upon the jury that it must not aggregate all of the evidence when determining the defendant's guilt of each charge, but rather that the jury should separate the evidence and the charges and make individual determinations of guilt. This can be achieved by proper instruction from the trial court and the vigilance of defense counsel in preventing a prosecutor from arguing that evidence should be aggregated. (See *Verzi v. Superior Court* (1986) 183 Cal.App.3d 382, 389; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 985-986 [prejudicial effect of joinder dispelled by instruction not to consider defendant's status as a felon in deciding other charges].) Here, the trial court failed to instruct the jury in this manner or give an appropriate limiting instruction to prevent the jury from aggregating the corroborating and other evidence on all counts.

Federal courts had endorsed the same principles. Different United States

Courts of Appeals have observed that a defendant is not prejudiced by joinder of unrelated charges when an instruction is provided to the jury that advises the jurors to compartmentalize the evidence applicable to each charge. (See *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084-1085; *Herring v. Meachum* (2nd Cir. 1993) 11 F.3d 374, 378 [joinder of separate murder charges not prejudicial because jury instructed not to use evidence of one charge to determine defendant's guilt of another charge].)

In California, a trial court has a duty to give cautionary instructions that may be called for by the state of the evidence. (*People v. Ford* (1964) 60 Cal.2d 772, 799.) The failure to provide these cautionary instructions, and the guidance they provide to the jury in determining the proper method for judging the defendant's guilt, calls for reversal when it is reasonably probable that the defendant would have obtained a more favorable result if the instruction had been given. (*People v. Beagle* (1972) 6 Cal.3d 441, 455; *People v. Lopez* (1975) 47 Cal.App.3d 8, 13.)

The CALJIC No. 17.02 instruction the court gave here instructed the jurors on the procedure they were to follow in assessing appellant's guilt of each of the individual charges. The instruction told the jurors that they were to consider guilt of each count separately and return a verdict for each count, thereby directing a procedural approach rather than directing a substantive manner of consideration. Thus, this instruction fulfilled a procedural purpose by directing the jury as to the appropriate manner of deliberation. However, it utterly failed to provide proper

direction to the jury regarding the more substantive issue of whether it was appropriate to aggregate the evidence of all charges when deciding the key question of accomplice corroboration and ultimately appellant's guilt on any one charge.

The necessity for providing this type of instruction can be seen by looking at the analogous situation of the introduction of other-crimes evidence pursuant to Evidence Code section 1101. It is a violation of the due process clause to admit evidence of other crimes committed by a defendant without giving the jury a limiting instruction identifying the purpose for which the evidence was admitted. (*Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337, 341.) The reason for this requirement, as recognized by this Court, is that evidence the defendant committed other crimes cannot be used to show his criminal propensity in deciding whether the defendant is guilty of the crime at bar. (*People v. Alcala* (1984) 36 Cal.3d 604, 631.)

This Court has noted the "potentially devastating impact of other-crimes evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder." (*People v. Garceau* (1993) 6 Cal.4th 140, 186; see *People v. Gibson* (1976) 56 Cal.App.3d 119, 129 [admitting other-crimes evidence poses severe risk of prejudice because of its possible misuse as propensity evidence].) Thus, if a defendant requests a limiting instruction regarding this type of evidence, the trial court has a duty to accurately describe the precise purpose for which the evidence was admitted. (*People v. Key* (1984) 153 Cal.App.3d 888, 898-899.)

In appellant's case, however, the necessity to provide an instruction which guides the jury not only in how to evaluate and apply the instructions regarding the corroboration required of testimony, but also in how properly to marshal and apply the relevant evidence as the jury considers each count, far exceeded the situation typically presented when other crimes evidence has been introduced.

Here, the need for an instruction directing the jury to apply correctly the accomplice corroboration requirement and to marshal the evidence took on heightened importance, both because of the inordinate number of offenses and because proof of appellant's culpability on virtually every count charged rested solely on the testimony of Jose Munoz. Indeed, much of the evidence placed before the jury was simply irrelevant evidence, serving only a limited purpose. Yet the court's failure properly to instruct the jury in this regard effectively permitted the jury to apply the evidence "across offenses," so to speak, in a discretionless, unguided manner that assured appellant's conviction on all counts, without regard to the standard of proof required. Thus, the jury could find, for example, that because Munoz' testimony with regard to the Feltonberger offenses was sufficiently corroborated, his testimony regarding the other offenses was also true. In this way, Munoz' testimony improperly became the proxy for proof of the elements required to find appellant guilty of the other offenses charged.

As a further example, other than Jose Munoz' testimony as to the Mills-Ewy shooting, there was no evidence linking appellant to that crime and virtually no evidence to corroborate Munoz' assertions that appellant was both present and

fired the shotgun blast into the Mills-Ewy vehicle. By virtue of the trial court's instructions, however, while the jury had to consider the Mills-Ewy shooting separately from the other counts, the jury was not obligated at the same time to determine whether Munoz' testimony had been independently corroborated by evidence relating to that specific incident alone. The jury could well have used Feltonberger's corroborating testimony as to counts 18 and 19 to find the requisite corroboration on unrelated counts 5 through 7.

The same was true of the Mans-Jones (counts 1 and 2) and Aragon (count 3) murders. Jose Munoz' testimony was crucial in proving appellant's presence, participation, intent, state of mind, and special circumstances liability. Munoz' testimony was also crucially important in proving appellant's attitudes and reactions before, during, and after the killings, all of which were later certainly considered by the jury in weighing the appropriate penalty. In the absence of eyewitnesses to the Mans-Jones and Aragon killings, Jose Munoz' testimony was vital to secure appellant's convictions on the capital counts. By virtue of the trial court's instructions, Munoz' accomplice testimony as to counts 1 and 2 could have been corroborated by the victim's testimony in the unrelated William Meredith robbery (count 4) or by Randolph (Half Pint) Rankins testimony in respect to the shooting involved in counts 9 and 10. Once corroborated by unrelated evidence or testimony on other, unrelated counts, the court's failure properly to instruct the jury resulted in it deeming Jose Munoz' testimony reliable and sufficient for all other counts, including the charged murders.

Only relevant evidence may be admitted against a defendant at trial. (Evid. Code, § 350.) Relevant evidence is defined as any evidence having a tendency in reason to prove or disprove any disputed fact of consequence to determination of the action. (Evid. Code, § 210.) There can be little doubt that much of the evidence admitted against appellant at trial was irrelevant to one or more of the charges brought against him. For example, none of the acts relating to the Mans-Jones murders bore any relevance to the murder of Jose Aragon. The weapons used in each incident were different. Thus, the evidence of appellant's guilt on counts 1 and 2 was irrelevant to the issue of his guilt of the Aragon murder, since none of the Mans-Jones evidence tended to prove any disputed fact relating to the Aragon offense. Because all crimes were joined together in a single trial, all of this evidence was placed before the same jury. Under these circumstances, the only way to protect appellant's right to have the jury properly evaluate and consider Jose Munoz' accomplice statements and testimony and to render a constitutionally valid and reliable verdict on each count was for the trial court to provide the jury with an appropriate limiting instruction.

Section 1111 is designed to prevent the conviction upon suspect evidence. Hence, the lack of the requisite corroboration rendered the accomplice's testimony insufficient and suspect, and the court's failure to instruct the jury in this regard enhanced the possibility that appellant was unjustly convicted and sentenced to death. A capital conviction obtained under such circumstances violates the heightened reliability and due process requirements of the Eighth and Fourteenth

Amendments to the United States Constitution. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Appellant had and continues to have a constitutionally-protected liberty interest of "real substance" in section 1111, which provides that "no conviction shall be had" on uncorroborated accomplice testimony. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478). To uphold his conviction, when the state failed to proffer evidence sufficient to corroborate the accomplice testimony on each count, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the due process clause of the Fourteenth Amendment.]; *Hicks v. Oklahoma* (1980) 447 U.S. 343.) Furthermore, depriving appellant of the protection afforded under the principles discussed above is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the due process clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

C. The Circumstances of this Case Required a Sua Sponte Alteration of CALJIC No. 17.02 to Direct the Jury to Segregate the Accomplice Corroboration and Other Evidence Pertinent to Each Count or Incident

A trial court must, on its own motion and without request, instruct the jury

on all general principles of law relevant to the case. (*People v. Horton* (1969) 1 Cal.3d 444, 449.) The general principles of law governing a case are those principles closely and openly connected with the evidence adduced before the court which are necessary for the jury's proper consideration of the case. (*People v. Wilson* (1962) 66 Cal.2d 749, 759; see *People v. Marks* (1988) 45 Cal.3d 1335, 1345.)

Under the facts of this case, the trial court was obligated to provide an instruction to the jury that advised the jury of the proper manner for assessing both the sufficiency of the evidence of accomplice corroboration and appellant's guilt of each of the charged offenses. This instructional obligation could have been done readily and easily by altering CALJIC No. 17.02 to inform the jury that it should decide each count separately on the law and the evidence applicable to it, including accomplice corroboration. The trial court's failure to provide this instruction denied appellant due process and a fair trial.

This Court has previously addressed the necessity for sua sponte instructions regarding both the limited admissibility of evidence and the necessity for providing an instruction pursuant to CALJIC No. 17.02. An analysis of these cases is helpful for understanding why the trial court had a sua sponte duty in the present case to provide a proper instruction regarding the general principles of evidentiary use and accomplice corroboration rather than merely instructing the jury pursuant to the standard version of CALJIC No. 17.02.

This Court has held that as a general principle there is no duty for a trial

court to instruct sua sponte on the limited admissibility of evidence of past criminal conduct. (*People v. Collie* (1981) 30 Cal.3d 43, 63-64.) However, the Court has also noted that there may be an occasional extraordinary case where a trial court may need to provide such an instruction sua sponte in order to protect a defendant's fair trial rights. (*Id.* at p. 64.)

Even though this case does not involve other crimes evidence admitted pursuant to Evidence Code section 1101, the principles applicable to sua sponte instructions for that type of evidence offer guidance in this case. In both cases, limited admissibility of evidence in the section 1101 context requires a sua sponte limiting instruction. The same considerations apply in this case where CALJIC No. 17.02 alone was insufficient to apprise the jury of its duties as to how the evidence respective to each count and/or incident, including accomplice corroboration, should be utilized in its deliberations. (See *People v. Catlin* (2001) 26 Cal.4th 81, 153.) The same considerations militating in favor of a sua sponte instruction, as discussed by this Court in *People v. Collie, supra*, 30 Cal.3d at p. 64, existed at appellant's trial. Accomplice Jose Munoz' testimony formed the "dominant part" of the prosecution's evidence against appellant and was "so obviously important to the case that sua sponte instruction would be needed to protect" appellant -- even "from his counsel's inadvertence." (*Ibid.*)

Regarding the necessity for instructing on the principles reflected by CALJIC No. 17.02, this Court has similarly held that such an instruction need not be given sua sponte (see *People v. Beagle, supra,* 6 Cal.3d at p. 456, overruled on

other grounds in *People v. Castro* (1985) 38 Cal.3d 301), while leaving open the possibility that under some circumstances there may be a sua sponte obligation to provide such an instruction in a capital case. (See *People v. Morris* (1991) 53 Cal.3d 152, 215, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824.) Although the trial court provided instruction pursuant to CALJIC No. 17.02 in this case, an analysis of the cases where this Court found no error when a trial court failed to instruct sua sponte with CALJIC No. 17.02 sheds light on why the instruction given here represented an incomplete statement of the legal principles applicable to appellant's case.

The seminal case for the proposition that there is no sua sponte duty to instruct pursuant to CALJIC No. 17.02 is *People v. Beagle, supra,* 6 Cal.3d 441. *Beagle* specifically stated this proposition and cited to two cases: *People v. Holbrook* (1955) 45 Cal.2d 228 and *People v. Bias* (1959) 170 Cal.App.2d 502. However, current examination of both *Holbrook* and *Bias* reveals that the trial courts in both of those cases gave exactly the type of instruction appellant contends was warranted in this case.

In *Holbrook*, the issue on appeal was actually whether the trial court should have sua sponte given the jury a limiting instruction that it could not consider specific evidence pertaining to one count when it considered guilt of the other count. This Court held that the trial court had no sua sponte duty to highlight the particular evidence at issue since it had "properly instructed the jury that each count charged a separate offense and that the jury 'must consider the evidence

applicable to each offense as though it were the only accusation.'" (*People v. Holbrook*, *supra*, 45 Cal.2d at p. 233.) It was the Court's view that if the defendant desired a pinpoint instruction he should have requested one. Thus, rather than support *Beagle's* proposition that the trial court need not sua sponte instruct that the jury must decide each count solely on the law and evidence applicable to it, *Holbrook* supports the proposition that such an instruction is a correct statement of the law. Since the trial court in *Holbrook* gave such an instruction, the *Holbrook* Court never actually reached the point asserted in *Beagle*, but rather merely held that if a defendant desired a more specific instruction than one on the general principle of law, the defendant needed to specifically request it. All appellant is asserting here is that he was entitled generally to the same type of instruction that was found appropriate in *Holbrook* with additional reference to accomplice corroboration.

Bias is similar to *Holbrook.* The trial court in *Bias* also instructed the jury to consider only the evidence applicable to each count in arriving at its verdict. The appellant in *Bias* was actually challenging that instruction on appeal and the appellate court found that the instruction was proper. (*People v. Bias*, *supra*, 170 Cal.App.2d 502, 510.) Once again, the appellate court's decision in *Bias* hardly supports the notion that in an exceptional case this type of instruction need not be given sua sponte.

The final point to note regarding *Beagle* is that in *Beagle* all of the evidence was deemed to be relevant as to both counts before the jury. (*People v. Beagle*,

supra, 6 Cal.3d at p. 456.) Here, that is not the case. Jose Munoz provided the most crucial evidence against appellant on the murder counts, special circumstances, and all other non-capital crimes. His testimony was the linchpin of the prosecution's case against appellant, more so than any other testimony or evidence. Nevertheless, the law requires that Munoz' accomplice testimony had to be corroborated on a count-by-count, crime-by-crime, or incident-by-incident basis. However, some of the corroborating evidence was relevant only to particular counts and could not be used across-the board to corroborate all of his testimony, generally, or as a matter of law. Not even the broadest interpretation of the sufficiency or admissibility of accomplice testimony permits corroboration of accomplice testimony as to some acts or incidents to apply to all other counts or crimes.

Recently, this Court revisited the use of an instruction seemingly like the one appellant asserts should have been given in this case. In *People v. Catlin, supra,* 26 Cal.4th 81, the defendant requested an instruction that evidence should be considered only as it related to each offense charged as if that offense were the only accusation before the jury. This Court held that such an instruction was properly refused because the other-crimes evidence at issue was admissible as to both of the counts and because the evidence regarding the murder of one of the victims would have been cross-admissible at a trial of the murder of the other. This Court also found that to the extent the defendant was seeking to have the jury arrive at a verdict as to each count separately, the trial court's instruction pursuant

to CALJIC No. 17.02 protected that right. (*Id.* at p. 153.)

Catlin is instructive because it demonstrates that this Court does in fact recognize that there is a difference between the right of the jury to consider all of the admissible evidence as supportive of guilt on all of the counts and the procedural concept of arriving at separate verdicts for each count. In *Catlin*, the jury was told to reach its verdicts by considering each count separately, but there was no need for a separate instruction addressing the evidentiary issue because the other-crimes evidence was relevant to both counts and the evidence of each murder was cross-admissible as to the other murder. Once again, that is different from the instant case, where Jose Munoz' accomplice testimony was not completely cross-admissible absent some corroboration on a count-by-count or incident-by-incident basis. That Munoz' accomplice testimony was sufficiently corroborated as to count 3 did not signify that his testimony in respect to counts 1 and 2 separately was also admissible absent the requisite corroboration as to those particular counts as well.

An examination of the cases, both pre-*Beagle* and post-*Beagle*, which address situations where it may have been appropriate for the trial court to instruct in a manner which appellant claims was necessary here, leads to the conclusion that the statement in *Beagle* that such an instruction is not necessary sua sponte is without support. A more appropriate phrasing might be that it is unnecessary to provide such an instruction where the evidence at issue is Evidence Code section 1101 evidence which is relevant to all of the counts or where all of the evidence is

cross-admissible. In this case, section 1101 evidence is not involved, and not all of Munoz' accomplice testimony was generally admissible in the absence of corroboration on a count-by-count or incident-by-incident basis. Thus, the limiting instruction should have been given.

The United States Supreme Court has recognized that when a defendant is being tried for multiple offenses, and is thus subject to a situation where evidence relating to one crime may influence the jury as to a totally different charge, the defendant is protected because the jury is given an instruction limiting the evidence to its proper function. (*Spencer v. Texas* (1967) 385 U.S. 554, 562.) This is what ensures that the defendant is receiving due process and a fair trial. A sua sponte instruction was necessary here to protect appellant's right to due process and a fair trial.

The situation here is also analogous to that in *People v. Castillo* (1997) 16 Cal.4th 1089, where the Court recognized that misleading instructions "implicate the court's duty to give legally correct instructions. Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*Id.* at p.1015.) Here, having protected one aspect of appellant's rights with respect to accomplice corroboration, the trial court needed to go further to ensure that Jose Munoz' crucially important accomplice testimony be evidentially corroborated on each and every count charged and not misused or misapplied to find appellant guilty of the offenses for which there was no corroboration.

A defendant is entitled to a reversal when a conviction is not based on admissible evidence submitted under proper instruction. (*People v. Houts* (1978) 86 Cal.App.3d 1012, 1019.) As to each of the ten incidents involved in this case, there was an overwhelming amount of accomplice testimony that had to be corroborated before it could properly be considered as evidence of appellant's guilt. The jury was nevertheless permitted to consider appellant's guilt in the absence of an instruction which informed the jurors that they could not consider Jose Munoz' testimony as to appellant's guilt on particular counts unless his testimony on those counts had first been sufficiently corroborated by separate evidence of appellant's guilt on those counts. Absent appropriate instruction, appellant was denied due process and a fair trial on each affected count.

D. The Trial Court's Failure To Provide a Proper Instruction to the Jury Against Aggregating Accomplice Corroboration and Other Evidence of Guilt on Each Count Impermissibly Lessened the State's Burden of Proof

For a defendant to receive a constitutionally-acceptable trial the jury must be correctly instructed on the defendant's presumption of innocence and the meaning of reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) In this case, the jury was instructed pursuant to CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This

> presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth
> of the charge.
>
> (6 CT 1409; see also 45 RT 6817.)

The combination of this instruction with the trial court's failure to provide a proper instruction regarding the manner in which the jury was to assess the sufficiency of accomplice corroboration evidence and to refrain from aggregating evidence of guilt stemming from unrelated incidents, generally, resulted in a lowering of the state's burden of proof below a constitutionally acceptable level.

True, the jury was properly instructed that before it could render a conviction it needed to find appellant guilty beyond a reasonable doubt. However, the jury was also instructed in the same instruction that it could arrive at this determination after an "entire comparison and consideration of all of the evidence." (6 CT 1409; 45 RT 6817.) This instruction, coupled with the court's failure to instruct the jury that Jose Munoz' accomplice testimony on each count had to be corroborated independent of the evidence on any other offenses, severely prejudiced appellant. Absent such an instruction, the jury would not have understood that guilt on any single charge could only be appropriately found by

considering the evidence which related to that charge and only that charge. Without such an instruction, the jury would naturally aggregate all of the corroborating evidence to find appellant guilty of all offenses, irrespective of the legal sufficiency of the evidence on any particular count. The error thus enabled the jury to render a guilty verdict on any one count without performing the constitutionally-mandated function of determining whether appellant's guilt independently had been proven beyond a reasonable doubt with respect to each and every count. As a consequence, the state's burden of proof was impermissibly lessened.

The recent case of *People v. Armstead* (2002) 102 Cal.App.4th 784 demonstrates that appellant's claim of error rests on well-established legal principles. In *Armstead,* the defendant was tried on multiple charges before a single jury. During deliberations in that case, the jury sent out the following note: "CALJIC [No.] 2.90 includes the phrase "consideration of all the evidence" in the second paragraph. Does this phrase mean, (1) all of the evidence presented throughout the trial, or (2) all of the evidence presented per count? In other words, do we base our judgment on each count based solely on the evidence related specifically to the exact robbery and/or victim? (*Id.* at p. 790.) This question by the jury brings the issue into sharp focus.

The *Armstead* court provided an answer which told the jury it could consider evidence of the other charged crimes in deciding each count, but that such consideration was limited to showing identity, motive or intent. (*Id.* at pp.

790-791.) Because this issue was not litigated during the course of the trial, the Court of Appeal found that the trial court's answer constituted a due process violation. (*Id.* at p. 795.) Nevertheless, as the juror note in *Armstead* reveals, appellant's concern regarding the jury's improper aggregation of evidence wholly irrelevant to or insufficient to prove certain charges is well-founded.

The law is clear that barring its proper introduction under some theory, such as other-crimes evidence, a jury should not be permitted to convict a defendant of a crime alleged in one count by using accomplice corroborating or other evidence relevant solely to another count. That is exactly what happened here. The principle of law that our legal system does not countenance a conviction under these circumstances is one that is essential to a defendant's right to a fair trial. Particularly in a capital case, with its heightened reliability and due process requirements, the trial court's failure sua sponte to instruct the jury in accordance with this principle violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and prejudiced appellant's rights.

The impairment of the burden of proof in this case and the violation of appellant's rights to procedural and substantive due process of law, fair trial, and to a reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, constituted fundamental structural defects that rendered the guilt, and derivatively the penalty, proceedings unfair regardless of the evidence. (See *People v. Flood* (1998) 18 Cal.4th 470, 489-490; *People v. Wims* (1995) 10 Cal.4th 293, 312-314.) These

rights obviously involve "basic protections" to which both this Court (*People v. Wims, supra*, 10 Cal.4th at pp. 312-313) and the United States Supreme Court (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 281-282) have referred, the violation of which constitutes a structural defect in the course and conduct of appellant's trial. As elsewhere stressed by this Court in *People v. Cahill* (1993) 5 Cal.4th 479, 493, some federal constitutional errors are not subject to the ordinary or generally applicable harmless error analysis and may require reversal of the judgment "notwithstanding the strength of the evidence contained in the record in a particular case." (*Id.* at p. 493.)

Even if the trial court's federal constitutional errors are not deemed prejudicial per se, they must still be deemed prejudicial under the alternatively applicable standard of review. Under the Fourteenth Amendment to the United States Constitution, prejudice is presumed unless the government establishes that the errors were harmless beyond a reasonable doubt. (See, e.g., *Rose v. Clark* (1986) 478 U.S. 570, 576-579.) Because the trial court erred in violation of appellant's rights to due process, fair trial, and trial by a fair and impartial jury, and to a reliable determination of guilt (and penalty), the proper standard of review (if the error is not otherwise prejudicial per se) is the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. v. California* (1967) 368 U.S. 18, 24), not the harmless error standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 for assessing the prejudicial effect of state error. Because the trial court's failure to instruct on the appropriate

principles of law prevented appellant from receiving a fair trial and impacted his right to due process of law, the prosecution bears the burden of demonstrating beyond a reasonable doubt that the error was harmless. (*Chapman v. California, supra,* 368 U.S. at p. 24.) Under the facts of this case, the state cannot meet that burden; there is no way to determine on which accomplice corroborating testimony or evidence the jury may have relied on any particular count. As a consequence, the judgment of conviction on all counts and the penalty of death must be reversed.

VII

THE USE OF CALJIC 2.90 IN CONJUNCTION WITH OTHER JURY INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, UNANIMOUS VERDICT, AND DUE PROCESS OF LAW, AND RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

The fundamental federal constitutional guarantee of due process of law embodied in the Fourteenth Amendment to the United States Constitution protects every accused, including appellant, 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; *accord*, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 433 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].)

Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

In this case, the trial court gave a series of standard CALJIC instructions, beginning with No. 2.90, which separately and in the aggregate violated the above principles and enabled the jury to convict appellant on a lesser standard than is required under both the state and federal constitutions. Because the instructions violated the United States Constitution in a manner that never can be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

B. CALJIC No. 2.90 Erroneously Implied that Reasonable Doubt Requires Jurors to Articulate Reason for Their Doubt

The trial court instructed the jury in the language of CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People [the Deputy District Attorney Mr. West][140] the burden of proving him guilty beyond a reasonable doubt.

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[140]/ Bracketed language was added by the court to the standard jury instruction. (See 45 RT 6817.)

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.
>
> (6 CT 1409; 45 RT 6817.)

The reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*In re Winship, supra,* 397 U.S. at p. 363; *see also Cage v. Louisiana, supra,*, 498 U.S. at p. 40. "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.'" (*Id.* at p. 40.) According to the High Court, unique and invaluable interests are at stake when someone is formally charged with a crime. Defendants stand to lose their liberty if convicted, and to suffer the social stigma that only criminal conviction can bring. (*In re Winship, supra*, 397 U.S. at p. 363.) In the High Court's view, the reasonable doubt standard, like the presumption of innocence, was essential to protect innocent persons from erroneous findings of guilt. (*Ibid.*)

An essential conceptual underpinning of the presumption of innocence is that the accused bears no burden of proof whatsoever. It is not the obligation of the accused to "raise" or "create" any specified threshold of doubt. (*See People v. Loggins*, (1973) 23 Cal.App.3d 597, 601-604.). As explained, for example, in *People v. Frazier* (2005) 128 Cal.App.4th 807, 819 [quoting *Loggins*], "California

law has 'long barred instructions placing upon the defense any burden of persuasion as to the elements of the crime.'" Nor is the jury required to "find" any particular degree or amount of doubt before it may acquit. Rather, the jurors must acquit under all circumstances unless they find that the prosecution has proven every fact essential to conviction beyond a reasonable doubt.

Accordingly, it is constitutionally erroneous expressly to require the jurors to articulate concrete reasons for their doubt. (*People v. Antommarchi* (N.Y. 1992) 80 N.Y.2d 247, 252, 604 N.E.2d 95, 98, 590 N.Y.S.2d 33, 36). When jurors are required to articulate reasons for acquitting "[t]he burden ... is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt." *State v. Cohen* (1899) 108 Iowa 208, 78 N.W. 857, 858). In short, "jurors are not bound to give reasons to others for the conclusion reached." (*Id.* at p. 858.)

In the present case, the jurors were not expressly instructed that they must articulate reason and logic for their doubt. However, the instructional language embodied in CALJIC No. 2.90 implied as much. By requiring more than "mere possible or imaginary doubt" the instruction suggested to the jurors that the reason and logic for their doubt should first be articulated and then evaluated against the "mere possible or imaginary" standard. In the context of the instruction as a whole, and for the reasons additionally discussed, *infra*, as reasonably interpreted by the jurors (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), CALJIC No. 2.90 impermissibly required an articulation of their doubts before such doubts could be considered sufficient to acquit, contrary to due process and jury trial principles

embodied in the Fifth, Sixth, and Eighth, and Fourteenth Amendments to the United States Constitution.

C. CALJIC 2.90 Unconstitutionally Admonished the Jury that a Possible Doubt Is Not a Reasonable Doubt

The second paragraph of CALJIC No. 2.90 admonished the jury that "reasonable doubt" is " is not a mere possible doubt ... ." (6 CT 1409; 45 RT 6817.) This instructional admonition was unconstitutional, because it failed adequately to limit the scope of possible doubt. Unlike an imaginary doubt, a possible doubt may be based on fact. When driving on a two-lane road, for example, reasonable drivers do not pass on a blind curve because it is "possible" that a car may be approaching in the other lane. Cautious investors regularly forgo higher returns and opt instead for the lower return of an insured bank account because it is "possible" they may lose principal in a more lucrative but riskier investment. In other words, merely because a doubt is only possible does not make it unreasonable or insignificant.

Contrary to the language of CALJIC No. 2.90, the question of reasonable doubt should be measured by reasonable reliance rather than possibility. If the doubt is sufficient to cause a juror to reasonably rely on it in making important decisions then the doubt is reasonable even if it is merely possible. (*See, e.g., Victor v. Nebraska, supra,* 511 U.S. at pp. 20-21 [hesitate to act language "gives a commonsense benchmark for just how substantial such a [reasonable] doubt must be]").

This formulation of reasonable doubt was approved in *United States v. Wilson* (1914) 232 U.S. 563, 570, and has since been endorsed by a number of state and federal courts. (*See, e.g., Holland v. United States* (1954) 348 U.S. 121,140; *Hilbish v. State* (Alaska App. 1995) 891 P.2d 841, 850-851.) For example, the Eighth Circuit Court of Appeals clarifies "possible doubt" by relating the concept to the notion of reliance: A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. (See *8th Circuit Model Jury Instructions -- Criminal* 3.11 (Reasonable Doubt) (2000); *see also* Kevin F. O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions*, § 12:10 (Presumption of Innocence, Burden of Proof, and Reasonable Doubt) (West, 5th ed. 2000).

Alternatively, it may be said that reasonable doubt does not mean a captious or speculative doubt, or a doubt from mere whim, caprice, or groundless conjecture. In the present case, however, reasonable doubt was not so defined. Instead, the jury was admonished that a doubt is not reasonable if it is "merely possible." Such a definition unconstitutionally allowed the jurors to reject a doubt as unreasonable even if they would reasonably have relied on a similar degree of doubt in their own important affairs.

Moreover, by stating that mere possible doubt was unreasonable, the instruction unconstitutionally implied some obligation on the part of appellant accused to raise a probable doubt as to his guilt. It is unconstitutional to require the accused to assume any burden of proof as to reasonable doubt. (*In re Winship, supra,* 397 U.S. at p. 364.)

D. CALJIC No. 2.90 Was Deficient and Misleading by Failing Affirmatively to Instruct that Appellant Had No Obligation to Present or Refute Evidence

The instructional language defining and explaining the presumption of innocence was the first paragraph of CALJIC 2.90 which provided as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the prosecution the burden of proving him guilty beyond a reasonable doubt." (6 CT 1409; 45 RT 6817.) CALJIC No. 2.90 omitted one of the most fundamental underpinnings of the presumption of innocence, *i.e.*, that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of other instructions and the likely interpretation given to them by the jury, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt in order for appellant to attain acquittal on any of the 19 counts with which he was charged.

The essence of the presumption of innocence is that the defense has no

obligation to present evidence, refute the prosecution evidence or to prove or disprove any fact. (*In re Winship, supra,* 397 U.S. 358; *see People v. Hill* (1998) 17 Cal.4th 800, 831 ["to the extent (prosecution) was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence]; *see also State v. Miller* (1966) 197 W.Va. 588, 610, 476 S.E.2d 535, 557 [if requested, court must instruct that defendant has no obligation to offer evidence]; *United States v. Maccini* (1st Cir. 1983) 721 F.2d 840, 843; Federal Judicial Center, *Pattern Criminal Jury Instructions*, 22 (1988) ["[A] defendant has an absolute right not to ... offer evidence"]).

As the judge told the jury in *Maccini*:

> I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. That is, the burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial.
>
> The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. In every case, and I have no doubt in this case as well, the defendant will be presenting evidence by way of cross-examination of [prosecution] witnesses. The defendant relies upon evidence elicited by cross-examination. So that the opportunity that [defendant] will have, as the defendant in every case has, to bring out certain facts by way of cross-examination and by way of argument and

> analysis to the jury, does not in any way imply a necessity on the part of the defendant to produce any evidence. That's fundamental. There is no need of the defendant to produce any evidence. There is no need in law for him to take advantage of the opportunity. He doesn't have to put a single question on cross-examination if counsel decides not to do so. The bottom line is that the burden is on the [prosecution] to prove guilt beyond a reasonable doubt. There is no burden on the defendant to prove his innocence, and there's no burden on the defendant to come forward with a single item of evidence or testimony.
>
> (*United States v. Maccini, supra,* 721 F.2d at p. 843.)

An instruction explaining that the defendant has no obligation to produce evidence is especially important in cases where the defense does present affirmative evidence because the jurors will be naturally inclined to view their duty as deciding whether the defense evidence has proved or disproved the facts in issue. Of course, in appellant's case no affirmative defense was presented.

In light of the instructions as a whole (CALJIC No. 1.01) and presumed by law to be faithfully followed by the jury (*People v. Hardy* (1992) 2 Cal.4th 86, 208; *People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *Francis v. Franklin* (1985) 471 U.S. 307, 324-325, fn. 9 [High Court presumed jury followed language of instructions given]), it is reasonably likely that jurors concluded that appellant had the burden of producing sufficient evidence to raise a reasonable doubt of his guilt. The following instructions given by the trial court, in addition

to CALJIC No. 2.90, virtually assured this outcome.

First, the trial court instructed the jury in the language of CALJIC No. 1.00, which described the duties of jurors to "determine the facts from the evidence received in the trial" and required the jury to "consider and weigh the evidence" in "reach[ing] a just verdict. (6 CT 1376; 45 RT 6804-6805.) This initial instruction -- the first instruction read to the jury -- explicitly imposed a weighing process on the jury which would reasonably be interpreted as the duty to consider the evidence presented by both the prosecution and defense to determine what happened. Such a weighing process, however, was at variance with presumption of innocence by which the jury was not bound to determine "ultimate truth" but rather to determine exclusively whether the prosecution had proved guilt beyond a reasonable doubt. Consequently, the jury's fact-finding and deliberative functions as described by CALJIC No. 1.00 were misleading and at odds with CALJIC No. 2.90.

Second, the trial court instructed the jury in the language of CALJIC No. 2.11 which provided as follows: "Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence." (6 CT 1389; 45 RT 6809-6810.) This "missing witness" instruction exacerbated the deficient presumption of innocence instruction by implying that appellant had the obligation to present evidence. By expressly telling the jury that neither side is required to

"call ... all" potential witnesses to an event or "produce all objects or documents," the instruction suggested that the production of some evidence by both sides was required. (*See e.g., Commonwealth v. Bird* (1976) 240 Pa.Super. 587, 590, 361 A.2d 737, 739 [reversible error to instruct jury that it could draw inference against defendant for failure to call bystander as witness even though the instruction also permitted the jury to draw an inference against the prosecution for its failure to call the same witness]; *State v. Mains* (1983) 295 Or. 640, 647, 669 P.2d 1112, 1117.)

Third, the trial court instructed the jury on circumstantial evidence in the language of CALJIC No. 2.01. This circumstantial evidence instruction exacerbated the deficiencies of the presumption of innocence instruction by stating that each fact which is essential to complete a set of circumstances must be proved beyond a reasonable doubt. While the second paragraph of CALJIC No. 2.01 referred to establishing the defendant's guilt and addressed only the prosecution's evidence, the instruction as a whole did nothing to explain how the defense evidence should be considered in light of the prosecution's burden.

Fourth, the trial court instructed the jury in the language of CALJIC No. 2.60 on the impact of the defendant not testifying and that no inference of guilt may be drawn: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. ..." (6 CT 1400; 45 RT 6813.) This instruction was limited explicitly to the defendant's failure to testify. It did not apply to the failure

to present evidence. Hence, the instruction reinforced the misconception that appellant had the burden of producing some evidence to raise a reasonable doubt of his innocence on the various counts with which he was charged.

Fifth, the trial court instructed the jury in the language of CALJIC No. 2.61 as follows: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element." (6 CT 1410; 45 RT 6813-6814.) However, by limiting its applicability to the decision whether or not to testify and by admonishing the jury that "no lack of testimony on defendant's part will supply a failure of proof," the instruction, by implication, did not apply at all to appellant's failure to present evidence generally or the implication that the burden of proof might thereby be affected as a consequence.

Sixth, the trial court instructed the jury in the language of CALJIC No. 2.21.2 that a "witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others" and that the testimony of a witness who has testified falsely as to a material point may be totally rejected "unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (6 CT 1395; 45 RT 6812.) By referring to the "probability of truth," this instruction conveyed the implication that appellant was required to

produce evidence to raise a reasonable doubt of his innocence in order to be acquitted. When a generally applicable instruction is made specifically applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. In weighing conflicting testimony and in determining an issue of fact, the jury was further instructed in the language of CALJIC No. 2.22 to evaluate the "convincing force" of the evidence, again implying a lesser standard of proof. (See 6 CT 1396; 45 RT 6812.)

Finally, the jury was instructed in the language of CALJIC No. 2.27 which provided as follows: "You should give the uncorroborated testimony of a single witness whatever weight you think it deserved. However, testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration, is sufficient for the proof of that fact." By specifically referring to any fact required to be established by the prosecution," this instruction impermissibly suggested by implication that some facts were required to be proven by the defense. Hence, the instruction contributed to the misleading message of the instructions as a whole that the defense has a burden as to affirmative defense theories to raise a reasonable doubt. In sum, the instructions as a whole perpetrated the misconception that the defense had the burden of raising a reasonable doubt.

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed

instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand -- in the face of so many instructions permitting conviction upon a lesser showing -- that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in Subsection A of this argument, *supra*.

E. CALJIC 2.90 Failed to Inform the Jury that the Presumption of Innocence Continues Throughout the Entire Trial, Including Deliberations

As given by the trial court, CALJIC 2.90 instructed the jury in pertinent part, as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved ... ." (6 CT 1409; 45 RT 6817.) Use of the term "until" in this instruction undermined the prosecution's burden of proof. Use of the word "until" is less clear and definitive than "unless." That is, "until" implies that the proof will be forthcoming, while "unless" implies that sufficient proof might not ever be presented.

In apparent recognition of how use of the term "until" fails to comport with *Winship* and thus risks misleading the jurors, other standard pattern instructions throughout the nation use "unless" or "unless and until." (*See, e.g., Idaho Criminal*

Jury Instructions ICJI No. 1501 ("unless"); Oklahoma Uniform Jury Instruction Crim (2nd ed.) No. 1 (same); *State v. Hutchinson* (Tenn. 1994) 898 S.W.2d 161, 172 [same]; Criminal Jury Instructions--New York CJI (New York) (lst ed. 1983) No. 3.05 ["unless and until"]; Ky. Rev. Stat. § 532.025 [same]; *Criminal Jury Instructions For The District of Columbia*, Instr. 1.03 (Bar Association of the District of Columbia, 4th ed. 1993) [same]; Uniform Criminal Jury Instructions (Oregon) No. 1006 [same]; 1st Circuit Model Instructions Criminal No. 1.01 [same]; Eighth Circuit Model Instructions, Criminal No. 1.01 [same].

It is also well recognized that the presumption of innocence continues throughout the entire trial and applies to every stage, including deliberations. (See *Clarke v. Commonwealth* (1932) 159 Va. 908, 919, 166 S.E. 541, 545-46 ; *see also State v. Goff* (1980) 166 W.Va. 47, 55, 272 S.E.2d 457, 463 [burden of proof never shifts to the defendant]). Hence, it is improper to give the jury the impression that the presumption of innocence continues "until" the jury, in its discretion, decides that it should end. (*See United States v. Payne* (9th Cir. 1990) 944 F.2d 1458, 1462-63; *see also People v. Johnson* (1972) 4 Ill.App.3d 539, 541, 281 N.E.2d 451, 453; *People v. Attard* (1973) 346 N.Y.S.2d 851; S*tate v. Tharp* (1980) 27 Wash.App. 198, 211, 616 P.2d 693, 700); *Washington Pattern Jury Instructions -- Criminal*, WPIC 1.01 (Advance Oral Instruction-Introductory) comment (West, 2nd ed. 1994) [words "during your deliberations" were added to instruction "to avoid any suggestion that the presumption could be overcome before all the evidence is in]".)

"It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, 'until such time, if at all, as it is overcome by credible evidence' is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused." (*Wisconsin Jury Instructions- Criminal*, *WIS-JI-Criminal* 140 [Burden of Proof and Presumption of Innocence] comment p. 4 (University of Wisconsin Law School, 2000).

Here, as given in the present case, CALJIC 2.90 was deficient because it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations. The instruction was deficient because it implied that the prosecution would meet its burden of proof. Finally, the instruction also failed to assure that the presumption of innocence would remain in place throughout the trial and during deliberations.

F. The Jury Should Have Been Instructed that a Conflict in the Evidence and/or a Lack of Evidence Could Form the Basis of Reasonable Doubt as to Guilt

As noted by the Court of Appeal in *Estate of Obernolte* (1979) 91 Cal.App.3d 124, 129, equal probability does not satisfy the burden of proof. CALJIC 2.90 was thus incomplete and misleading because it failed expressly to inform the jury that reasonable doubt or the failure of proof could be based on a

conflict in the evidence and a lack of evidence, or both.

Reasonable doubt may arise from a conflict in the evidence, lack of evidence, or a combination of the two. *See Georgia Suggested Pattern Jury Instructions - Criminal Cases* part 2 (D) p. 7 (Instruction D) (Carl Vinson Institute of Government, University of Georgia, 2nd ed. 2000). This is so because two equally probable conflicting inferences do not overcome a burden of proof. When conflicting inferences are equally probable or, in other words, when the evidence is in equipoise, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42 ; *see also Rexall v. Nihill* (9th Cir. 1960) 276 F.2d 637, 644; *Reliance Ins. v. McGrath* (N.D. Cal. 1987) 671 F.Supp. 669, 675.)

G. The Court Should Reconsider its Prior Rulings Upholding the Defective Instructions

Although CALJIC No. 2.90, in conjunction with the other instructions challenged above, *supra*, violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has in the past rejected various or other constitutional challenges to the burden of proof instruction (*see, e.g., People v. Maury* (2003) 30 Cal.4th 342, 428-429; *People v. Samuels* (2005) 36 Cal.4th 96, 131); to former or current language (*see, e.g., People v. Robinson* (2005) 37 Cal.4th 592, 637 [rejecting argument that phrases such as "moral evidence" and "moral certainty" are incomprehensible to modern juries]; *People v. Monterroso* (2004) 34 Cal.4th 743, 766); and to assertedly unconstitutional combinations of

CALJIC 2.90 and other standard instructions. (*See, e.g.*, *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Crew* (2003) 31 Cal.4th 822, 848 [rejecting challenge to CALJIC Nos. 1.00, 2.01, 2.51, and 2.52 which referred to "guilt or innocence," concluding that "innocence" means evidence less than that required to establish guilt, not that defendant must establish innocence or that the prosecution has any burden other than proof beyond a reasonable doubt]; *People v. Robinson, supr*a, 37 Cal.4th at p. 637 [rejecting joint challenge to CALJIC Nos. 2.01 and 8.83]; *People v. Jennings* (1991) 53 Cal.3d 334, 385-386 [rejecting joint challenge to CALJIC Nos. 2.90 and 2.01].)

While recognizing the shortcomings of some of the instructions, this Court has consistently held that the instructions must be viewed "as a whole," rather than singly, and that CALJIC No. 2.90 is but one "of a panoply of other instructions that guided the jury's consideration of the evidence." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101.) While repeatedly emphasizing that the jury instructions as a whole plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt, the Court has consistently concluded that jurors are not misled when they are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (*See People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) As this Court itself has repeatedly stressed, the question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72); and, contrary to the import of the Court's prior decisions (see, e.g., *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 101), there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale -- that the flawed instructions were "saved" by the language of CALJIC No. 2.90 -- requires reconsideration. (*See People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *see generally Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a

misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one -- rather than vice-versa --- the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard at least six separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set out in former CALJIC No. 2.90.

This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943 [citations omitted].) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

H. The Errors Violated the United States and California Constitutions; the Errors Were Prejudicial Per Se

For all of the above reasons CALJIC 2.90 and related instructions failed properly to instruct the jury on the prosecution's burden of proof. The failure properly to instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state and federal constitutional rights to due process and fair trial by jury. (U.S. Const., 6th and 14th Amendments; Cal. Const. art. I, §§ 1, 7, 15, 16 & 17; *In re Winship*, supra, 397 U.S. 358; *see also Sullivan v. Louisiana, supra,* 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1, 19; *Cage v. Louisiana, supra,* 498 U.S. 39; *Jackson v. Virginia*, *supra*, 443 U.S. 307.

Moreover, the error also violated the due process and cruel and unusual punishment clauses of the federal constitution which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (U.S. Const., 8th and 14th Amendments.; *Beck v. Alabama* (1980) 447 U.S. 625, 627-46 (1980); *see also Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Furthermore, verdict reliability is also required by the due process clause of the federal Constitution. (U.S. Const, 14th. Amendment; *White v. Illinois* (1992) 502 U.S. 346, 363-364; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.) Because appellant was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state Constitution and Evidence Code, including

sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300; *see also People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.

The giving of an instruction which dilutes the standard of proof for conviction is reversible error per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of the system of criminal trials and deprives the criminal defendant of the right to be convicted only upon a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan* v. *Louisiana, supra,* 508 U.S. at pp. 280-282.) This Court has reached a similar conclusion. (*People v. Vann* (1974) 12 Cal.3d 220, 225-226. Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution can demonstrate beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California, supra,* 386 U.S. at 24; *see also In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People* v. *Williams* (1971) 22 Cal.App.3d 34, 58-59.) Given the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under *Chapman*.

B. Penalty Phase Issues and Assignments of Error

VIII

APPELLANT'S JURY INCLUDED JURORS WITH ACTUAL PENALTY BIAS IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY IMPARTIAL JURY, DUE PROCESS, AND A TO RELIABLE ETERMINATION OF PENALTY GUARANTEED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; THE CONSTITUTIONAL VIOLATIONS AS TO PENALTY ARE REVERSIBLE PER SE

A criminal defendant is entitled to a fair trial and impartial jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the California Constitution. (See, e.g. *Morgan v. Illinois, supra,* 504 U.S. at p. 727 [and authorities cited therein]; *People v. Wheeler, supra,* 22 Cal.3d at p. 272.) Of course, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-522, fn. 20.) Hence, when the "pro-life" side of the spectrum is excluded, the state "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Id.* at pp. 520-521.)

Where a biased juror has actually been seated, the defendant has been deprived of his fundamental right to trial by a fair and impartial jury. (*See, e.g., Morgan v. Illinois, supra,* 504 U.S. at p. 729; *People v. Weaver* (2001) 26 Cal.4th 876, 910; *People v. Boyette* (2002) 29 Cal.4th 381, 416; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517.) Without qualification, the United States Supreme Court has

unambiguously declared that where such a violation has occurred and "the death sentence is imposed, the State is disentitled to execute the sentence." *(Morgan v. Illinois, supra*, 504 U.S. at p. 729; *see also United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316 [if trial court's denial of challenge for cause "result(s) in the seating of any juror who should have been dismissed for cause . . . that circumstance would require reversal"].)

In the present case, at least eight actually biased jurors deliberated appellant's fate and therefore his penalty must be reversed. This error does not concern the process by which the biased jurors were seated. As such, this error does not lay the blame upon the court or trial counsel for failing to conduct adequate voir dire. Instead, the penalty must be reversed because biased jurors were seated on appellant's jury.

In *People v. Boyette, supra*, 29 Cal.4th 318, this Court held that a juror who gave answers strikingly similar to many jurors' answers in this case should have been excluded for cause from a capital jury under the *Witt* standard. (See *Wainwright v. Witt* (1985) 469 U.S. 412, 424.) In *Boyette*, the prospective juror indicated both that he was strongly in favor of the death penalty and that he was "somewhat pro-death." (*Id.* at pp. 417-418.) He initially stated that the death penalty should automatically be imposed on defendants convicted of multiple murder. (*Ibid.*) Like all of the biased jurors in the present case, the prospective juror in *Boyette* agreed that he could vote for life if it was appropriate, but that he would "probably have to be convinced" to vote for life and "would be more

inclined to go with the death penalty." (*Ibid.*) He "equivocated when asked whether he would exclude consideration of a life term, saying, 'Never having been in that situation, I have no idea.'" (*Ibid.*) Finally, he stated that he could not "assume" that "life without parole means what it says." (*Ibid.*) The trial court denied the defendant's challenge for cause under *Witt*.

This Court held that the juror was biased and therefore the trial court erred in denying a defense challenge for cause: "This was not a case in which the juror gave equivocal answers: He was strongly in favor of the death penalty and was not shy about expressing that view. He indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. . . ." (*People v. Boyette, supra,* 29 Cal.4th at p. 419.)

In the present case, the responses of Juror Nos. 1, 2, 4, 6, 8, 9, 11, and 14 -- all seated and regular jurors -- were remarkably similar or equivalent to the biased juror's responses in *Boyette*. They did not simply give equivocal answers but, as in *Boyette*, were strongly in favor of the death penalty and should have been dismissed for cause. For example, Juror No. 1 believed in the death penalty. She stated too many condemned prisoners were never executed. (3 Supp CT [Redacted Juror Questionnaires] 653; see also 25 RT 4030 ["so many on death row for 20, 30 years and nothing happens"].) Juror No. 1 indicated that she would only vote for life imprisonment without the possibility of parole if the killing had been

accidental or unintentional and the defendant did not "fit the normal criminal mode." (3 Supp CT [Redacted Juror Questionnaires] 660.) Juror No. 1 was dubious of mitigating evidence. (3 Supp CT [Redacted Juror Questionnaires] 659.) Indeed, Juror No. 1 indicated she would not consider mitigating evidence, stating that if the defendant had been involved in a death, "they should pay for the crime." (3 Supp CT [Redacted Juror Questionnaires] 660.) Juror No. 1 suggested that she would virtually have "no choice" on imposing the death penalty under certain circumstances. (25 RT 4031.)

Juror No. 2 believed in the death penalty and that it was used too seldom. In her opinion, a lot of people were sentenced to death but were still alive. (5 Supp CT [Redacted Juror Questionnaires] 1208; see also 23 RT 3821.) Juror No. 2 readily agreed that she could vote to have appellant executed. (23 RT 3829.) Juror No. 2 did not express any reluctance to impose the death penalty even when the defendant did not actually kill anyone but simply may have influenced another to kill: "he might as well have been the one doing the murder." (23 RT 3855.) Juror No. 2 equated reckless indifference with intent to kill. (23 RT 3855-3856.) Juror No. 2 was unsure whether background information could ever be relevant to penalty. (5 Supp CT [Redacted Juror Questionnaires] 1208.)

Juror No. 4 strongly believed in the death penalty. She stated that its use might make people think twice, presumably about committing crimes. She believed that the death penalty was too seldom used. (26 RT 4249.) Juror No. 4 did not believe that life imprisonment without possibility of parole was

sufficiently harsh as compared to the death penalty. She thought that too many multiple murderers had gotten off without the death penalty and had gotten off to commit more murders. (26 RT 4250.) With particular relevance to the present case, Juror No. 4 believed that the death penalty was used too seldom and that such multiple murderers were permitted to "live out their lives after taking several others." (3 Supp CT [Redacted Juror Questionnaires] 764; see also 26 RT 4250.) Juror No. 4 also indicated that her strong views on the death penalty were based on the Bible's injunction of an "eye for an eye." (3 Supp CT [Redacted Juror Questionnaires] 765.)

Juror No. 6 had worked in law enforcement. (26 RT 4263.) She lost her brother in a homicide -- "Hemet's first triple murder" -- this case obviously was also a triple murder. (3 Supp CT [Redacted Juror Questionnaires] 822, 826.) Indeed, Juror No. 6 mentioned that two brothers (as here) were responsible for her brother's murder. (3 Supp CT [Redacted Juror Questionnaires] 832.)

Juror No. 6 manifested bias and prejudice against appellant simply because he had been arrested; indeed, according to Juror No. 6, appellant was probably guilty because he had been arrested and was in custody. (3 Supp CT [Redacted Juror Questionnaires] 834.) Juror No. 6 favored the death penalty and expressed "no problem" with it, noting as well that the death penalty was used too seldom: "we don't use it often in this state -- it takes years to happen." (3 Supp CT [Redacted Juror Questionnaires] 838.) Juror No. 6 indicated that her views in support of the death penalty were deeply rooted and of long duration. (26 RT

4263-4264.) As to whether Juror No. 6 was willing to consider appellant's background on considering penalty, she indicated, by her answer, that background criminal history was possibly relevant but probably not his upbringing. (See (3 Supp CT [Redacted Juror Questionnaires] 844.) Interrupting and without waiting for the prosecutor to complete his question, Juror No. 6 emphatically stated that she could reach a death verdict. (26 RT 4283.)

Juror No. 8 expressed total opposition to drug abuse. (4 Supp CT [Redacted Juror Questionnaires] 939.) In respect to the death penalty, Juror No. 8 stated that while it was a "shame we have to have the death penalty," if one of her loved ones had been killed and the person responsible were found guilty, she would probably impose the death penalty. (4 Supp CT [Redacted Juror Questionnaires] 949.) Indeed, Juror No. 8 indicated that she would automatically vote for the death penalty if someone went out and shot another person intentionally.[141] (24 RT 3899.) Here, appellant was alleged to have been involved in three intentional killings and several other intentional shootings.

Juror No. 9 believed in the death penalty for first degree murder. (4 Supp CT [Redacted Juror Questionnaires] 986.) Juror No. 9 indicated that if a defendant were guilty, intended to kill and premeditated, he would strongly favor the death penalty. (24 RT 3969.) Juror No. 9 was in favor of the death penalty simply if the evidence of guilt were strong. (9 RT 3969.) As to factors in

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[141]/ Appellant's challenge of Juror No. 8 for cause was denied by the trial court. (24 RT 3934-3936.)

mitigation, Juror No. 9 indicated he would only consider that the defendant was a first-offender. (4 Supp CT [Redacted Juror Questionnaires] 992.) In response to the prosecutor's single question, Juror No. 9 manifested absolutely no reluctance or hesitation to return a death verdict. (9 RT 3986.)

Juror No. 11 was a CDC correctional officer at the California Rehabilitation Center in Norco. (4 Supp CT [Redacted Juror Questionnaires] 1004-1005; 25 RT 4107.) She believed that "in today's world," the laws were in favor of the criminals. (4 Supp CT [Redacted Juror Questionnaires] 1008.) Juror No. 11 was biased against psychiatrists and psychologists, stating that they were unjustifiably used as a way out or for getting a lesser sentence. (4 Supp CT [Redacted Juror Questionnaires] 1012.) She was biased against drug users, noting that the use of alcohol or drugs also caused individuals to commit crimes. (4 Supp CT [Redacted Juror Questionnaires] 1013.) Juror No. 11 strongly believed in the death penalty for murder. As to life imprisonment without possibility of parole, Juror No. 11 expressed a strong opinion that it was a waste to the taxpayers for a defendant to spend his life in prison. She believed that the death penalty was used too seldom. (4 Supp CT [Redacted Juror Questionnaires] 1023; 25 RT 4107.)

Juror No. 14 -- originally Alternate Juror No. 2 -- became a seated juror on the first day of trial in substitution of Juror No. 3 who was discharged for hardship at that time.[142] (See 27 RT 4360; 4861-4862, 4866; 3 CT 742.) Juror No. 14

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[142]/ After substitution Alternate Juror No. 4 was designated Self Juror No. 14. (See, for example, 27 RT 4866 [redacted pages].)

(Alternate Juror No. 2) stated that some crimes "required" the death penalty and that a single murder would be sufficient to warrant the death penalty. (24 RT 3909-3910.) Juror No. 14 (Alternate Juror No. 2) indicated that she would only consider background information about a defendant as it pertained to the particular case, suggesting thereby that she would not fully consider or evaluate the range of mitigating evidence that might be offered during the penalty trial. (See 3 Supp CT [Redacted Juror Questionnaires] 696.)

The United States Constitution guarantees a defendant "the right to a jury that will hear his case impartially, not one who tentatively promises to try." (*Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 503 [mere statements by prospective jurors that they would try to decide the case based on the evidence insufficient to support finding of impartiality]; *see also Nance v. State* (Ga. Supreme Court 2000) 526 S.E.2d 560, 567 [court erred in denying challenge for cause to juror who stated that she would vote for death although ultimately agreeing she would "listen" to the law and facts and choose the appropriate sentence].) In addition, a juror who will not consider mitigating evidence must be excused. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at p. 507.) Under the foregoing principles, Juror Nos. 1, 2, 4, 6, 8, 9, 11, and 14 -- two-thirds of the entire panel -- were actually biased and should not have sat on appellant's jury.

Both state and federal cases are clear that when an actually biased juror sits, the penalty must automatically be reversed. Trial counsel's failure to object or failure to conduct further voir dire matters not when a biased juror actually decides

a capital defendant's fate. There is not a single case in which any court has held that a seated juror was biased, but also that counsel either waived his client's right to challenge the constitutional violation by failing to exhaust his peremptory challenges or was not ineffective in failing to remove that juror with a peremptory challenge. (*See, e.g., People v. Farnham* (2002) 28 Cal.4th 107, 132-133 [claim not preserved because exhaustion requirement not met, but also concluding jurors not biased]; *People v. Hillhouse, supra*, 27 Cal.4th at pp. 486-488 [same].) To apply the exhaustion requirement to avoid such a constitutional violation on appeal, or to analyze the effectiveness of counsel in failing to exercise a peremptory challenge or challenge for cause to prevent a biased juror from being seated, presupposes that counsel may waive his client's right to have an impartial jury decide whether his client lives or dies. (*Cf. United States v. Quintero-Barraza* (9th Cir. 1995) 78 F.3d 1314 (dis. opn. of Tang, J. at pp. 1353-1354) [discussing majority's dual holding that juror was not biased and counsel was not ineffective for failing to strike him: majority's "reasoning is confusing because either (the juror) is biased or he is not biased. If he is not biased, then counsel simply made no error in impaneling an unbiased juror. If [he] is biased, then the issue is whether counsel can functionally waive the defendant's right to an impartial jury."].) But this simply is not so.

The starting point for this analysis is the fundamental rule that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and ... 'do not presume acquiescence in the loss of

fundamental rights.'" (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Of course, as this Court has observed, "'[b]y choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics.'" (*In re Horton* (1991) 54 Cal.3d 82, 95 [and authorities cited therein].) However, as to certain fundamental personal rights, waiver may not be implied through counsel's action or inaction; they require the defendant's personal and express, knowing, and intelligent, waiver.

Determining the manner in which certain rights may be waived (if they may be waived at all) often turns on a number of factors. First and foremost, whether the defendant's express personal waiver is required turns on whether the right at issue is a "fundamental personal" one. (*In re Horton, supra*, 53 Cal.3d at p. 95; *see also, e.g., People v. Collins* (2001) 26 Cal.4th 297, 310.) If so, the nature of the right alone may require the defendant's express, personal, knowing, and intelligent waiver. In addition, courts may examine the significance of the fundamental personal right. If it is so critical that its violation amounts to a structural defect undermining the integrity of the trial and requiring reversal per se (*see, e.g., Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264), it is ordinarily the kind of right that the defendant must personally and expressly waive. (*See, e.g., People v. Collins, supra,* 26 Cal.4th at p. 310; *People v. Webster* (1991) 54 Cal.3d 411, 438 [concluding that right to peremptory challenges not "fundamental" right requiring personal waiver in part because, unlike violation of right to jury trial which requires automatic reversal, improper denial of peremptory challenge

requires showing of prejudice].) Finally, if the waiver of a particular right can never be ascribed to "defense strategies and tactics" (*In re Horton, supra*, 54 Cal.3d at p. 94), it would follow that it is not the kind of right that counsel may waive on his client's behalf, but rather is one requiring the defendant's express personal waiver.

Under these principles, a defendant's state and federal constitutional right to trial by jury is a fundamental personal right, the violation of which amounts to structural error. (See, e.g., *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282; *Duncan v. Louisiana* (1968) 391 U.S. 145, 156-158; *People v. Collins, supra*, 26 Cal.4th at pp. 310-311; *People v. Ernst* (1994) 8 Cal.4th 441, 449.) Therefore, it requires the defendant's express personal waiver under both state and federal law. (*See, e.g., Patton v. United States* (1930) 281 U.S. 276, 308-312 [express personal waiver required under federal constitution]; Fed. Rules of Crim. Proc. Rule 23 [express, written waiver required under federal rules]; *People v. Collins, supra*, 26 Cal.4th at pp. 304-305 and n.2 [express waiver in open court required under state and federal law]; see also Cal. Const., Art. I, § 16.)

According to the very text of the Sixth Amendment, trial by jury means trial by an "*impartial* jury." (*See also People v. Wheeler, supra,* 22 Cal.3d at pp. 265-266 [although right to impartial jury is not explicitly stated in California Constitution, it is implied].) The right to an impartial jury ""'is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.'" [Citations]." (*In re Hitchings, supra,* 6 Cal.4th at p. 110.) Hence, it is as much a

critical, "fundamental personal right" as is the right to trial by jury. (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 473 [observing right to trial by impartial jury is "fundamental personal right"]; *accord, e.g., Rogers v. McMullen* (11th Cir. 1982) 673 F.2d 1185, 1189-1190 and fn. 5, cert. denied, 459 U.S. 1110 (1983).)

Indeed, "[t]he right to a fair and impartial jury is one of the most sacred and important guarantees of the Constitution" (*People v. Wheeler, supra*, 22 Cal.3d at p. 283.) As the United States Supreme Court has emphasized, "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors ... ." (*Gentile v. State Bar of Nev.* (1991) 501 U.S. 1030, 1075.) Moreover, it is deeply personal right, particularly in the capital context. Indeed, it is difficult to conceive of a right more "personal" than a defendant's right to have a fair and impartial decision-maker declare whether he shall live or die.

Moreover, the fundamental right to an impartial jury is so important that the seating of even a single biased juror "taints the entire trial" (*Wolfe v. Brigano, supra,* 232 F.3d at p. 503), amounts to structural error, and requires reversal per se. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at p. 729; *People v. Weaver, supra*, 26 Cal.4th at p. 910; *In re Carpenter* (1995) 9 Cal.4th 634, 654 ["a biased adjudicator is one of the few 'structural defects in the constitution, which defy analysis by "harmless error" standards'"]; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463 [seating of biased juror is structural defect]; *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 755 ["trying a defendant before a biased

jury is akin to providing him with no trial at all"]; *United States v. Gonzalez, supra,* 214 F.3d at p. 1111 [seating of even one biased juror requires reversal per se]; *United States v. Eubanks, supra*, 591 F.2d 513, 517 [same]; see also *Gray v. Mississippi* (1987) 481 U.S. 648, 668 ["impartiality of the adjudicator goes to the very integrity of the legal system;" hence, violation requires reversal per se].)

Finally, the waiver of the right to an impartial jury cannot be ascribed to "defense strategies and tactics." (*In re Horton, supra*, 54 Cal.3d at p. 94.) "The question of whether to seat a biased juror is not a discretionary or strategic decision." (*Hughes v. United States, supra*, 258 F.3d at p. 463; *cf. Gardner v. Florida* (1977) 430 U.S. 349, 361 [Court refuses to find that counsel's failure to object waived right to challenge court's consideration of undisclosed report in imposing death sentence because, *inter alia*, "there is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision" not to object].) For all of the foregoing reasons, "if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' [Citation], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury." (*Hughes v. United States, supra*, 258 F.3d at p. 463; *accord McCullough v. Bennett* (N.D.N.Y. 2003) 317 F.Supp.2d 112, 119.)

Even assuming for purposes of argument that counsel could technically waive his client's right to an impartial jury through inaction alone, the outcome

would not change. It is beyond dispute that: (a) an attorney's failure to remove a biased juror falls below an objective standard of reasonableness and cannot be justified by any conceivable trial "tactic;" and (b) such deficient performance undermines confidence in the outcome of the case because a biased juror was seated. (*Hughes v. United States, supra,* 258 F.3d at pp. 463-464; *accord People v. Weaver, supra*, 26 Cal.4th at p. 911 ["because the presence of even a single juror compromising the impartiality of the jury requires reversal, counsel would be constitutionally ineffective if he had failed to" preserve the claim].) In other words, establishing the bias of a deliberating juror necessarily establishes that counsel was constitutionally ineffective in failing to remove that juror with a challenge for cause or peremptory challenge. (*Ibid*; see also *Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.)

As a consequence, regardless of the analytical approach and whether the blame for the violation is placed on the shoulders of the trial court, trial counsel, or both, the result is that the defendant was deprived of his right to an impartial jury. (*Cf. People v. Estrada* (1998) 63 Cal.App.4th 1090, 1096 ["The direction of a blow is less important than the wound inflicted."]; *Tejada v. Dubois* (1st Cir. 1998) 142 F.3d 18, 24-25 ["It is unnecessary for us to attempt to divide the blame between lawyer and judge. . . . Instead, our constitutional focus is on the defendant . . . and he lost regardless" of the offender].) The reasons for the deprivation are immaterial and do not change the fact that, if a biased juror is actually seated on a jury that fixes the punishment at death, the state is disentitled

from executing the death judgment. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at p. 729; *People v. Weaver, supra*, 26 Cal.4th at p. 910.)

Consistent with the foregoing principles, other jurisdictions recognize that the seating of a biased juror violates the Sixth and Fourteenth Amendments and therefore requires reversal without regard to counsel's action or inaction. Some courts simply refuse to find waiver under these circumstances. (*See, e.g., United States v. Martinez-Salazar, supra,* 528 U.S. at p. 316 [we "reject the contention that under federal law, a defendant is obliged to use a peremptory challenge to cure a judge's error" in denying a challenge for cause; if court's ruling "result[s] in the seating of any juror who should have been dismissed for cause ... that circumstance would require reversal"]; *Johnson v. Armontrout, supra,* 961 F.2d 748, 754 [rejecting state's argument that counsel's failure to object to seating of biased juror waived claim for review: "When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias. (Citations.) If a defendant proves that jurors were actually biased, the conviction must be set aside (Citations)"]. Other jurisdictions have reversed by finding counsel constitutionally ineffective for the reasons discussed above. (*See, e.g., Hughes v. United States, supra*, 258 F.3d at pp. 463-464; *Johnson v. Armontrout, supra,* 961 F.2d at pp. 754-755; *McCullough v. Bennett, supra,* 317 F.Supp.2d at p. 119.) Still others apply both analyses and reach the same conclusion. (*See, e.g., Johnson v. Armontrout, supra*, 961 F.2d at pp. 754-755.) In sum, where, as here, it has been shown that one or more biased jurors actually sat on a jury which

returned a death verdict, the state is disentitled from executing the death judgment regardless of whether trial counsel satisfied the exhaustion rule. As such, penalty reversal is required.

IX

THE TRIAL COURT ERRED BY ADMITTING, AND THE PROSECUTOR COMMITTED MISCONDUCT BY OFFERING AND ARGUING, IMPROPER, HIGHLY INFLAMMATORY, AND PREJUDICIAL VICTIM IMPACT EVIDENCE DURING THE PENALTY TRIAL IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND TO A RELIABLE DETERMIINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

Prior to the penalty trial, appellant moved to exclude victim impact evidence on grounds that the admission of this evidence would violate appellant's rights to a fair trial, due process of law, and to a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant also asserted that evidence of victim impact in this case would be highly prejudicial and fundamentally unfair and should therefore be excluded pursuant to Evidence Code section 352. (8 CT 1836-1860.) Opposing appellant's motion, Deputy District Attorney West argued that victim impact evidence was not only relevant to the jury's determination of penalty but broadly admissible *beyond* mere impact on the victim's family and friends. (See 8 CT 1861-1870.) West stressed, however, that he would "narrow the scope of the evidence ... to just family members." (8 CT 1870.)

A hearing was held on appellant's motion to exclude victim impact evidence on May 2, 1996. At the hearing, Deputy District Attorney West

indicated, contrary to his earlier representation, that he did not intend to limit victim impact evidence to family members. In respect to the impact of Jose Aragon's death, District Attorney West additionally asserted that he also intended to offer testimonial evidence by a close friend of the victim "as to the effect of [his] death on her." (48 RT 7175.) Satisfied that the proffered evidence related to the "impact of the loss of the victim on their lives," to be amplified by personal characteristics of the victims themselves (as represented by prosecutor West), the trial court denied appellant's motion to exclude victim impact evidence during the penalty trial. (48 RT 7176.)

As more fully summarized in the Statement of Facts, *supra*, Deputy District Attorney West subsequently presented victim impact evidence in respect to all three murder victims. The stepmother, sister, and neighbor of Jose Aragon; the mother and sister of Joe Mans; and the father of Timothy Jones all presented testimony as to the impact of the respective victims' deaths on their lives. However, as also summarized in detail in the Statement of Facts, *supra*, the victim impact evidence actually admitted was not limited in scope or purpose in accordance with the trial court's initial ruling.

Numerous photographs, showing Jose Aragon, his brother and sisters, family and friends, as well as his many awards and trophies for athletics and motorcycling racing, were introduced into evidence during victim impact testimony by his stepmother, sister, and neighbor. (See 2 CT [Photographs-Exhibits] 525-552.)

Lydia Aragon testified about Jose Aragon's background, upbringing, education, and relationships with his family, siblings, and friends both in California and New Mexico. She told the jury about his engineering studies, interest in motorcycles, as well as his various achievements in sports and athletics. She was permitted to testify that Jose Aragon wanted his father or girlfriend to accompany him on the day he was murdered and expressed her highly prejudicial and speculative opinion to the jury that it was probably better that no one else went, "because then we would have had two dead people on our hands."

Lydia Aragon described how she and her husband went to search for Jose Aragon, how they learned of his death, and the immediate and longer-term reactions of family and friends. She was permitted to describe in graphic terms the retrieval and cleaning of Jose Aragon's bloody truck after his death. Lydia Aragon was encouraged to describe the funeral arrangements for Jose Aragon, describing as well for the jury his "cold and swollen appearance" at the funeral. As victim impact evidence, Lydia Aragon said that Jose Aragon's "life's blood was just splattered all over" his truck. Aragon's uncle cleaned the truck; the family found it "too intolerable" to do.

Although not present when the murder occurred, Lydia Aragon was encouraged by the District Attorney to testify how she thought all the time about the last few minutes of Jose Aragon's life. In highly inflammatory and prejudicial testimony, Lydia Aragon described how she imagined Jose shot and left to die alone with "no one to cradle him, hold him, and say that you love him and to say

good-bye." She told jurors she realized that they could not have saved Jose because he was left for dead, stating "They made sure of that."

Lydia Aragon told the jury she imagined Jose Aragon lying in his truck by himself while his ATM card was being used and the money in his account stolen. She told jurors Aragon did not have much money, because she went to the bank herself and closed Aragon's account. She also was permitted to describe her feelings for the little boy who found Jose Aragon and who, assertedly, could not sleep thereafter for "months and months and months."

Victim Jose Aragon's younger sister Stephanie described her brother, her reactions at his death, and the funeral. During her testimony, Stephanie was encouraged by the prosecutor to read from a letter that she had sent to Jose Aragon's girlfriend in February 1993, describing how she dreamed of her brother and her failure to understand why he was killed. Stephanie was also encouraged to read from another letter describing other feelings and memories of her brother. She told the jury that she and her mother went to the cemetery every weekend to bring her brother cards, flowers, and flags. She testified that Jose Aragon had the cleanest headstone; they took care of him as though he were still alive.

Best friend and neighbor Leighette Hopkins also testified, describing how she met Jose Aragon and her relationship with him. Hopkins used to see Aragon nearly every day; they hung out together. He helped her with her studies and homework. She told the jury how, after his death, she kept a Pepsi bottle with some Pepsi that Jose Aragon had been drinking on the night before he was killed.

Hopkins told the jury about a conversation she had with Jose Aragon some time before his death about seeing a deer outside his house. She related to the jury a subsequent conversation with Aragon's father when he, too, saw and followed a deer on their property.

Deputy District Attorney West also presented victim impact testimony from Joe Mans' mother, Catherine Mans, and sister, Angela Mans. Living in Florida, Catherine Mans had not seen her son, whom she called "Punckon" when he was growing up, for at least a year before his death. In addition to testifying about Mans' relationship with his sisters and family, Catherine Mans described how her son had met Timothy Jones and how they had been friends for years. Catherine Mans offered testimony as to her immediate reactions to her son's death, how she went outside and started screaming and banging on a car, and how she refused to believe that he had died. She testified that she had never visited his grave but told jurors she intended to go after finishing her testimony.

Catherine testified that she was still upset, angry, and depressed about Joe's death. Although getting better with time, Catherine Mans still cried a lot, unable to stop. She also prayed a lot and had to take tranquilizers. She described to jurors how she could not get over his death and how she dreamed that she was holding and kissing him. She told jurors that in her dreams Mans told her that he was okay. She described how in her dreams she asked her son what had happened, and he pointed to his back, saying "it hurts me back here." Joe Mans kept telling his mother in her dreams that he was okay.

Catherine Mans testified that she constantly thought about her son; the thoughts never went away. She told jurors Joe Mans was always around her, she talked to him, and she felt him. She explained that the hardest thing for her to deal with was the fact that her son was murdered and that somebody took something, her flesh and blood, away from her. She described in detail how she kept thinking that Joe Mans was gasping for air and struggling to breathe when he died, because he was shot in the back of the neck. She thought he was in pain.

Angela Mans described her brother, his interests and close relationship with all members of the family. Angela told the jury she missed her brother and wished he were alive. In addition to other details about Joe Mans' life, Angela testified about the pain her parents were suffering, including her father's increased use of alcohol as a result of her brother's death. In highly improper, speculative, and prejudicial testimony, Angela was encouraged to tell the jury that when she thought about her brother, she knew he was scared when he was killed.

In further highly improper, speculative, inflammatory, and prejudicial testimony, Catherine was permitted to testify that on seeing her brother in his casket at the funeral, she saw that he had a scared expression on his face. Angela told the jury that she kept talking to her brother at the funeral, waiting for a response, but he would not talk back.

Angela felt bad because she was unable to protect her brother, particularly because he had always protected her. Joe Mans later came to Angela in a dream and told her to stop crying and that he was okay. In addition to this testimony,

Deputy District Attorney West introduced photographs of Joe Mans' grave with his nickname "Puncken" engraved on his tombstone; a birthday sign at his gravesite; his sister with balloon sitting by his gravel; his family with balloons and birthday signs at the gravesite; and childhood and other photographs were offered and introduced during the testimony of his mother and sister, Catherine and Angela Mans. (See 2 CT [Photographs-Exhibits 565-581].

The jury also heard from James Jones, father of Timothy Jones, who described his son Tim as a very loveable kid, his favorite. During his testimony, photographs of Tim with his sister, his family, and as a child in his baseball uniform, were introduced and shown to the jury. (See 2 CT [Photographs-Exhibits] 553-564.)

James told the jury that Tim never caused any problems. James last saw his son the night before he died. Timothy was staying at a friend's house. James went to see if Timothy needed anything. At the time, Timothy said he was not feeling too well. As his father left. Timothy gave him a hug and told him, "I love you pop."

James did not believe the news of his son's death. Timothy's death was devastating. James wished he could have died instead. The news devastated Timothy's mother; she died from a stroke about a year and a half after Timothy died. James believed that Timothy's death contributed to his mother's death as well.

Both James and his daughter took Timothy's death very hard. If they

started thinking about him, the next moment they would be crying. It was very hard to accept that Timothy was dead. Timothy's death was very hard on James' nerves. When holidays came around, the family started crying. The family did not celebrate Christmas around a tree as they had in the past.

James was permitted to relate to the jury an incident involving Timothy's brother Jimmy. Jimmy was paralyzed and lived in a convalescent hospital. James told the jury that when he visited Jimmy at the hospital the previous day, Jimmy pointed out a kid who looked exactly like Timothy. Jimmy called out "Timmy, Timmy." Both father and son started crying.

James testified that he did not attend the trial very much because he could not stand the thought of what his son had gone through when Timothy knew he was going to die and could not do anything about it. James testified that he could not forget his son's death and could not stand the thought of finding out exactly how Timothy died. In highly improper testimony, James stated that he believed Timothy suffered when he was killed. He told jurors that it was more difficult knowing that his son had been murdered, rather than if he had an accident or had gotten sick. He felt he would have been able to understand that type of death, but he just could not understand why anyone would want to take the life of a kind and generous kid.

With insidious and impermissible religious undertones, the court also permitted the District Attorney to elicit testimony from James Jones that when visiting his son's grave, he always tells his son that they will meet again some day,

that everything is going to be okay, and that he did not have to worry about anything any more.

The victim impact evidence described above was excessive, improper, inflammatory, and highly prejudicial. It is telling that, years after the conclusion of trial, the trial court vividly and emotionally described on the record (during record settlement and correction proceedings) the impact of the victim impact evidence. "Some things that happened during trial I have a very vivid recollection of, one of them was the date we had victim witness testimony, which was a very painful and agonizing date for everyone who was in the courtroom. We had the victims, including the mother and father of the three people that were killed, testify and asked as to how that affected their lives. We had best friends and other relatives testifying. I would say there wasn't a dry eye in the courtroom. Everybody was crying that day. It was a very emotional day for everyone. That's the day that I will always have with me. And that's something that -- that had, had an impact on myself and everybody else that was in the court that day. ..." (3 RT [September 9-10, 2002] 318.) Clearly, the court's impartiality was undermined by that overwhelmingly prejudicial and inflammatory testimony.

B. Victim Impact Evidence Was Admitted Without the Safeguards Needed to Confine the Evidence Within Constitutional Bounds

The language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only

with such facts. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735.) To determine the scope of the victim impact evidence permitted by *Payne v. Tennessee* (1991) 501 U.S. 808, the facts that were before the United States Supreme Court in *Payne* must be examined.

Payne involved a single victim impact witness who testified about the effects of the murder of a mother and her 2-year old daughter on the woman's 3-year-old son, who was himself present at the scene of the crime and suffered serious injuries in the attack. (*Id.* at pp. 811-812.) The boy's grandmother testified that he cried for his mother and sister, that he worried about his sister, and that he couldn't seem to understand why his mother did not come home. (*Id.* at pp. 814-815.)

To be consistent with the facts and holding of *Payne*, the admission of victim impact evidence, if such evidence is admitted at all, must be attended by appropriate safeguards to minimize its prejudicial effect and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. There are three such safeguards that apply to the nature of the evidence itself.[143] None of those safeguards was employed in the instant case.

First, victim impact evidence should be limited to testimony from a single

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[143]/ Other necessary safeguards are a pretrial hearing to explore the precise nature of the victim impact evidence the prosecution intends to present and a cautionary instruction to the jury on how such evidence should be considered. Those safeguards are discussed in separate arguments, *infra*.

witness, like the testimony from the grandmother in *Payne*. In some states, this limitation is imposed by judicial decision, as in New Jersey (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180), or by statute, as in Illinois (Illinois Rights of Victims and Witnesses Act, 725 ILCS 120/3(a)(3); see *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107).

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

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

Here, the victim impact witnesses testified at length about the lives and characteristics of each victim and the impact of their deaths on family and friends.

Second, victim impact evidence should be limited to testimony which describes the effect of the murder on a family member who was present at the scene during or immediately after the crime. Third, victim impact evidence should be limited to those consequences that were known or reasonably apparent to the defendant at the time he committed the crime or were properly introduced to prove the charges at the guilt phase of the trial. Again, these

limitations are consistent with *Payne*, where the victim impact evidence described the effect of the crime on the son and brother of the victims who was himself present at the scene of the crime and whose existence and likely grief were therefore well-known to the defendant.

These limitations are also necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes and to avoid expanding the aggravating circumstances to the point that they become unconstitutionally vague. In California, aggravating evidence is only admissible when it is relevant to one of the statutory factors (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776). Victim impact evidence is admitted on the theory that it is relevant only to factor (a) of Penal Code section 190.3, which permits consideration of the *"circumstances of the offense"* (*People v. Edwards* (1991) 54 Cal.3d 787, 835 [emphasis added]).

Appellant acknowledges that this Court has previously rejected the argument that evidence of a victim's characteristics unknown to his killer at the time of the crime should be disallowed. (*People v. Roldan* (2005) 35 Cal.4th 646, 732.) The Court did not analyze this contention in *Roldan*, stating simply that it disagreed the principle asserted by the defendant in that case. (*Id.*)

Appellant here offers that such a limitation, although rejected by *Roldan* without discussion or analysis, is necessary to ensure such evidence remains relevant to assessing the moral culpability of the offender as required by the Eighth and Fourteenth Amendments to the United States Constitution. (See *People*

v. Bacigalupo (1993) 6 Cal.4th 457, 476.) To be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) The only victim impact evidence which meets this standard is evidence of "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935) and evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.)).

In *Payne*, the United States Supreme Court said that the prosecution had a legitimate interest in presenting evidence about the victim's personal characteristics to counteract similar evidence about the defendant. Illustrating the potential unfairness that would result if evidence about the victim were barred, the High Court noted that the defendant had presented evidence about himself. Here, appellant offered no similar or countervailing mitigating evidence. In contrast, the victim impact evidence included numerous details of the victims' lives, activities, and achievements, beginning with their childhood and continuing through their deaths. In addition, the victims' relatives described years of emotional anguish following the victims' death, including highly inflammatory and speculative assertions about the victims' pain, fear, and suffering that could only have inflamed the jurors' sentiments against appellant.

Moreover, an interpretation of "circumstances of the crime" so broad that it would allow for admission of the excessive, irrelevant, and improper victim impact evidence in this case would render factor (a) unconstitutionally overbroad and vague. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 17.) As stressed by this Court in *People v. Dunkle* (2005) 36 Cal.4th 861, 925 in regard to victim impact evidence, "[t]he sentencing jury in a capital case "must never be influenced by passion or prejudice." As also explained by the United States Supreme Court, victim impact evidence must show the direct impact on the victims' friends and family. The numerous speculative yet inflammatory assertions made by the victim impact witnesses in this case went far beyond the concept of direct impact previously articulated by this Court and the High Court. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 825-827; see also *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

Things that happened many years before the crime (as the victims' activities as children) or many years after (as the continuing reactions of the victims' relatives right up to the penalty trial) do not constitute "direct impact" or fall within any reasonable common-sense definition of the phrase "circumstances of the crime." All these types of testimony as set forth in the Statement of the Facts and Subsection (A), *supra*, and more, were introduced under the rubric of victim impact in this case. Such evidence effectively rendered factor (a) of Penal Code section 190.3 unconstitutionally vague. (But see *People v. Boyette* (2002) 29 Cal.4th 381, 445, rejecting a similar argument where substantial, but less

extensive, victim impact testimony was presented.)

C. Irrelevant and Prejudicial Opinions About the Crimes and Appellant Were Improperly Admitted as Victim Impact Evidence

In *Booth v. Maryland* (1987) 482 U.S. 496, 502-503, 508-509, the United States Supreme Court held that it was error to admit evidence of the opinions held by murder victim's relatives on the crime and the defendant. The admission of such opinions, the Court held, is clearly inconsistent with the reasoned decision-making required in capital cases and hence violates the Eighth Amendment to the Constitution of the United States. This portion of *Booth* was not overruled by *Payne* and remains good law today. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2; *Hain v. Gibson* (10th Cir. 2002) 287 F.3d 1224, 1238-1239; *State v. Bjorklund* (Neb. 2000) 604 N.W.2d 169, 214; *State v. Bernard* (La. 1992) 608 So.2d 966, 971-972.)

The admission of opinion evidence on these two topics identified as improper in *Booth* would be grave constitutional error. In this case, the trial court permitted the state to introduce the very type of inflammatory opinion evidence prohibited by the principles articulated in *Booth* and left intact by *Payne*. Regarding the crime itself, Lydia Aragon testified that Jose Aragon's "life's blood" was "splattered all over" his truck. Although not present when the murder occurred, Lydia Aragon also testified that she thought all the time about the last few minutes of Jose Aragon's life. She described how she imagined him shot and

left to die alone with "no one to cradle him, hold him, and say that you love him and to say good-bye." She told jurors she realized that they could not have saved Jose because he was left for dead, stating "They made sure of that." Lydia Aragon told the jury she imagined Jose Aragon lying in his truck by himself while his ATM card was being used and the money in his account stolen. Finally, Lydia Aragon was encouraged to describe her feelings for the little boy who found Jose Aragon.

In respect to the murder of her son, Catherine Mans told jurors that in her dreams Mans told her that he was okay. She described how in her dreams she asked her son what had happened, and he pointed to his back, saying "it hurts me back here." She described in detail how she kept thinking that her son was gasping for air and struggling to breathe when he died, because he was shot in the back of the neck. She thought he was in pain.

Angela Man described seeing her brother in his casket at the funeral and that, in her opinion, he had a scared expression on his face.

James Jones testified that he did not attend the trial very much because he could not stand the thought of what his son had gone through. He told the jury nevertheless that Timothy knew he was going to die but could not do anything about it. In James' opinion, Timothy suffered when he was killed.

This improper opinion evidence violated appellant's due process right to a fair trial under the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution and his right to a fair and

reliable penalty trial under the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 502-503, 508-509.)

Admission of the improper opinion evidence also invaded the province of the jury (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-1183; *People v. Torres* (1995) 33 Cal.App.4th 37, 46-48), the entity charged with the responsibility of determining the appropriate sentence, thereby depriving appellant of his state and federal constitutional right to trial by jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16.)

In addition, these opinions were irrelevant. Relevant evidence includes evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The admission of unproved, inflammatory opinions by relatives of the victim about the factual circumstances of the crime violated Evidence Code sections 350 and 352 and appellant's due process right to a fair trial (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; cf. *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6; *People v. Castro* (1985) 38 Cal.3d 301, 313) and arbitrarily deprived appellant of a state statutory right in violation of due process of law (U.S. Const., 14th Amend.; *Hicks* v. *Oklahoma* (1980) 447 U.S. 343, 346; *Vitek* v. *Jones* (1980) 445 U.S. 480, 488).

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D. Accounts of the Victims, Including Their Activities, Achievements and Awards, Were Improperly Presented to the Penalty Jury

The penalty retrial should have focused on appellant's background and character and the circumstances of the crime. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *People v. Mickey* (1991) 54 Cal.3d 612, 692.) Instead, the penalty trial was diverted from its proper purpose and converted into what amounted to a memorial service for the victims and a tribute to their lives. This clearly violated the teachings of *Payne*.

The victim impact evidence was not limited to a "quick glimpse" of the victims' lives approved in *Payne v. Tennessee*, *supra*, 501 U.S. 808. Indeed, the evidence went far beyond a discourse on how the victims' survivors were impacted by their deaths. Rather, it turned into a cathartic outpouring of grief in which the surviving family members and friends were able to express and declare every dream, passing thought, speculative supposition, and imagined sense of suffering that entered their minds in connection with the deaths of their loved ones. Deputy District Attorney West, as the prosecutor in *Moore v. Kemp* (11th Cir. 1987) 809 F.2d 702, sought not merely to let the jury know who the victims were, but rather to urge the jury to return a sentence of death *because of* who the victims were (*id.* at p. 749 [conc. and dis. opn. of Johnson, J.]), rendering the penalty retrial unconstitutionally unreliable and unfair.

In *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 822-823, the United States Supreme Court held that a state could allow the admission of evidence providing

"'a quick glimpse of the life' which a defendant 'chose to extinguish'" in order "to show ... each victim's 'uniqueness as an individual human being.'"[144] *Payne* noted, however, that "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Id.* at p. 825.)

In *People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836, this Court suggested additional limitations, emphasizing that "we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*, *supra*, ..." The Court further warned that: "Our holding also does not mean there are no limits on *emotional* evidence and argument. In *People v. Haskett* [(1982)] 30 Cal.3d [841] at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial." (*Id.* at p. 836, fn. 11 [emphasis added].)

Although this Court has not established detailed guidelines for the

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[144]/ *Payne* itself did not involve any evidence of this type. Therefore, this statement in *Payne*, purportedly to overrule the contrary holding of *Booth*, in which such evidence *was* introduced, may be nonbinding dicta. (*People v. McKay* (2002) 27 Cal.4th 601, 612 [Court refused to accept United States Supreme Court dicta]; see also *People v. Mendoza* (2000) 23 Cal.4th 896, 915 [a decision is not authority for everything said in opinion but only for the points actually involved and actually decided; only ratio decidendi of opinion has precedential effect]; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 123 [Court declined to apply dicta from prior case because prior situation unlike that in current case]; *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1155 [Court not bound by dicta].)

admission of evidence about a victim's character, the cases in which the admission of such evidence has been approved generally involve evidence that was brief, factual, and noninflammatory. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [evidence of the victim's plan to enlist in the Army at time of her death]; *People v. Montiel, supra,* 5 Cal.4th at pp. 934-935 [evidence that victim was in excellent health at time of his death, that he needed to use a walker to get around, and that he could still enjoy life]; *People v. Edwards*, *supra*, 54 Cal.3d at p. 832 [photographs of the victims shortly before their deaths].)

Other states have established more specific guidelines or standards. The Supreme Court of Tennessee, for example, has held that "Generally, victim impact evidence [about the victim's character] should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed." (*State v. Nesbit* (Tenn. 1998) 798 S.W.2d 872, 891.) Similarly, the Supreme Court of New Jersey has held that victim character evidence "can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests," but that "testimony should be factual, not emotional, and should be free of inflammatory comments or references." (*State v. Muhammad*, *supra*, 678 A.2d at p. 180.)

The need for restraint in the admission of victim character evidence was also emphasized by the Supreme Court of Louisiana. Although it held that the prosecutor could "introduce a limited amount of general evidence providing

identity to the victim," it also warned that special caution should be used in the "introduction of detailed descriptions of the good qualities of the victim" because such descriptions create a danger "of the influence of arbitrary factors on the jury's sentencing decision." (*State v. Bernard*, *supra*, 608 So.2d at p. 971.) The Supreme Court of New Mexico likewise held that "victim impact evidence, *brief and narrowly presented*, is admissible" in capital cases. (*State v. Clark* (N.M. 1999) 990 P.2d 793, 808 [emphasis added].) While these out-of-state rulings are not binding on this Court, they are instructive nevertheless.

If ever there was a case that elucidates the dangers of failing to exclude improper and excessive victim-impact evidence, it is appellant's case. Here, the evidence about each victims' character, particularly that pertaining to Jose Aragon, far exceeded the "quick glimpse" of their lives otherwise approved in *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 822-823, or the "general factual profile of the victim" approved in *State v. Muhammad*, *supra*, 678 A.2d at p. 180. The victims' virtues were explored through highly emotional and redundant inflammatory testimony that included details regarding not only their activities and achievements, but their survivors' tortured imaginings about the pain the victims suffered and the fear they must have felt. The survivors were permitted to testify at length and without limitation regarding dreams they had in which the victims lamented, inter alia, that "it hurts back there." None of this testimony was based in fact, yet it was elicited by the District Attorney to devastating and prejudicial effect against appellant.

Beyond its highly prejudicial and unduly inflammatory nature, much of the impact evidence was also irrelevant. (Evid. Code § 350.) In *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, where analogous life history evidence was introduced through the testimony of a single witness, the court noted that "portraying [the victim] as a cute child at age four in no way provides insight into the contemporaneous and prospective circumstances surrounding his death," (*id.* at p. 829) and found that the probative value of the life history evidence was substantially outweighed by its prejudicial effect (*id.* at p. 830).

The presentation of extensive evidence concerning the outstanding qualities and characters of the homicide victims also created the risk that arbitrary and irrelevant comparisons would influence the sentencing decision. (*Booth v. Maryland*, *supra*, 496 U.S. at p. 506 and fn. 8; *State v. Carter* (Utah 1995) 888 P.2d 629, 652; *Alvarado v. State* (Tex.Crim.App. 1995) 912 S.W.2d 199, 222 [conc. opn. of Baird, J.].) It is wrong to allow "such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." (*Booth v. Maryland*, *supra*, 482 U.S. at p. 506.)

Whether the comparison is phrased as a comparison between victims or a comparison between the defendant and the victims, the effect is exactly the same, and the result is a death sentence that is not only arbitrary and unfair (*Booth v. Maryland*, *supra*, 482 U.S. at p. 506) but also a violation of the equal protection of the laws (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564). (U.S.

Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 15 and 17.)

The most obvious discrimination is unique to the capital punishment context -- the danger that defendants whose victims are perceived as assets to society will be more likely to receive the death penalty than equally culpable defendants whose victims are perceived as less worthy. (*Booth v. Maryland, supra*, 482 U.S. at p. 506.) However, a more familiar form of discrimination is lurking as well -- discrimination based on race or ethnicity. "[I]n many cases, expansive [victim impact evidence] will inevitably make way for racial discrimination to operate in the capital sentencing jury's life or death decision." (Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 280 [hereafter cited as Blume].)

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray* (1986) 476 U.S. 28, 35.) That danger is particularly acute where the jury, as here, is virtually all Caucasian -- as were two of the victims -- and appellant is Hispanic. (*Id.* at p. 37.)

Overt prejudice is not the only danger. There are many subtle ways in which conscious or unconscious racism or bias against Hispanics can color the jurors' perception of the defendant, their evaluation of his defenses, and their assessment of the seriousness of his crime. (*Turner v. Murray*, *supra*, 476 U.S. at p. 35.) Evidence which focuses the jury's attention on the character of the victims gives these improper influences free rein, causing jurors from the dominant culture

to view the crime as especially serious because they empathize and identify with the victims. (See Berger, *Payne and Suffering – A Personal Reflection and a Victim-Centered Critique* (1992) 20 Fla.St.U.L.Rev. 21, 25, 48.)

A death sentence is surely unconstitutional "if it discriminates against [the defendant] by reason of his race, . . . *or if it is imposed under a procedure that gives room for the play of such prejudices.*" (*Furman v. Georgia* (1972) 408 U.S. 248, 242 [emphasis added] [conc. opn. of Douglas, J.].) Therefore, while it may be impossible to eliminate the pernicious effect of race from capital sentencing altogether (*McCleskey v. Kemp* (1987) 481 U.S. 279, 308-314), the courts should engage "in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system" (*id.* at p. 309) and disapprove any procedures which create an unnecessary risk that racial prejudice will come into play (*Batson v. Kentucky* (1986) 476 U.S. 79, 99; *Turner v. Murray*, *supra*, at pp. 35-37.)

Here, the presentation of emotional or inflammatory biographical evidence about the virtues and accomplishments of the homicide victims invited both arbitrary or invidious comparisons and, especially in cross-racial cases like this one, arbitrary comparisons tainted by racial bias against Hispanics.

In *State v. Carter*, *supra*, the Utah Supreme Court prohibited the admission of victim impact evidence as a matter of state law and explained:

> In our society, individuals are of equal value and must be treated that way. We will not tempt sentencing authorities to distinguish among victims

> -- to find one person's death more or less deserving of retribution merely because he or she was held in higher or lower regard by family and peers.
>
> Such a scheme draws lines in our society that we think should not be drawn. The worth of a human life is inestimable, and we do not condemn those who take life more or less harshly because of the perceived value or quality of the life taken. [Citation.] Indeed, society is probably incapable of even-handedness in such judgments.

(*State v. Carter*, *supra*, at p. 652.)

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

The majority in *Payne v. Tennessee*, *supra*, 501 U.S. 808, discounted the concern in *Booth v. Maryland, supra,* that the admission of victim character "evidence permits a jury to find that defendants whose victims were assets to their communities are more deserving of punishment than those whose victims are perceived to be less worthy." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 809.) The only reason given for its position was the assertion that, as a general matter, "victim impact evidence is not offered to encourage comparative judgments of this kind." (*Ibid.*) Yet this is precisely what victim-impact evidence does, even when

limitations on such evidence are imposed. How much greater the danger and harm, then, when no limitations whatsoever are imposed, as in appellant's case. *Payne* in no way held or suggested that evidence and argument that *was* offered to encourage such comparative judgments would be permissible.

The excessive testimony, photographs, and argument in this case reveals that the evidence of the victims' character was clearly offered to encourage and provoke the type of comparative evaluations found impermissible in *Booth*. The relatives' testimony alone created an unacceptable risk that the jury's attention would be focused on improper considerations. Not only were the victims described as a kind, compassionate, honest, patient, helpful, studious, hard-working, dedicated, and modest young adults, (information about Mans' and Jones' drug use having been conveniently kept from the jury by the trial court on granting the District Attorney's in limine motion), they were also described as generous, patient, protective, caring, thrifty, and hard-working children -- in stark and disturbing contrast to the defendants. The goal of the District Attorney was not merely to humanize the victims, as permitted by *Payne v. Tennessee*, *supra*, 501 U.S. 808, but to deify them and in so doing, to convince the jury that their virtues-- compared to the defendants who took their lives -- justified imposition of a sentence of death.

The victim impact evidence presented to the jury also created the risk that the death sentence was improperly imposed based on a comparison between the victims and appellant. (See, e.g., *Burns v. State* (Fla. 1992) 609 So.2d 600, 610.)

That comparison had the same effect as a comparison between victims: If two defendants have identical backgrounds and commit crimes of equal gravity, the defendant who killed a victim regarded as an asset to the community will fare worse in the comparison than the defendant who kills a less worthy victim and hence will be more likely to receive the death penalty. Even though victims are not compared directly, it is the difference in the worth of the victims that causes different sentences to be imposed in otherwise identical cases.[145]

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

Common experience compels the conclusion that any comparisons between convicted murderers and their victims are inherently prejudicial as all convicted defendants in those circumstances invariably will be deemed by jurors more reprehensible that the victims. For these reasons, victim impact testimony should

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

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

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

In this case, an improper comparison between appellant's worth and the worth of the victims was a major theme in the District Attorney's case for death. In closing argument to the jury during the penalty trial, prosecutor West focused extensively on the impact of the crimes on the victims. Indeed, West's references to and discussion of the impact of appellant's crimes on families and friends take up a large portion of his closing argument, including the impact of Jose Aragon's

death on Lydia Aragon, her family, and friends (54 RT 8087-8091); the impact of Joey Mans' death on his mother, sister, and family of Joe Mans (54 RT 8091-8095); and the impact of Timothy Jones death on his father James Jones, family, and friends. (54 RT 8096-8098.) West argued, for example, that "the harm and the pain and the heartache and the fear that this man has caused is so overwhelming that it is difficult to hear about it, let alone to have lived through it or died from it." (54 RT 8082.) Such argument exacerbated the prejudice inherent in improper victim impact evidence presented.

In describing the weighing process and the evidence to be considered in aggravation, Deputy District Attorney West told the jury: "Can you weigh and consider the harm done to the victims, to their families, to their friends, and to our community in deciding just how grotesque these crimes are? And in weighing, what the response needs to be? What is the just punishment." (54 RT 8085.) Urging the jury in effect to compare victim Jose Aragon with appellant, West stated: "You can consider Jose Aragon, a young man who spray-pained his own shoes [inferentially as opposed, of course, to appellant who allegedly spray-painted Magnolia Center Interiors during a burglary], played soccer, helped friends with homework, watched TV with his sister. He wanted to be an engineer." (54 RT 8085.) Shortly thereafter, West again told the jury that, "In considering the weight to assign -- the aggravating weight to assign Mr. Self's conduct, you can consider the impact that his death had on others." (54 RT 8087.) He then quoted at length the testimony of Lydia Aragon and urged the jury to

consider what "she had to say." (54 RT 8087.)

Extensively quoting verbatim much of the victim impact testimony, Deputy District Attorney West urged the jury to "consider Stephanie Aragon" in deciding between death and life imprisonment without the possibility of parole: "You can consider Stephanie Aragon, when you consider how strongly we wish to condemn this conduct, a young woman who is filled with fear and anger and dark and violent thoughts." (54 RT 8090.) West repeatedly exhorted the jury to choose death based on this improper evidence. He urged the jury to compare the murder victims and their families (54 RT 8091-8098), as well as the non-capital victims, to the defendants. (See 54 RT 8098-8101.) West continued to return to this theme, arguing, "You know, during the break I was sitting here looking at the photo of Timmy [Jones]. Many of you have looked at it and have your reaction: Nice young man." (54 RT 8107.) And then comparing Jones to appellant, stating that appellant's "reaction upon meeting him [Jones] was to put a bullet in his head, two of them." (54 RT 81078.) Surely, the comparisons of worthiness between the victims and appellant that the prosecutor was urging the jury to make were not lost on the jurors. There can be no doubt that the excessive victim impact evidence presented to the jury violated appellant's right to an individualized and reliable sentencing determination by causing the jury to base its decision on facts related to the survivors' sense of grief and loss rather than upon appellant's moral culpability and blameworthiness. Consequently, the erroneously admitted victim impact evidence was prejudicial.

E. Inflammatory and Emotionally-Charged Evidence About the Impact of the Crime on the Victims' Survivors Was Erroneously Admitted and Undermined Appellant's Right to a Fair Trial, Due Process, and a Reliable Determination of Penalty

In *People v. Edwards, supra*, this Court stressed that its holding permitting victim impact evidence "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra*, 54 Cal.3d at p. 835.) The Court advised that trial courts should weigh the probative value of the victim impact evidence against the prejudicial effect. "'On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*Id.* at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.)

In *People v. Harris* (2005) 37 Cal.4th 310, this Court stressed that while the Eighth Amendment to the United States Constitution permits the introduction of victim impact evidence generally, or evidence of the specific harm caused by the defendant, when admitted in order for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, such evidence nevertheless violates the Fourteenth Amendment's due process clause when it is so unduly prejudicial that it renders the trial fundamentally unfair. (*Id.* at p. 351.) As the Court has elsewhere stressed, irrelevant information or inflammatory rhetoric that

diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed. (*People v. Edwards, supra*, 54 Cal.3d at p. 836; *People v. Zapien* (1993) 4 Cal.4th 929, 992; *People v. Haskett, supra,* 30 Cal.3d at p. 864.)

The victim impact evidence in this case was neither brief (as in *People v. Panah* (2005) 35 Cal.4th 395, 495) nor limited simply to the residual impact of the murders on the victims. Indeed, at the beginning of the penalty trial, in his opening statement, Deputy District Attorney West repeatedly emphasized that the relatives were direct victims in this case, suggesting that injury and harm to the victims' relatives constituted separate, distinct, and additional factors in aggravation as other crimes committed by appellant. Although in *People v. Stanley* (1995) 10 Cal.4th 764, 832, the Court found no misconduct in a prosecutor's argument on victim impact because "it was not so inflammatory or emotional as to divert the jury's attention from its proper role or invite an irrational, purely subjective response," the same cannot be said about the prosecutor's statements in the present case.

Here, prosecutor West correctly emphasized that an aggravating factor increases the enormity of the crime or adds to its injurious conduct above and beyond the elements of the crime itself. (See 48 RT 7250.) He then stressed, however, that in weighing the aggravating circumstances, the jury could consider all of the circumstances of the murders and that the crimes were "even worse" than what the jury had already heard in the guilt phase precisely because the bullet that

killed Joe Mans, for example, destroyed the lives of others. "[I]t struck his mother and destroyed a part of her. It went to Arizona where it struck his sister and destroyed a part of her."

Deputy District Attorney West repeated this same theme in respect to Timothy Jones and Jose Aragon. (See 48 RT 7252-7253.) As he told the jury: "You'll learn the pain that the defendant has imposed on the others and fathers, brothers and sisters, and friends of Jose Aragon and Joey Mans and Timothy Jones. ... These innocent victims have received a life sentence imposed by the defendant from which there will be no parole. What punishment then should be accorded to the defendant?" (48 RT 7252-7253.)

In the evidentiary phase of the penalty trial, the victims' relatives testified at length regarding the grief, pain, and enduring sense of loss they suffered as a result of their deaths. Setting the stage for the emotionally-charged victim impact evidence, the victim's stepmother provided a touching description of their last contact with Jose Aragon. James Jones testified in the same fashion about his final meeting with his son. All of the witnesses emphasized that their grief had not abated with the passage of time. Jose Aragon's father lost his purpose in life, according to Lydia Aragon. Further emphasizing the permanency of the loss, each of the victim impact witnesses testified that the holidays were not the same after the murders. Holidays, formerly celebrated, became occasions for further grief and pain. Catherine Mans' father, for example, refused to celebrate some of the holidays, because the family was not complete. If celebrations occurred, they

were moved from the home to the cemetery. At Christmas, Jose Aragon's sister and mother took a tree to his grave; at Easter, an Easter basket. These accounts of pain and permanency converged in wrenching testimony about Jose Aragon's headstone and Joe Mans' funeral.

This testimony went far beyond the brief victim impact testimony in *Payne v. Tennessee*, *supra*, 501 U.S. at pp. 814-815, and tainted the penalty proceedings with unchecked emotion. It would defy reality to characterize as relatively dispassionate (cf. *People v. Boyette* (2002) 29 Cal.4th 381, 445) testimony like that given by Lydia Aragon, who testified that part of her family had been "ripped out," or that the hole caused by the shotgun blast to Jose Aragon's neck "was our son"; or by Catherine Mans, who testified that her family talked about Joe Mans' murder all the time and cry and were unable to put it aside; by Angela Mans' testimony that her brother appeared scared when she saw him in his casket; or by Timothy Jones' father, who testified that his son must have suffered before his death and that, in imaginary conversations with his son he always tells him that they will meet again some day and that everything would be okay.

In *People v. Gurule* (2002) 28 Cal.4th 557, 622, this Court characterized as "highly inflammatory" the brief portion of a guilt phase stipulation which stated that the victim's mother had hugged him goodbye on the morning of his death. (*Id.* at p. 622; see also *id.* at pp. 654-655 [noting that the evidence about the hug would have been potentially prejudicial if it had been introduced at the penalty phase].) In this case, an even more extensive description of Timothy Jones' touching last

visit with his father was introduced during the penalty phase through the victim impact testimony of James Jones. Seeing his father the night before he died, Timothy gave his father a hug and told him, "I love you pop." This testimony was as equally and unfairly inflammatory as in *Gurule*, if not more so.

In *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373, the court held that it was error to admit evidence that the victim's son put flowers on his mother's grave and brushed the dirt away because that evidence "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative." In this case, the evidence was far more egregious. Lydia Aragon was permitted by the court to testify at length about the funeral arrangements and funeral of Jose Aragon. Catherine Aragon described how she and her mother went to the cemetery every weekend to bring cards, flowers, and flags to her brother's grave. She testified that Jose Aragon had the cleanest headstone in the cemetery and that she and her mother took care of him in the grave as though he were still alive. Catherine Mans told the jury that she did not attend her son's funeral because she did not want to see her son in a box. She went on to add that she had never visited his grave and expressed her intentions to do so immediately after her testimony. James Jones testified he visited his son in the cemetery every Memorial Day and would talk to him even though he knew he was not there. Such testimony clearly inflamed the jurors' sentiments against appellant but had absolutely no relevance to the issue of appellant's culpability or blameworthiness.

All of these aspects of the victim impact testimony -- its volume, substance, and highly inflammatory language -- demonstrate that the trial court failed in its duty carefully to limit or monitor the victim impact to evidence to ensure that emotion did not take precedence over reason. The prosecutor repeatedly exploited this evidence both at the beginning and conclusion of the penalty trial in argument to the jury. Under these circumstances, the admission of highly emotional and inflammatory victim impact testimony was undoubtedly prejudicial, undermining appellant's constitutional right to a fair and reliable capital sentencing proceeding. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, and 17.)

F. The Erroneous Admission of Improper Victim Impact Evidence Requires Reversal

From the beginning of the penalty trial to the end, the prosecutor sought to keep the jury's attention focused on the victims' relatives and friends. The prosecution's case in aggravation at the penalty phase relied heavily on victim impact testimony. As discussed in Subsection E, *supra*, in his opening statement Deputy District Attorney West repeatedly told the jury that the families and friends of the Jose Aragon, Joe Mans, and Timothy Jones were also victims in this case, in essence inviting the jury to consider the impact of the murders on them as additional aggravating factors. Addressing the jury at the commencement of the penalty trial, prosecutor West stressed the emotional impact of the evidence to be admitted and its consideration by the jury in determining penalty:

> You will find as you've probably already found that murder in real life is different from murder on TV, the way that we've become accustomed to murder in our society; ... .
>
> On TV, they don't show much about the victim's life. Maybe you get a couple of minutes before the victim is killed, but on TV they don't show you much about the victim's life because they don't want you to know them too well. *They don't want to upset you emotionally* as you watch the show for entertainment.
>
> But real life is different. Each of these families had over 20 years to get to know and love and appreciate their sons. You will get to know and love and appreciate their sons. These people can't change the channel and move onto something less painful.
>
> *Their pain doesn't end at the top of the hour.* Every morning when they awaken, they are hit again with the reality that their sons have been murdered, that their sons, the young men that they raised, counseled, loved, *their babies were murdered* for the amusement of that man over there (indicating).
>
> (48 RT 7252-7253 [emphasis added].)

The seven victim impact witnesses were the lead-off penalty trial witnesses in the prosecution's case-in-chief. As stated by the trial court during record correction proceedings, the entire courtroom was in tears during this phase of the penalty trial. Even the trial court observed that it was the most emotional trial session in which the court had ever participated: "[T]he date we had victim witness testimony ... was a very painful and agonizing date for everyone who was in the courtroom. ... I would say there wasn't a dry eye in the courtroom. Everybody was crying that day. It was a very emotional day for everyone. That's the day that I will always have with me. And that's something that -- that had, had

an impact on myself and everybody else that was in the court that day. ..." (3 RT [September 9-10, 2002] 318.)

In his opening and closing statements to the jury, Deputy District Attorney West repeatedly referred to the victim impact testimony and relied heavily on that evidence in urging the jury to sentence appellant to death. West's penalty-phase closing argument comprises 33 pages of transcript on appeal. (See 54 RT 8082-8106, 8107-8116.) Fully a third of his argument referenced the victim impact evidence, including lengthy quotations of the relatives' testimony. (See 54 RT 8087-8098.) This evidence was repeatedly urged as justification for imposing death.

"Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) The improper and excessive victim impact testimony in this case was voluminous, detailed, and emotionally-charged. In addition to narrations about the victims' lives, descriptions of their characteristics and nature as children and young adults, poignant and emotionally-charged vignettes and anecdotes illustrating the devastation caused by theirs deaths, the testimony included the survivors' opinions regarding the crimes, the defendants, and grieving accounts of how they all had been adversely affected.

Deputy District Attorney West's opening and closing arguments magnified the inflammatory nature of the evidence and the improper use to which it was to be used. Overwhelmed by highly emotional testimony and numerous

photographs of the murder victims, the jurors could not give appellant's evidence or the argument of defense counsel the consideration they deserved. (See *Le v. Mullin* (10th Cir. 2002) 311 F.2d 1002, 1016.)

All of improperly admitted victim impact evidence violated appellant's right to a fair and reliable capital sentencing hearing and to effective assistance of counsel and due process by making the penalty trial fundamentally unfair. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 17; *Tuilaepa v. California* (1994) 512 U.S. 967; *Payne v. Tennessee, supra*, 501 U.S. 808; *Booth v. Maryland, supra*, 482 U.S. 496.)

Under state law, error at the penalty phase of a capital trial requires reversal of a death judgment if there is a reasonable possibility that the error affected the penalty verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) This standard "is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. at p. 24." (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.) Violations of the United States Constitution require reversal unless the prosecution can show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra.*) In view of the nature and extent of the evidence and the exploitation of that evidence by the prosecutor during opening and closing argument, the errors must be deemed prejudicial.

That was the conclusion of the Supreme Court of Florida in *Burns v. State* (Fla. 1992) 609 So.2d 600, which involved the murder of a police officer during

the performance of his duties. In *Burns*, only one type of victim impact evidence, evidence of the victim's character, was improperly introduced, but the court concluded: "Reverting to our earlier finding that it was error to admit the background evidence of the deceased, we cannot with the same certainty determine it to be harmless in the penalty phase. The testimony was extensive and it was frequently referred to by the prosecutor. The prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased. These emotional issues may have improperly influenced the jury in their recommendation." (*Id.* at p. 610.) In appellant's case, where the evidence was even more extensive, involving three victims, three families, and irrelevant, highly inflammatory evidence that, by the trial court's own account, affected everyone in the courtroom, the error cannot be deemed harmless beyond a reasonable doubt and reversal of penalty is required.

X

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

In his proposed penalty jury instructions, appellant proffered Special Jury Instruction No. 9 [Cautionary and Limiting Instruction on Victim Impact Evidence] which stated as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.
>
> (8 CT 1942; 9 CT 2086.)

Appellant argued that the proffered instruction was required to protect appellant's rights to due process of law, equal protection, and to a reliable penalty determination guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. (8 CT 1942-1943.) The trial court denied appellant's request

and refused appellant's proffered jury instruction. (9 CT 2086.)

As summarized in the Statement of Facts and Argument IX, *supra*, the prosecution introduced extensive and highly emotional victim impact evidence in respect to all three murder victims. This highly emotional and inflammatory testimony overwhelmed all other penalty phase evidence. Indeed, the trial court later vividly described the victim impact evidence as perhaps the most emotional day of trial: "Some things that happened during trial I have a very vivid recollection of, one of them was the date we had victim witness testimony, which was a very painful and agonizing date for everyone who was in the courtroom. We had the victims, including the mother and father of the three people that were killed, testify and asked as to how that affected their lives. We had best friends and other relatives testifying. I would say there wasn't a dry eye in the courtroom. Everybody was crying that day. It was a very emotional day for everyone. That's the day that I will always have with me. And that's something that -- that had, had an impact on myself and everybody else that was in the court that day. ..." (3 RT [September 9-10, 2002] 318.)

In closing argument to the jury during the penalty trial, Deputy District Attorney West focused extensively on the impact of the crimes on the victims. Indeed, references to and discussion of the impact of appellant's crimes on families and friends take up a large portion of his closing argument, including the impact of Jose Aragon's death on Lydia Aragon, her family, and friends (54 RT 8087-8091); the impact of Joey Mans' death on his mother, sister, and family (54

RT 8091-8095); and the impact of Timothy Jones' death on his father James Jones, family, and friends. (54 RT 8096-8098.)

The trial court did not give any instruction or the use, consideration, or evaluation of victim impact evidence. The jury was not instructed that such evidence was to be considered within the meaning of factor (a) of CALJIC No. 8.85, nor instructed that victim impact evidence did not constitute separate aggravating circumstances as was done in *People v. Harris* (2005) 37 Cal.4th 310, 358-359.) No instructions were given that in any way informed the jury of the law regarding the proper consideration of victim-impact evidence.

B. The Court Failed to Instruct the Jury on the Proper Use of Victim-Impact Evidence

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1988) 19 Cal.4th 142, 154.)

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

victim impact evidence in this case was highly emotional and inflammatory. Even the trial court acknowledged this many years after the trial. (See Subsection A, *supra*). Unlike the situation in *People v. Harris, supra*, 37 Cal.4th at p. 352, where challenged portions of victim impact testimony was very brief and consumed but a few lines of transcript, here the victim evidence was extensive, detailed the victims' virtues, their closeness to their families and friends, and the impact of their deaths on the lives of their families. As discussed above, during his penalty-phase closing argument to the jury, the prosecutor repeatedly quoted lengthy portions of the victim impact testimony and constantly reminded the jurors of the victim-impact evidence, stressing its import in the jury's penalty determination calculus.

While, generally, victim impact evidence and argument is permissible (*Payne v. Tennessee* (1991) 501 U.S. 808 , 827; *People v. Edwards* (1991) 54 Cal.3d 787, 835 [§ 190.3, factor (a), allows evidence and argument on specific harm caused by defendant, including impact on family of victim]), given the highly inflammatory nature of the crimes in this case, all involving young men in their formative years, there was a very real danger that emotions engendered by the victim-impact evidence would preclude the jury from making a rational penalty decision unless the trial court provided some guidance on how the victim-impact evidence should be used and considered. Absent appropriate instructions as to its use or consideration, such victim impact evidence would serve only to incline the jury toward irrational or purely emotional responses untethered to the

facts appropriate to the penalty phase determination. (See *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Some guidance or appropriate limiting instruction, as proposed by appellant, was thus necessary for the jury's proper understanding of the case, and therefore it should have been given as requested by appellant, or on the trial court's own motion. (See generally *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; *People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022.)

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

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

a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required instruction varies in each state, depending upon the role victim-impact evidence plays in that state's statutory scheme, common features are an explanation of how the evidence can properly be considered and the admonition not to base a decision on emotion or the consideration of improper factors. If not appellant's proposed instruction, an alternative instruction for California would read as follows:

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

The first four sentences of this instruction duplicate the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159. The last sentence is based on *State v. Koskovich*, *supra*, 776 A.2d at p.

177.[146]

This Court addressed a different proposed limiting instruction in *People v. Ochoa, supra,* 26 Cal.4th at p. 445, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, an instruction which was also given in this case.[147] (See 9 CT 2034.) However, CALJIC No. 8.84.1 does not refer specifically to victim impact evidence or cover any of the points made by the instruction proposed here by appellant. It does not tell the jurors why victim-impact evidence was introduced. It does not caution the jurors against an irrational decision, such as imposing death based on the prosecutor's comments regarding the defendant's supposed courtroom demeanor.

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[146]/ In *State v. Koskovich, supra*, the New Jersey Supreme Court held: "We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard." (*Id.* at p. 177.)

[147]/ The version of CALJIC No. 8.84.1 given to appellant's jury read as follows:

> "You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> "You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> "You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict."
>
> (9 CT 2034.)

(See *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 979-982 [prosecutor's reference to non-testifying defendant's courtroom behavior violated defendant's due process rights to a guilt determination based on evidence and his constitutional right not to testify, and was reversible error].) It does not warn the jurors not to consider what they may perceive to be the opinions of the victim-impact witnesses -- a clearly improper factor. (See *Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2; *People v. Pollock, supra,* 32 Cal.4th at p. 1180; *People v. Smith* (2003) 30 Cal.4th 581, 622.) Nor does it admonish them not to employ the improper factor of vengeance in their penalty determination. These potential abuses were addressed in appellant's proposed Special Jury Instruction 9, which properly cautioned the jury against focusing on impermissible considerations and which CALJIC No. 8.84.1 failed to address. Yet this violation of appellant's fair trial rights was inevitable given the overwhelmingly emotional and inflammatory nature of the victim-impact evidence introduced by the state.

Although CALJIC No. 8.84.1 does admonish the jury that, "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings" (9 CT 2034), nothing in the instruction's language explicitly refers to victim impact evidence. Arguably, the sorrowful testimony of family and friends do not fall within the ambit of the "public opinion or public feelings" language recited in the instruction. Given the common-sense meaning of these terms, it would be reasonable for jurors to conclude that the victim impact evidence was not covered by this language. Similarly, the jurors

would reason that the admonition against being swayed by "public opinion or public feeling" (9 CT 2034) did not apply to the private opinions of the victims' relatives, or to any exhortation by the District Attorney to seek vengeance on behalf of the victims' families or society as a whole.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction proposed by appellant would have conveyed that message to the jury; none of the instructions given at the trial did. Consequently, there was nothing to dissuade the jury from incorporating these considerations into the sentencing calculus, including vengeance and the wishes of the victims' families. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by an impartial and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The violations of appellant's federal constitutional rights require reversal unless the state can show that they were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 381 U.S. 18, 24.) The violations of appellant's comparable or equivalent state rights also require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) Although this standard has been considered the same, in substance and

effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. 18, 24 (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11), in *People v. Brown, supra*, the Court stressed the applicability of a more exacting standard of review when assessing the prejudicial effect of state-law errors at the penalty phase of a capital trial. (*People v. Brown, supra*, 46 Cal.3d at pp. 447-448.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase.

In *People v. Ashmus, supra*, 54 Cal.3d at pp. 983-984, the Court again invoked *Brown,* explaining that the prejudice standard required the reviewing court to reverse based on even the possibility that a hypothetical juror might have reached a different decision absent the error. "We must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*People v. Ashmus, supra.*) Given *Brown* and *Chapman, supra*, which equate the reasonable possibility standard under state law with the federal harmless beyond a reasonable doubt standard, the trial court's instructional error cannot be considered harmless, particularly in view of the purely emotional and excessively inflammatory nature of the victim-impact evidence presented in this case, and the prosecutor's effective and extensive use of that evidence during his closing argument. Reversal of the death judgment is required.

XI

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND PROTECTION FROM THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY GUARANTEED BY THE FIFTH, EIGHTH AND, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

California does not provide for comparative appellate or intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. The failure to conduct intercase proportionality review of death sentences violates appellant's right to be protected from the arbitrary and capricious imposition of capital punishment guaranteed by the Eighth Amendment to the United States Constitution, and his Fifth, Eighth, and Fourteenth Amendment rights to a fair trial, due process, and equal protection of the laws.

A. The Lack of Intercase Proportionality Review Violates Appellant's Eighth and Fourteenth Amendment Protections Against the Arbitrary and Capricious Imposition of the Death Penalty

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (*See Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.)

Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required and that intercase proportionality review does not render California death penalty law unconstitutional.(*See People v. Farnam, supra,* 28 Cal.4th at p. 193; *People v. Harris* (2005) 37 Cal.4th 310, 366.)

However, as Justice Blackmun observed, the holding in *Pulley v. Harris, supra,* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, [*citations omitted*] (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*,

> at 53, [*citations omitted*], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*.
>
> (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

In its now time for the Court to reevaluate its reliance on *Pulley v. Harris, supra.* Comparative case review is the most rational -- if not the only -- effective means by which to ascertain whether a statutory scheme as a whole is producing arbitrary results. Thus, unlike California, the vast majority of the states that sanction capital punishment require some type of comparative or intercase proportionality review.[148]

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[148] / *See* Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988). Other states have judicially instituted similar review. (*See, for example, State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

The capital sentencing scheme in effect in 1996, at the time of appellant's trial, was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming for purposes of this argument that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors -- especially the circumstances of the offense factor delineated in section 190.3, subdivision (a) -- coupled with the discretionary nature of the sentencing instruction under CALJIC No. 8.88 (1989 Revision) given by the trial court in this case (9 CT 2081), effectively grant a jury virtually unfettered discretion in making the death-sentencing decision. (*See Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.).)

Indeed, as applied in California, section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. As more thoroughly discussed and demonstrated in Argument XII, Subdivision B, *infra*, [and incorporated by reference herein], prosecutors throughout California have argued for the death penalty in almost every conceivable circumstance of the crime, even those that -- from case to case -- reflect starkly opposite circumstances -- e.g., arguing in one case that the defendant struck with many blows and, then in

another, that he struck with a single blow; that the defendant killed with a purportedly aggravating motive and that the defendant acted without any motive at all; that the defendant engaged in a cover-up to conceal his crime and that the defendant did not engage in a cover-up; that the defendant made the victim endure terror and that the defendant killed without any warning; arguing that the victim had children and, then in another, that the victim had not yet had a chance to have children; arguing that the victim struggled and, and then in another, that the victim did not struggle; arguing that the defendant was a complete stranger to the victim and, then in another that the defendant did not know the victim.

California's authorization of the death penalty for felony-murder works in combination with the far-reaching and malleable statutory sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Section 190.2 immunizes few kinds of first degree murderers from death eligibility, and section 190.3 provides little guidance to juries in making the death-sentencing decision. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability, criminal history, and backgrounds are sentenced to death.

California's capital sentencing scheme neither operates in a manner to ensure consistency in penalty phase verdicts nor in a manner to prevent arbitrariness of verdicts in capital sentencing. Therefore, California is

constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment rights not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

B. The Lack of Intercase Proportionality Review Also Violates Appellant's Rights to a Fair Trial, Due Process, and Equal Protection of the Laws Guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing 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* (1988) 524 U.S. 721, 731-732.) Despite this directive, California provides far fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Appellant acknowledges that the Court has previously held, albeit with little analysis, that the absence of intercase proportionality review does not violate a defendant's right to equal protection of the law under the Fourteenth Amendment. (*People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Moon* (2005) 37 Cal.4th 1, 48.) The Court has also held that equal protection does not require that capital defendants be afforded the same sentence review afforded other felons under the determinate sentencing law. (*People v. Dunkle* (2005) 36 Cal.4th 861,

940; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Morrison* (2004) 34 Cal.4th 698, 731.) For the reasons discussed below, however, these decisions should be reevaluated; under Fourteenth Amendment equal protection principles, appellant is entitled to the same sentence review afforded other felons under the Determinate Sentencing Law (DSL).

At the time of appellant's sentence, California required intercase proportionality review for noncapital cases. (See § 1170, subd. (d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law -- a comprehensive and detailed disparate sentence review. (*See* generally *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) However, persons sentenced to death, the most extreme penalty, are unique among convicted felons in that they are not accorded this review. This distinction is irrational and unjust.

To succeed on a claim under the equal protection clause, a defendant first must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*United States v. Batchelder* (1979) 442 U.S. 114, 123-125; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568; *In re Eric J.* (1979) 25 Cal.3d 522, 530.) In considering whether state legislation violates the equal protection clause of the Fourteenth Amendment, the Court applies different levels of scrutiny to different types of classifications. Classifications affecting fundamental rights are given the most exacting scrutiny. (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) Since life itself and freedom from the

arbitrary imposition of death are perhaps the most elemental aspects of the fundamental constitutional rights to life and personal liberty, the strict scrutiny test is necessarily applicable. (*People v. Olivas* (1976) 17 Cal.3d 236, 250-251 [personal liberty is a fundamental interest, second only to life itself].)

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning of *Allen*, however, was flawed.

The *Allen* Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.) Although the observation may be true, it ignores a more significant point, *i.e.*, the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, yet not provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special

circumstances (§ 190.2) and sentencing factors (§ 190.3), and a court of statewide jurisdiction is well-situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (*See McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing through prohibition of death penalties that flout a societal consensus as to particular offenses or offenders. (*See Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584; *Atkins v. Virginia* (2002) 536 U.S. 304; see also *Roper v. Simmons* (2005) 543 U.S. 551 [execution of juveniles]; *Penry v. Lynaugh* (1989) 492 U.S. 302 [execution of mentally retarded persons].) But juries -- like trial courts and counsel -- are not immune from error, and they may stray from the larger community consensus expressed in statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (*See* § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a capital verdict would render the jury's sentencing function less than inviolate, since it is not entirely inviolate under the

current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287 [emphasis added].) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra,* 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for -- rather than against -- requiring application of review procedures to potentially disparate capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (*See People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very

little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (*Compare* § 190.3, subds. (a) through (j) with Cal. Rules of Court, rule 4.421 [circumstances in aggravation] and rule 4.423 [circumstances in mitigation].) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, thus creating the risk of arbitrariness, the legislature created the non-capital, disparate review mechanism under section 1170, subdivision (d) to minimize this risk.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*See Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (*See Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

As this Court ruled in *Allen*, the fact that a death sentence reflects community standards cannot justify the arbitrary and unequal treatment of convicted felons, like appellant, who are condemned to death. All criminal sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all

other convicted felons in this state -- the type of review routinely provided in virtually every death penalty state, except California. The lack of intercase proportionality review violates appellant's fundamental constitutional rights to due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and implicates Eighth Amendment reliability principles as well. Reversal of appellant's death sentence is required.

XII

THE JURY INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS IN SECTION 190.3, AND THE JURORS' APPLICATION OF THESE SENTENCING FACTORS, RENDERED APPELLANT'S DEATH SENTENCE CAPRICIOUS AND ARBITRARY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

The trial court instructed the jury on the sentencing factors in section 190.3 in the language of CALJIC No. 8.85, the standard instruction regarding the statutory factors to be considered by the jury in determining whether to impose a sentence of death or life without the possibility of parole. (9 CT 2057-2058; 54 RT 8145-8146.) In addition to CALJIC No. 8.85, the court instructed the jury with Special Instruction No. 7 as follows:

> The factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider. You are not allowed to consider any other facts or circumstances as the basis that the death penalty would be appropriate in this case.
>
> (9 CT 2065; 54 RT 853.)

The jury was also instructed in the language of CALJIC No. 8.88 (1989 Revision) , the standard instruction on aggravating and mitigating factors, in relevant part as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state

prison for life without the possibility of parole, shall be imposed on the defendant.

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

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of he crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstances in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

* * *

(9 CT 2801-2802; 54 RT 8158-8159.)

Together, these instructions rendered appellant's death sentence unconstitutional.

B. The Instruction on Section 190.3, Subdivision (a) and Application of that Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, subdivision (a) permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." Accordingly, the jury in this case was instructed pursuant to CALJIC No. 8.85 to consider and take into account "[t]he circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (9 CT 2057; 54 RT 8145.)

In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that -- at least in the abstract -- it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

An analysis of how section 190.3, subdivision (a) is actually used by prosecutors in capital cases shows that the essence of the Court's judgment in *Tuilaepa* is incorrect. In fact, there is an extraordinarily disparate use of the circumstances-of-the-crime factor. Beyond question, whatever "common sense core of meaning" subdivision (a) once may have had is long gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision-making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires the adoption of "procedural

safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

As applied in California, however, section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. Prosecutors throughout California have argued that the penalty jury weigh aggravation in almost every conceivable circumstance of the crime, even those that -- from case to case -- reflect starkly opposite circumstances. For example, records in other capital cases before the Court[149] reveal that prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale because:

1. The defendant struck many blows and inflicted multiple wounds;[150]
2. The defendant killed with a single execution-style wound;[151]
3. The defendant killed the victim for some purportedly aggravating

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[149]/ Evid. Code § 452, subd. (d) authorizes the Court to take judicial notice of the records of any court of this state.

[150]/ See, e.g., *People v. Morales*, Cal. Sup. Ct. No. (hereinafter "No.") S004552, RT 3094-3095 [defendant inflicted many blows]; *People v. Zapien*, No. S004762, RT 36-38 [same]; *People v. Lucas*, No. S004788, RT 2997-2998 [same]; *People v. Carrera*, No. S004569, RT 160-161 [same].

[151]/ See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 [defendant killed with single wound]; *People v. Frierson*, No. S004761, RT 3026-3027 [same].

motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification);[152]

4. The defendant killed the victim without any motive at all;[153]

5. The defendant killed the victim in cold blood;[154]

6. The defendant killed the victim during a savage frenzy;[155]

7. The defendant engaged in a cover-up to conceal his crime;[156]

8. The defendant did not engage in a cover-up and so must have been proud of it;[157]

9. The defendant made the victim endure the terror of anticipating a violent death;[158]

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[152]/ See, e.g., *People v. Howard*, No. S004452, RT 6772 [money]; *People v. Allison*, No. S004649, RT 968-969 [same]; *People v. Belmontes*, No. S004467, RT 2466 [eliminate a witness]; *People v. Coddington*, No. S008840, RT 6759-6760 [sexual gratification]; *People v. Ghent*, No. S004309, RT 2553-2555 [same]; *People v. Brown*, No. S004451, RT 3543-3544 [avoid arrest]; *People v. McLain*, No. S004370, RT 31 [revenge].

[153]/ See, e.g., *People v. Edwards*, No. S004755, RT 10,544 [defendant killed for no reason]; *People v. Osband*, No. S005233, RT 3650 [same]); *People v. Hawkins*, No. S014199, RT 6801 [same].

[154]/ See, e,g., *People v. Visciotti*, No. S004597, RT 3296-3297 [defendant killed in cold blood].

[155]/ See, e.g., *People v. Jennings*, No. S004754, RT 6755 [defendant killed victim in savage frenzy (trial court finding)].

[156]/ See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 [defendant attempted to influence witnesses]; *People v. Benson*, No. S004763, RT 1141 [defendant lied to police]; *People v. Miranda*, No. S004464, RT 4192 [defendant did not seek aid for victim].

[157]/ See, e.g., *People v. Adcox*, No. S004558, RT 4607 [defendant freely informs others about crime]; *People v. Williams*, No. S004365, RT 3030-3031 [same]; *People v. Morales*, No. S004552, RT 3093 [defendant failed to engage in a cover-up].

[158]/ See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

10. The defendant killed instantly without any warning;[159]

11. The victim had children;[160]

12. The victim had not yet had a chance to have children;[161]

13. The victim struggled prior to death;[162]

14. The victim did not struggle;[163]

15. The defendant had a prior relationship with the victim;[164] and

16. The victim was a complete stranger to the defendant.[165]

The above examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is now being used in California. In fact, as the above-referenced cases indicate, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on diametrically-opposed or

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[159]/ See, e.g., *People v. Freeman*, No. S004787, RT 3674 [defendant killed victim instantly]; *People v. Livaditis*, No. S004767, RT 2959 [same].
[160]/ See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) [victim had children].
[161]/ See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 [victim had not yet had children].
[162]/ See, e.g., *People v. Dunkle*, No. S014200, RT 3812 [victim struggled]; *People v. Webb*, No. S006938, RT 5302 [same]; *People v. Lucas*, No. S004788, RT 2998 [same].
[163]/ See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 [no evidence of a struggle]; *People v. Carrera*, No. S004569, RT 160 [same].
[164]/ See, e.g., *People v. Padilla*, No. S014496, RT 4604 [prior relationship]; *People v. Waidla*, No. S020161, RT 3066-3067 [same]; *People v. Kaurish* (1990) 52 Cal.3d 648, 717 [same].
[165]/ See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 [no prior relationship]; *People v. McPeters*, No. S004712, RT 4264 [same].

squarely-conflicting circumstances. This demonstrates that the term has no common or core meaning or significance but is so malleable that it can be applied or invoked in virtually every case. It therefore cannot withstand Eighth and Fourteenth Amendment scrutiny.

Of equal importance to the arbitrary and capricious use of the circumstances-of-the-crime factors to support a penalty of death is the fact that it is applied so broadly as to subsume the entire spectrum of circumstances invariably present in every homicide, including age of victim, method of killing, motive, and location of crime. For example, prosecutors have argued, and juries have been permitted to find, that factor (a) is an aggravating circumstance because:

1. The victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[166]

2. The victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[167]

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[166]/ See, e.g., *People v. Deere*, No. S004722, RT 155-156 [victims were young, ages 2 and 6]; *People v. Bonin*, No. S004565, RT 10,075 [victims were adolescents, ages 14, 15, and 17]; *People v. Kipp*, No. S009169, RT 5164 [victim was a young adult, age 18]; *People v. Carpenter*, No. S004654, RT 16752 [victim was 20], *People v. Phillips*, (1985) 41 Cal.3d 29, 63 [26-year-old victim was "in the prime of his life"]; *People v. Samayoa*, No. S006284, XL RT 49 [victim was an adult "in her prime"]; *People v. Kimble*, No. S004364, RT 3345 [61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"]; *People v. Melton*, No. S004518, RT 4376 [victim was 77]; *People v. Bean*, No. S004387, RT 4715-4716 [victim was "elderly"].

[167]/ See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 [strangulation]; *People v. Kipp*, No. S004784, RT 2246 [same]; *People v. Fauber*, No. S005868, RT 5546 [use of an axe]; *People v. Benson*, No. S004763, RT 1149 [use of a

3. The defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[168]

4. The victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[169] and

5. The victim was killed in her own home, in a public bar, in a city park, or in a remote location.[170]

The foregoing examples illustrate how the factor (a) circumstances-of-the-crime aggravator actually is being applied and demonstrate beyond doubt that it is applicable and used in *every* case regardless of the facts or circumstances, by *every* prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts -- or facts that are inevitable variations of every homicide -- into aggravating factors that are offered to every

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hammer]; *People v. Cain*, No. S006544, RT 6786-6787 [use of a club]; *People v. Jackson*, No. S010723, RT 8075-8076 [use of a gun]; *People v. Reilly*, No. S004607, RT 14,040 [stabbing]; *People v. Scott*, No. S010334, RT 847 [fire].

[168]/ See, e.g., *People v. Howard*, No. S004452, RT 6772 [money]; *People v. Allison*, No. S004649, RT 969-970 [same]); *People v. Belmontes*, No. S004467, RT 2466 [eliminate a witness]; *People v. Coddington*, No. S008840, RT 6759-6761 [sexual gratification]; *People v. Ghent*, No. S004309, RT 2553-2555 [same]; *People v. Brown*, No. S004451, RT 3544 [avoid arrest]; *People v. McLain*, No. S004370, RT 31 [revenge]; *People v. Edwards*, No. S004755, RT 10,544 [no motive at all].

[169]/ See, e.g., *People v. Fauber*, No. S005868, RT 5777 [early morning]; *People v. Bean*, No. S004387, RT 4715 [middle of the night]; *People v. Avena*, No. S004422, RT 2603-2604 [late at night]; *People v. Lucero*, No. S012568, RT 4125-4126 [middle of the day].

[170]/ See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 [victim's home]; *People v. Cain*, No. S006544, RT 6787 [same]; *People v. Freeman*, No. S004787, RT 3674, 3710-3711 [public bar]; *People v. Ashmus*, No. S004723, RT 7340-7341 [city park]; *People v. Carpenter*, No. S004654, RT 16,749-16,750 [forested area]; *People v. Comtois*, No. S017116, RT 2970 [remote, isolated location].

jury as unique factors weighing on death's side of the scale. This is precisely the kind of arbitrariness and capriciousness proscribed by Eighth and Fourteenth Amendment reliability and due process principles.

In the present case, the prosecutor invoked a multiplicity of circumstances and facts that, he argued, rendered factor (a) uniquely applicable to appellant. At the commencement of his closing argument, the prosecutor stressed that the aggravating circumstances, in his opinion, "center around two areas. What's called the (a) paragraph and the (b) paragraph ... ."

In respect to the "(a) paragraph," which he defined as "the circumstances of the crime (54 RT 8083-8084), the prosecutor told the jury that appellant picked "people out of our community at random to kill them." (54 RT 8082.) He also said that appellant took "their lives just for the fun of it, for the thrill of it." (54 RT 8082.) The prosecutor also stated that appellant killed people "for sport" (54 RT 8082) and engaged in "recreational murder, recreational violence, hurting people for the fun of it." (54 RT 8082.) The prosecutor emphasized, for example, that the daytime murder of Jose Aragon was "unfair" because he was a young man who wanted to be an engineer. (54 RT 8085-8086.) In quoting the victim impact testimony of Lydia Aragon, the prosecutor reminded the jury that Jose Aragon was a "kid," a son, a grandson, and a friend. The prosecutor stressed that Aragon was married and that his death constantly reminded his family that he was not going to have any children. (54 RT 8088.) The prosecutor mentioned that appellant was an "artist" who liked to hurt people and create dead people. (54 RT 8098.) The

prosecutor repeatedly urged that the death penalty was appropriate because of the pain inflicted on Jose Aragon, because the killing was unfair, because he "prayed" for appellant and his accomplices to leave. (54 RT 8086.)

As to the murders of Joe Mans and Timothy Jones, the prosecutor told the jurors that they should consider in weighing the circumstances of the crimes that the murders were unfair, that appellant and his accomplices, "stormed" their car," caused great fear and humiliation, and caused great pain. (54 RT 8091-8092, 8094.) The prosecutor stressed that coappellant Romero "executed" Mans. (54 RT 8096.) As to Timothy Jones, the prosecutor stressed that he was a kind young man, defenseless, accosted by gunmen in the middle of the night and in the middle of nowhere. (54 RT 8095-8096, 8107.)

In so arguing factor (a) to the jury, the prosecutor invoked a potpourri of purportedly unique facts and circumstances that apply in virtually every homicide. As this case so clearly illustrates, the circumstances-of-the-crime aggravating factor can be invoked in every conceivable situation or circumstance. Every fact or circumstance involved in a crime -- precisely because they are so malleable in the hands of the prosecution -- 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*, *supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and

reality both show. Factor (a) is being used -- as was used in this case -- to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

C. The Instruction on Penal Code Section 190.3, Subdivision (b) and the Jurors' Application of that Sentencing Factor Violated Appellant's Constitutional Rights to a Fair Penalty Trial, Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination

1. Introduction

In addition to CALJIC No. 8.85 and 8.88, as discussed in Subsection A, *supra*, the trial court instructed the jury in the language of CALJIC No. 8.87 (1989 Revision) that as aggravating factors under section 190.3, subdivision (b), the jury could consider evidence that appellant committed "assault, battery, attempt[ed] forcible oral copulation and possession of deadly weapon in jail which involved the express or implied use of force or violence or the threat of force or violence." (9 CT 2059; 54 RT 8149, 8151.) The jury was told it could rely on these aggravating factors in the weighing process necessary to determine if appellant should be executed. The jury was told that it was not necessary for all jurors to agree. "If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." (9 CT 2059; 54 RT 8152.) Thus, although the jury was told in the

language of CALJIC No. 8.88 (1989 Revision) that all jurors 12 must agree on the penalty determination (9 CT 2082), the jury was also explicitly told that as to factor (b) it was not necessary for all jurors to agree. (9 CT 2059; 54 RT 8152.) Indeed, the jury was explicitly instructed that such unanimity as to factor (b) was not required. Thus, the sentencing instructions contrasted sharply with those given at the guilt phase, where the jurors were told they had to agree unanimously on appellant's guilt and the special circumstances allegations. This aspect of section 190.3, subdivision (b) and CALJIC No. 8.87 (1989 Revision), permitting the jury to sentence appellant to death by relying on evidence on which it did not necessarily agree unanimously, violated both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. The Use of Unadjudicated Criminal Activity as Aggravation Renders Appellant's Death Sentence Unconstitutional

The instruction on factor (b) aggravation was upheld against an Eighth Amendment vagueness challenge in *Tuilaepa v. California*, *supra*, 512 U.S. at p. 977. However, the instruction and evidence in this case violated the Eighth Amendment, because they permitted the jury to consider unreliable evidence of appellant's alleged prior and subsequent unadjudicated criminal conduct.

The admission into evidence of unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment, and a reliable

determination of penalty under the Eighth Amendment. (*State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments]; *see also State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance based on state constitution with due process and impartial jury provisions comparable to United States and California Constitutions].) Thus, the trial court's instructions in this case that expressly permitted the jury to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, the use of this evidence in a capital proceeding violated appellant's equal protection rights under the California and United States Constitutions. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) Further, because the state applies its law in an irrational manner by providing more sentencing rights in non-capital cases, the use of this evidence in a capital sentencing proceeding also violated appellant's California and United States constitutional rights to due process and equal protection of the laws. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; U.S. Const., 6th & 14th Amendments; Cal. Const., art. I, §§ 7 and 15.)

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3. The Failure to Require a Unanimous Jury Finding on the Unadjudicated Acts of Violence Denied Appellant His Right to a Jury Trial Guaranteed by the Sixth and Fourteenth Amendments and Requires Reversal of His Death Sentence

Even assuming for purposes of argument that the evidence of alleged prior and subsequent unadjudicated acts was constitutionally admissible at the penalty trial, the failure of the trial court's instructions pursuant to section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior and subsequent acts of violence renders his death sentence unconstitutional.[171] The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The United States Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits

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[171]/ Argument XIII, *infra*, discusses the constitutional burden of proof requirements, jury unanimity, and fact-finding determinations made by a capital sentencing jury in California. This argument addresses solely the use of unadjudicated acts under factor (b), including the absence of jury unanimity as to unadjudicated acts under factor (b).

beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding -- at least in a non-capital case -- although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[172]

Prior to June of 2002, the United States Supreme Court's law on the Sixth Amendment did not apply to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating

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[172]/ The United States Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida, supra,* 430 U.S. at p. 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged prior and subsequent unadjudicated acts of violence, there is no need to reach this question here.

evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Hines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s]"].) In other words, absent juror unanimity in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to tell if all 12 jurors agreed that appellant committed the prior school assault with which he was never charged and about which there had been no prior proceedings or testimony. For the same reasons, there is no way to tell if all 12 jurors agreed that appellant committed all of the subsequent unadjudicated acts charged as aggravation which he allegedly committed while confined in the Riverside County Jail awaiting trial. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12

jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Dellinger* (1985) 163 Cal.App.3d 284, 302 [same].)[173]

4. Absent a Requirement of Jury Unanimity in Respect to the Alleged Unadjudicated Acts of Violence, the Instructions on Section 190.3, Subdivision (b) Allowed Jurors to Impose the Death Penalty on Appellant Based on Unreliable Factual Findings That Were Never Deliberated, Debated, or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio*, supra, 438 U.S. at p. 604.) For this reason, the High Court has not hesitated to strike down penalty phase procedures that increase the risk that the fact-finder will make an unreliable determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Supreme Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process."

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[173]/ This assumes that a harmless error analysis may apply to *Ring* error. In *Ring*, the High Court did not reach this question, but simply remanded the case. Because the error here is not harmless even under *Chapman v. California, supra,* 386 U.S. at p. 24 standard, there may be no need to decide whether *Ring* errors are structural in nature and hence prejudicial per se.

(*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (§ 190.3, subd. (b).) Before the fact-finder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (9 CT 2059; 54 RT 8151-8152.) Thus, as noted above, members of the jury may individually rely on this -- and any other -- aggravating factor each of the jurors deems proper as long as the jurors all agree on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the Sixth Amendment right to jury trial that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby

substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . . even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas).)

The High Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable fact-finding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate fact-finding . . .." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Supreme Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States, supra,* 164 U.S. at p. 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The United States Supreme Court's observations about the effect of jury unanimity on group deliberation and fact-finding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable fact-finding determinations is substantially greater. Second, unlike the

Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree on factor (b) evidence before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this critical factual issue, which was relied upon by the jurors to sentence appellant to death. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of less than unanimous factual findings that they have neither debated, deliberated nor even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi,* supra, 486 U.S. at p. 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g)) in CALJIC No. 8.85 as read to the jury (9 CT 2057), and "substantial" (see factor (g)) (9 CT 2057), acted as a barrier to the consideration of mitigation, in violation of the Sixth,

Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586; but see *People v. Blair* (2005) 36 Cal.4th 686, 753-754 [use of adjectives, such as "extreme" and "substantial" in section 190.3 penalty factors (d) and (g) does not impermissibly restrict jury's consideration of mitigating evidence in violation of the Eighth or Fourteenth Amendments]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.)

E. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980). There can be no meaningful appellate review unless juries make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.) Indeed, written findings are essential for a meaningful review of the

sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1999) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t 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.) By parity of reason, the same requirement must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170, subd. (c).) Under the Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing greater protection to noncapital than to capital defendants under similar circumstances violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra,* 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found upon which he bases the decision to imposed death.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[174] California's failure to require such findings renders

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[174]/ See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1993); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann.

its death penalty procedures unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

F. Even if the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants Such as Appellant Nevertheless Violates Equal Protection Requirements of the Fourteenth Amendment to the United States Constitution

As noted above (Subsections C and E, *supra*), the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases 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 of the High Court, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws under the Fourteenth Amendment.

Equal protection analysis begins with identifying the interest at stake. In

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Code art 27 § 413(i) (1993); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

California, Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas, supra,* 17 Cal.3d at p. 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) . . .." (*Commonwealth v. O'Neal* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," this Court and others have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest 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.)

California cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the California and United States Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections in order to make death sentences more reliable.

Appellant has previously demonstrated (Argument XI, *supra)* why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts, as though set out in full, that argument here with regard to the denial of other safeguards such the requirement of written jury findings, unanimous agreement on alleged unadjudicated, violent criminal acts under section 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in Subsections B through E, *supra*. The procedural protections outlined in these assignments of error, but denied capital defendants as appellant, are especially important in ensuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards, or on any other ground, is irrational and arbitrary and cannot withstand the Fourteenth Amendment close scrutiny analysis that applies when the most fundamental interest -- life -- is at stake.

G. Conclusion

For the reasons set forth above, both separately and in the aggregate, appellant's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and their California counterparts, and must therefore be reversed.

XIII

PENAL CODE SECTION 190.3 AND IMPLEMENTING JURY INSTRUCTIONS (CALJIC NOS. 8.84-8.88) ARE UNCONSTITUTIONAL, BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF OR CONTAIN OTHER CONSTITUTIONALLY COMPELLED SAFEGUARDS AND PROTECTIONS REQUIRED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

The California death penalty statute and the instructions given in this case (CALJIC Nos. 8.84-8.88) fail to assign a burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. The instructions do not delineate a burden of proof either with respect to the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. Neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors utilized by the jury as the basis for imposing a sentence of death. As shown below, these and other critical omissions in the California capital sentencing scheme embodied in section 190.3 and CALJIC Nos. 8.84-8.88 violated appellant's rights to trial by jury, fair trial, unanimous verdict, reliable penalty determination, due process, and equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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B. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, that the Aggravating Factors Outweigh the Mitigating Factors, and that Death is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (§ 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, *rev'd on other grounds*, *California v. Brown* (1987) 479 U.S. 538; *see also People v. Cudjo* (1993) 6 Cal.4th 585, 634. Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[175]

Here, the jury was specifically instructed in the language of CALJIC No. 8.84 and No. 8.88 that it must determine whether the death penalty or "confinement in the state prison for life without possibility of parole" shall be imposed. (9 CT 2033, 2081.) No burden of proof was specified or required by the trial court to guide the jury in determining penalty. The failure to assign or impose a burden of proof as a prerequisite for a jury's sentence of death renders both the California death penalty scheme and implementing instructions unconstitutional,

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[175]/ There are two exceptions to this lack of a burden of proof. The special circumstances (§ 190.2) and the aggravating factor of unadjudicated violent criminal activity (§ 190.3, subd. (b)) must be proved beyond a reasonable doubt. Appellant further discusses the defects in § 190.3, subd. (b), infra, as well as in Argument XII, *supra*.

and, in this case, renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

This Court has consistently held that neither the United States nor California 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. (*People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14 ["death is no more than the prescribed statutory maximum for the offense ... . Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*"].) Indeed as elsewhere stated by the Court in *People v. Turner* (2004) 34 Cal.4th 406, 439, "[t]he jury need not be instructed on the burden of proof during the penalty phase because the sentencing function is 'not susceptible to a burden-of-proof quantification'." Appellant offers nevertheless that the Court's reasoning and rulings are contrary to United States Supreme Court jurisprudence and the notion that no burden of proof is necessary or constitutionally compelled is contrary to United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona, supra,* 536 U.S. 584; and most recently in *Blakely v. Washington* (2004) 542 U.S. 296. Appellant acknowledges that this Court has ruled otherwise in *People v. Cornwell* (2005) 37 Cal.4th 50, 104; *People v. Blair* (2005) 36 Cal.4th 686, 754 [concluding without

analysis that the United States Supreme Court's recent decisions interpreting the Sixth Amendment's guarantee of a jury trial do not compel a different result].)

The High Court in *Apprendi* considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crime statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra,* 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process of law, reasoning that labeling a particular matter simply a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The High Court thus 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 v. Arizona, supra,* the Court applied *Apprendi's* principles in the context of capital sentencing requirements, stressing most importantly "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra,* 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 593.) Although the Court had previously upheld the Arizona scheme in *Walton v. Arizona, supra,* 497 U.S. at p. 639, the Court newly-found that *Walton* was irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra,*, 536 U.S. at p. 609.) The Court observed: "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. We hold that the Sixth Amendment applies to both." (*Id.*) In his concurring opinion, Justice Scalia distinctively and succinctly distilled the Court's holding: "All facts essential to the imposition of

the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 610 (Scalia J., concurring).)

In *Blakely*, the High Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra,* 124 S. Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Id.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra,* 124 S. Ct. at p. 2537 (emphasis in original).)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three

additional states have related provisions.[176] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to address the matter explicitly by statute.

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. Fairbanks* (1977) 16 Cal.4th 1223, 1255; *see also*

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[176]/ *See* Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre, supra,* 572 P.2d at p. 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992). Washington has a related requirement that before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. § 10.95.060(4) (West 1990). Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (See *State v. Ring* (Az. 2003) 65 P.3d 915.)

People v. Hawthorne, supra, 4 Cal.4th at p. 79 [concluding that penalty phase determinations are "moral," 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 jury or 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.[177] As set forth in CALJIC No. 8.88, California's "principal sentencing instruction" (*People v. Farnam, supra,* 28 Cal.4th at p. 177), which was read to appellant's jury, "an aggravating factor is any *fact*, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (9 CT 2081 [italics 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.[178] These factual determinations are essential prerequisites to death-

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[177]/ This Court has acknowledged that fact finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also --and most important -- to render an individualized, normative determination about the penalty appropriate for the particular defendant ... ." (*People v. Brown, supra,* 46 Cal.3d at p. 448.)

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.[179]

In *People v. Anderson, supra,* 25 Cal.4th at p. 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (*See, e.g., People v. Prieto, supra,* 30 Cal.4th at p. 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; *see also People v. Snow, supra,* 30 Cal.4th 43.)

In the face of the United States Supreme Court's recent decisions, this Court's burden of proof analysis and holdings in such cases as *Anderson, Prieto*,

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[178]/ In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Supreme Court of Nevada found, under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing; the Nevada court therefore concluded "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.)

[179]/ This Court has held that despite the "shall impose" language of § 190.3, even if jurors determine or find that aggravating factors outweigh mitigating factors, a sentence of life in prison without possibility of parole may still be imposed. (*People v. Allen, supra,* 42 Cal.3d at pp. 1276-1277 (1986); *People v. Brown* (1985) 40 Cal.3d 512, 541.)

and *Snow* are simply no longer tenable. Read together, the *Apprendi-Ring-Blakely* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*See Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) As stated in *Ring*, "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 v. Arizona, supra*, 536 U.S. at p. 586.) As Justice Breyer points out in explaining the holding in *Blakely*, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2551 (Breyer, J., dissenting).)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that: (1) aggravation exists; (2) aggravation outweighs mitigation; and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with

special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona, supra,* 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey, supra,* 530 U.S. at p. 541 (O'Connor, J., dissenting)).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase -- that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona, supra* 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494)), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona, supra,* 536 U.S. at p. 610 (Scalia, J., concurring).) They thus trigger *Blakely-Ring-Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact finding is one of the functions of the sentencer. Indeed, California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate."

(*People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32 (citing *People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn. 14).) The Court has repeatedly rejected *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra* 30 Cal.4th at p. 275; *People v. Snow, supra* 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence -- in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death -- no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the United States Constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra,*

512 U.S. at p. 972). No single factor therefore determines which penalty -- death or life without the possibility of parole -- is appropriate." (*People v. Prieto, supra* 30 Cal.4th at p. 263 (emphasis added).) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present -- otherwise, there is nothing to put on the scale in support of a death sentence. (*See People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The Supreme Court of Arizona, for example, has found that this weighing process is the functional equivalent of an element of capital murder and is therefore subject to the protections of the Sixth Amendment. (*See State v. Ring, supra,* 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; *accord State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[180])

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[180]/ *See also* Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this reality does not thereby make the jury's finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself, the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were only illustrative and not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own -- a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements.

The High Court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative-factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's determination of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, to be constitutionally sufficient, the finding must be made by a unanimous jury and must be made beyond a reasonable doubt.

In *People v. Griffin* (2004) 33 Cal.4th 536, in its first post-*Blakely*

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call for leniency since both findings are essential predicates for a sentence of death).

discussion of the jury's role in the penalty phase, the High Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin, supra,* 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the amount of punitive damages, it had to answer in the affirmative the following interrogatory: "[E]vidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" *(Cooper Industries, Inv. v. Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed de novo. Although the Court found that the ultimate amount was a moral decision that should be reviewed de novo, it made clear that all findings that were prerequisite to the dollar amount determination were fact issues for the jury. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors

substantially outweigh mitigating factors, are facts that are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the United States Constitution.

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring,* and *Blakely* are:

1. What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? *Answer*: The maximum sentence would be life imprisonment without possibility of parole.

2. What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? *Answer*: The maximum sentence without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life imprisonment without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for extending rather than withholding procedural protections. (*People v. Prieto, supra,* 30 Cal. 4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding of aggravating circumstances beyond a reasonable doubt by arguing that "death is different." This effort to turn the High Court's recognition of the irrevocable nature of the death penalty to its advantage was explicitly rebuffed by the Supreme Court itself:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific

> reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." [Citation]. The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence."
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> (*Ring v. Arizona, supra,* 536 U.S. at p. 606 (quoting with approval *Apprendi v. New Jersey, supra,* 530 U.S. at p. 539 (O'Connor, J., dissenting)).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California, supra,* 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) As the High Court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment ... . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.
>
> *(Ring v. Arizona, supra,* 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. The Court greatly errs, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are

prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. The Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

C. The State and Federal Constitutions Require an Instruction that the Jury May Impose a Sentence of Death Only if Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Outweigh the Mitigating Factors and that Death is the Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the due process clauses of the Fifth and Fourteenth Amendments 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, supra,* 430 U.S. at p. 358; *see also Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the due process clauses of the Fifth and Fourteenth Amendments as well as the Eighth Amendment to the United States Constitution.

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; *see also Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship, supra,* 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors ... the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the

countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; *see also Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

On examining the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall, supra,* 375 U.S. at p. 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*See In re Winship, supra,* 397 U.S. p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the state the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," (*Santosky v. Kramer, supra,* 455 U.S. at p. 755), the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement

> reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. ... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation]. The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], 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 v. Kentucky, supra,* 455 U.S. at p. 755 (quoting A*ddington v. Texas, supra*, 441 U.S. at pp. 423, 424, 427).)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky, supra,* 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship, supra,* 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a

reasonable doubt standard. Adoption of that standard would not deprive the state of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (*See Monge v. California, supra,* 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond a reasonable doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California, supra*, 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 (quoting *Addington v. Texas, supra*, 441 U.S. at pp. 423-424)) [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 that the factual bases for its decision are true, but that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (*See e.g., People v. Griffin, supra,* 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a

standard based on proof beyond a reasonable doubt. This conclusion follows because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Supreme Court of Connecticut recently explained on rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.
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> *(State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. at pp. 625, 637-638; *Monge v. California, supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments to the United States Constitution, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

D. The Fifth, Sixth, Eighth, and Fourteenth Amendments Require that the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the trial court in its penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (*See People v. Hayes, supra,* 52 Cal.3d at p. 643.) Appellant urges the Court to reconsider that ruling because it is constitutionally unsound under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital

punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) When a single, consistent standard of proof is not articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Even if it were not constitutionally necessary to impose on the prosecution such a heightened burden of persuasion as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case.

It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (*See Proffitt v Florida, supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland, supra*, 486 U.S. at p. 374 [impermissible for punishment to be

reached by "height of arbitrariness"].)

Second, while the current scheme fails to set forth a burden of proof for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors. This necessarily follows because a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (*see* §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[181]

A fact could not be established -- i.e., a fact finder could not make a finding -- without imposing some sort of burden on the parties presenting the evidence

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[181]/ As discussed below, the United States Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

upon which the finding is based. The failure to inform the jury of how to make factual findings is constitutionally unacceptable.

Third, in noncapital cases, California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (*See* Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evidence Code section 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing, (such as, for example, age when it is counted as a factor in aggravation), are still deemed to aggravate other wrongdoing by a defendant. Evidence Code section 520 is thus a state-created right that is constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument (*see* Argument XII, *supra*), the provision of greater protection to noncapital than to capital defendants violates the Fifth and Fourteenth Amendment rights to due process and equal protection, and the Eighth Amendment right to be free from cruel and unusual punishment. (*See e.g. Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves

torn between sparing and taking a defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors -- and the juries on which they sit -- respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) It is unacceptable -- indeed "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at p. 260) -- the "height of arbitrariness" (*Mills v. Maryland, supra*, 486 U.S. at p. 374) -- that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the state on the same facts, with no uniformly applicable standards to guide either.

Similarly, in the alternative, were it permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof and the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation at the penalty phase would continue to believe that. Such jurors do exist. This raises

the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of an allegedly nonexistent burden of proof. The failure to give any instruction at all on the subject violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the instructions given fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on the proper burden of proof, or the lack of such a burden, is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.)

E. The Instructions Violated the Sixth, Eighth, and Fourteenth Amendments by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. Indeed, as to unadjudicated criminal activity, the trial court instructed the jury that "it is not necessary for all jurors to agree." (9 CT 2059.) As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, it is impossible to determine precisely on what factors the jury relied in imposing death. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict.

(*See, e.g., Schad v. Arizona* (1991) 501 U.S. 624, 632-633.)

Appellant recognizes that this Court has previously held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (*See People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; *see also People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors in appellant's case to act in an arbitrary, capricious, and unreviewable manner, slanting the sentencing process in favor of death. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (*See Ballew v. Georgia, supra,* 435 U.S. at pp. 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.[182])

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* -- particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 -- should be reconsidered. In *Hildwin*, the Supreme Court

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[182]/ The absence of historical authority to support such a practice is an additional reason why the absence of jury unanimity violates of the Sixth, Eighth, and Fourteenth Amendments. (*See, e.g., Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the United States Supreme Court's holdings in previously-discussed *Ring* and *Blakely* make the reasoning in *Hildwin* highly questionable and constitutionally suspect, undercutting as well the constitutional underpinnings of this Court's analysis and ruling in *Bacigalupo*.

Applying the *Ring* and *Blakely* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (Kennedy, J., concurring).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana, supra,* 447 U.S. at p. 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732; *accord Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a

capital sentencing jury.

In addition, the California Constitution assumes -- indeed, is fundamentally predicated on -- jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (*See also People v. Wheeler, supra,* 22 Cal.3d at p. 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[183] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (*See, e.g.*, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (*see Monge v. California, supra*, 524

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[183]/ Significantly, the federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. See Ariz. Rev. Stat., § 13-703.01(E) (2002); Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

U.S. at p. 732; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994), and since the provision of greater protections to a noncapital defendant than to a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see, e.g., Myers v. Y1st, supra*, 897 F.2d at p. 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement of unanimity to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina, supra,* 11 Cal.4th at pp. 763-764), would by its inequity violate the fundamental constitutional requirement of equal protection, and by its irrationality violate both the due process and cruel and unusual punishment clauses of the California and United States Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. section 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. ... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these

> considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.
>
> (*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute permits a wide range of possible aggravators, as in California, and the prosecutor offers up multiple theories or instances of alleged aggravation, as here, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral"

and "normative" decision. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra,* 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the findings of one or more aggravating circumstances and that the aggravating circumstances outweigh mitigating circumstances are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

F. The Penalty Jury Should Have Been Instructed on the Presumption of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (*See Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (*See* Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351 (1984); cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amendment; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and

unusual punishment and to have his sentence determined in a reliable manner (U.S. Const.. 8th and 14th Amendments; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const., 14th Amendment; Cal. Const., art. I, § 7.)

In *People v. Arias*, 13 Cal.4th 92 (1996), this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at 190; see also *People v. Dunkle* (2005) 36 Cal.4th 861, 940.) However, as the other subsections of this argument, as well as Arguments XI and XII, *supra*, demonstrate, California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally compelled or required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California constitutional counterparts. Therefore, appellant's death sentence must be reversed.

XIV

THE USE OF CALJIC NO. 8.88 (1989 REVISION), DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As discussed in Arguments XII and XIII, *supra*, the trial court instructed the jury in the language of CALJIC No. 8.88 (1989 Revision). (See 9 CT 2081-2082.) The use of CALJIC No. 8.88 was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. Whether considered singly or together, the flaws violated appellant's fundamental rights to due process, fair trial by jury (U.S. Const., 5th, 6th & 14th Amends.), and to a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and require reversal of the sentence imposed. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.)

A. The Use CALJIC No. 8.88 (1989 Revision) Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard that Failed to Provide Adequate Guidance and Direction

Under CALJIC No. 8.88 (1989 Revision), the decision to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the

aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (9 CT 2081-2082.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty ... ." (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia[, supra.]* . . .." (*Id.* at p. 362.)

It is noteworthy that the Supreme Court of Georgia has found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. Indeed, the Georgia Supreme Court in *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391; see also *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.) As to the word "substantial," the *Arnold* court stressed:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.
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> (*Arnold v. State, supra*, 224 S.E.2d at p. 392 [footnote omitted].)[184]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 123, 124.) Nevertheless, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, as all cases, are factually different, their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold v. State*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of

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

serious assaultive criminal convictions" (*ibid.*, italics added), while the instruction here, as the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic -- they all involve penalty-phase instructions that fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, the use of the "substantial" language in CALJIC No. 8.88 (1989 Revision) arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. Hence, contrary to this Court's explanation in *People v. Smith* (2005) 35 Cal.4th 334, the "substantial" language used in CALJIC No. 8.88, or words of similar breadth, do not serve to avoid "reducing the penalty decision to a mere mechanical calculation." (*Id.* at p. 370.) Indeed, there is nothing about the language of CALJIC No. 8.88 that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th and 14th Amendments), the judgment of death must be reversed.

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B. CALJIC No. 8.88 (1989 Revision) Failed to Inform the Jurors that the Central Determination is Whether the Death Penalty is the Appropriate Punishment, Not Simply an Authorized Penalty

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, on weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) Nevertheless, CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling jurors that they could return a judgment of death if the aggravating evidence "warrants death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" to mean "to give warrant or sanction to" something, or "to serve as or give adequate

ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, on weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the United States Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate.

To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established. Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Although this Court has previously ruled otherwise (see *People v. Breaux, supra,* 1 Cal.4th at p. 316 [rejecting claim that the term "warrants" is too overbroad and permissive]; *People v. Griffin* (2004) 33 Cal.4th 536, 593[rejecting

Eighth and Fourteenth Amendment vagueness attacks based on asserted operation of the word "warrants"]), use of the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" in CALJIC No. 8.88 (1989 Revision) here was not cured by the trial court's reference to a "justified and appropriate" penalty. (9 CT 2081 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances"].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." Indeed, by referring to the "totality" of the circumstances, the instruction also conflicted with other instructions which sought to inform the jury that even in the absence of mitigating circumstances the death penalty would not necessarily be appropriate. (9 CT 2082.)

The crucial sentencing instruction violated the Eighth and Fourteenth

Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.), denies due process (U.S. Const., 5th & 14th Amends.; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346), and must be reversed.

C. CALJIC No. 8.88 (1989 Revision) Failed to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[185] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory statutory language, however, is not included in the text of CALJIC No. 8.88 (1989 Revision) as read to the jury. CALJIC No. 8.88 (1989 Revision) only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are

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[185]/ The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

"so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. By failing to conform to the specific mandate of section 190.3, the instruction given to appellant's jury violated the Fourteenth Amendment to the United States Constitution. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281 [italics in original].)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully offers that the Court's ruling conflicts with numerous other opinions that have

disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[186]

The Court's decision in *People v. Moore, supra,* 43 Cal.2d 517 is instructive on this point. There, the Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ... , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a

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[186]/ There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that in the absence of a strong showing of state interests to the contrary, "there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon* (1967) 412 U.S. 470, 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

> negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. ... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.
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> (*Id.* at pp. 526-527 [*internal quotation marks omitted*].)

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

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, CALJIC No. 8.88 is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital

crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants -- if not more so -- to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

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

D. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88 (1989 Revision), was impermissibly vague in crucial respects; denied appellant fundamental rights to a fair penalty trial by jury; failed to comply with the requirements of the due process and equal protection; and failed to assure a reliable determination of penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Therefore, appellant's

sentence of death must be reversed.

XV

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Introduction

In 2001, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.
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> (*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international

treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (*See Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

B. The Death Penalty in California Violates International Law

Article VII of the International Covenant on Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the supremacy clause of the United States Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[187] The

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[187]/ The United States Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (*See* 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (*see* Greenfield & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes

United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; *but see Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR.

Appellant recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (See, for example, *People v. Panah* (2005) 35 Cal.4th 395, 500-501; *People v. Smith* (2005) 35 Cal.4th 334, 375; *People v. Vieira* (2005) 35 Cal.4th 264, 305 [addressing only whether various errors made at trial and various aspects of the trial violated international law, not whether capital punishment itself violates international law]; *People v. Brown* (2004) 33 Cal.4th 382, 403-404; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) However, despite the Court's finding that the United States signed the ICCPR with an express reservation of the right to impose capital punishment (*People v. Brown, supra*), that condition does

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of action (*see* 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (*see* Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

not relieve the United States or its political subdivisions, including California, of its obligation to comply with the general ICCPR prohibition against cruel, inhuman or degrading punishment and the still-binding proscription against the arbitrary deprivation of life which is involved in this case.

Moreover, whether or not the United States reserved the right to impose capital punishment on signing the ICCPR, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*See United States v. Duarte-Acero*, *supra*, (11th Cir. 2000) 208 F.3d 1282, 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, appellant requests that the Court reconsider and, in the context of this case, substantively find appellant's death sentence violates international law. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

C. Evolving International Norms Compel the Conclusion that Appellant's Death Sentence Also Constitutes Cruel and Unusual Punishment in Violation of the Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason -- as opposed to its use as a regular punishment for ordinary crimes -- is particularly uniform in the nations of Western Europe. (*See, e.g.*, *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.)).

Indeed, *all* nations of Western Europe -- plus Canada, Australia, and New Zealand -- have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org>.[188]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because the framers of the United States Constitution looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "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.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress' power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dissenting opn. of

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[188]/ Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (*See* Amnesty International's "List of Abolitionist and Retentionist Countries," *supra,* at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

Field, J.).)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th Century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100.) And if the standards of decency as perceived by the civilized nations of Europe to which the framers looked as models have evolved, the Eighth Amendment requires that society evolves with them.

The Eighth Amendment prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world -- including totalitarian regimes whose own "standards of decency" are supposedly antithetical to our own. (*See Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming for purposes of argument that 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 contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*See Hilton v. Guyot*, *supra*, 159 U.S. 113; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

XVI

THE CUMULATIVE EFFECT OF ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Even if no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[189] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

In appellant's trial, the guilt phase errors included the use of an improper and prejudicial jury questionnaire (Argument I); prosecutorial misconduct during jury selection and argument to the jury (Argument II); trial court error in denying

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[189]/ Indeed, where there are a number of errors at trial, an issue-by-issue, error review is far less meaningful than analysis of the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

severance of the highly inflammatory counts 11 and 12 (Argument III); insufficiency of the evidence as to count 15 (Argument IV); insufficiency of the evidence as to counts 5 through 7 (Argument V); trial court error in failing to instruct the jury not to aggregate evidence of incidents to corroborate crucial accomplice testimony (Argument VI); and instructional error as to the burden of proof (Argument VII). The cumulative effect of these guilt-phase errors infected appellant's trial so as to render the proceedings fundamentally unfair and a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill, supra,* 17 Cal.4th at pp. 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes, supra,* 52 Cal.3d at p. 644 [court considers prejudice of guilt

phase instructional error in assessing that in penalty phase]; *People v. Brown, supra,* 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [reviewing court is obliged to consider cumulative effect of multiple errors on sentencing outcome].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.
>
> (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)

At the penalty phase trial of appellant's case, the errors committed include,

inter alia, the seating of unconstitutionally-biased jurors to determine penalty in this case (Argument VIII); the erroneous admission into evidence of, and prosecutorial misconduct in arguing, prejudicial and inflammatory victim impact evidence (Argument IX); the trial court's error in failing to instruct the jury on the appropriate use of victim-impact evidence (Argument X); the failure of the California death penalty scheme to provide intercase proportionality review (Argument XI); the trial court's erroneous instructions on the mitigating and aggravating factors in section 190.3 and the unconstitutional application of these sentencing factors at appellant's penalty trial (Argument XII); the unconstitutionality of section 190.3 and implementing jury instructions owing to the failure to set out the appropriate burden of proof, as well as other constitutional infirmities (Argument XIII); the use of CALJIC No. 8.88 (1989 Revision) defining the scope of the jury's sentencing discretion and the nature of its deliberative process additionally contain other constitutional defects (Argument XIV); and the fact that appellant's death sentence violates international law (Argument XV). Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires

reversal of appellant's convictions and death sentence. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction fundamentally and inherently unfair and a denial of due process law, and the judgment of death constitutionally unreliable. (U.S. Const., 5th, 6th, 8th & 14th Amendments; Cal. Const. art. I, §§ 7 & 15.)

XVII

APPELLANT SELF JOINS IN ALL ISSUES AND ASSIGNMENTS OF ERROR RAISED BY COAPPELLANT ROMERO WHICH MAY ACCRUE TO HIS BENEFIT

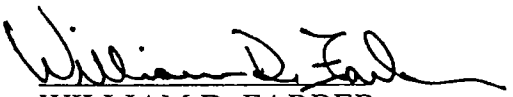
Appellant Self joins in all guilt and penalty issues not raised by himself, but raised by coappellant Romero which may accrue to his benefit. (California Rules of Court, rule 13; *People* v. *Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5; *People* v. *Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

By reason of the foregoing, appellant Christopher Self respectfully requests that the judgment of conviction on all counts, the special circumstances, and the sentence of death in this case be reversed.

DATED: September 18, 2006.

Respectfully submitted,



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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(b)(2))

I, William D. Farber, certify that the number of words in this opening brief, excluding the tables, totals 119,210 words. In counting words, I have relied on the word count of the computer program used to prepare this document as authorized by Cal. Rules of Court, rule 36(b)(2).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 18, 2006

WILLIAM D. FARBER

PROOF OF SERVICE

RE: **PEOPLE v. ROMERO and SELF**
Supreme Court No. S055856

I, WILLIAM D. FARBER, declare under penalty of perjury that I am counsel of record for defendant and appellant Christopher Self in this case, and further that my business address is William D. Farber, Attorney at Law, P.O. Box 2026, San Rafael, CA 94912-2026. On September 19, 2006, I served the attached: **APPELLANT'S OPENING BRIEF** by depositing each copy in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at San Rafael, California, addressed respectively as follows:

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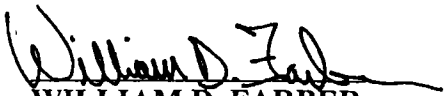

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