IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Case No. S161781
	)
v.	)
	) Superior Court No.
JUSTIN HEATH THOMAS,	) RIF086792
	)
Defendant and Appellant.	)
	)
	)

Appeal from the Superior Court of the State of California

In and For the County of Riverside

Honorable Terrance R. Boren, Judge

APPELLANT'S OPENING BRIEF
(Appeal from a Judgment of Death)
(Volume II: Pages 194-336)

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THE TRUE FINDING TO THE ROBBERY SPECIAL CIRCUMSTANCE ALLEGATION, THE CONVICTION FOR MURDER (COUNT ONE), AND THE JUDGMENT OF DEATH, SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY WITH THE LESSER INCLUDED OFFENSE OF GRAND THEFT, IN VIOLATION OF JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION

A. SUMMARY OF ARGUMENT

The jury found true the special circumstance allegation that Justin committed murder while engaged in the commission of a robbery. (14RT 3022-3023.) Robbery was also the theory for the felony murder charge. (13RT 2895-2896.) The prosecution theory was that Justin shot Noriega to prevent him from reporting Justin to the police. There was little evidence Justin shot Noriega for the purpose of obtaining his property. Noriega most likely was either dead or unconscious when Justin took his property. A person who forms the intent to take the victim's property after disabling him commits grand theft. Grand theft is a lesser included offense of robbery. The evidence raised a question of fact whether Justin committed robbery or theft. The true finding to the robbery special circumstance allegation must be reversed because the trial court erroneously failed to instruct the jury with the lesser included

offense of theft. For the same reason, Justin's conviction of murder, based on a theory of felony-murder, cannot be affirmed.

The other special circumstance making Justin eligible for the death penalty was the true finding to the Texas murder conviction. That true finding must be reversed for the reasons in Issue III. Because both special circumstance allegations must be reversed, Justin is not eligible for the death penalty. The judgment of death must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT.

The information alleged Justin committed murder while engaged in the commission of robbery within the meaning of section 190.2, subdivision (a)(17). (1CTP 81-82.) Dorothy Brown was the only witness to the incident. She testified as follows:

> Q. Okay. What was going on when you approached the location?
>
> A. It looked like Rafael had brought something and Justin wasn't —
>
> Q. You say it looked like Rafael had brought him something?
>
> A. It looked like Rafael had brought him something and Justin wasn't –
>
> Q. Were they talking to each other?
>
> A. Yeah, he said something to him. Rafael got out and moved to the back of the vehicle and opened up the trunk.
>
> Q. When he opened up the trunk, could you see anything?
>
> A. There was a duffle bag or something in there, a green–colored bag.

Q. Could you see the color of it?

A. It was a weird green.

Q. Okay. Where was Justin when this occurred?

A. He was standing right beside his truck with the door open.

Q. Okay. What happened next?

A. He opened fire.

Q. Who did?

A. Justin.

(6RT 1912-1913.) Brown saw Noriega fall to the ground. (6RT 1914.) Brown then testified that Justin shot Noriega multiple times in rapid succession. (6RT 1913-1914.) Justin put the green bag and the body in his truck. (6RT 1916, 1940-1941.) Brown repeated, in substance, the above testimony at pages 1938 and 1939 of the reporter's transcript. Brown did not give any testimony suggesting Noriega was alive or conscious after the shooting. When Brown made her statement to Detective Wilson, she told him that a large quantity of methamphetamine, and $5,000 had been taken from Noriega. However, she testified that these statements were false and simply made up by her to get out of custody. (6RT 1951-1952.) Brown denied that Justin's purpose for meeting Noriega was to take his drugs and money. (6RT 1955.)

Dr. Robert Ditraglia, a medical examiner, performed the autopsy on Noriega's body. (8RT 2291-2293, 2295.) Noriega's body had a hole in the sternum which Dr. Ditraglia

believed was caused by a bullet. Assuming the hole was caused by a bullet, the heart would have been damaged and severe and rapid bleeding occurred. (8RT 2306.) Noriega bled rapidly into his body and the blood pressure dropped. The rate at which Noriega lost consciousness depended on which organs were perforated. Dr. Ditraglia could not make that determination. (8RT 2313.) John Sams testified that Justin said that he shot someone for drugs. (9RT 2368-2369.) Kim Reeder testified that Justin said he shot Noriega because he was a "narc." (7RT 2022.) The prosecutor, during his opening statement, argued that Justin committed robbery because he took the green duffel bag. (13RT 2914.) He argued, "So if it's in your trunk and you're right there by the trunk and they shoot you and take it out of your trunk, you're in possession of it." (13RT 2914.)

The trial court gave the jury a felony-murder instruction based on the commission of a robbery. (13RT 2895-2896.) It also instructed the jury on robbery as a special circumstance allegation. (13RT 2899.)The instruction told the jury in part, "the defendant must have intended to commit the felony of robbery before or at the time of the act causing death. In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit robbery independent of the killing." (13RT 2899.) The verdict forms provided to the jury did not give it the option of finding that Justin committed theft rather than robbery. (17CT 4371.) The verdict form for murder did not require the jury to specify whether Justin had committed premeditated murder or felony murder. (17CT 4370.)

C. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de novo. (*People v. Guiuan, supra*, 18 Cal.4th at p. 569.)

D. THEFT IS A LESSER INCLUDED OFFENSE OF ROBBERY.

Robbery is 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." (Pen. Code, §211.) Theft is defined in section 484. It provides in part, "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft." Grand theft is defined as the taking of property exceeding a value of $950. (Pen. Code, §487, subd. (a).) Theft is a lesser included offense of robbery, which includes the additional element of force or fear. (*People v. Ortega* (1998) 19 Cal.4th 686, 694.)

E. THE EVIDENCE RAISED A QUESTION OF FACT WHETHER JUSTIN COMMITTED GRAND THEFT RATHER THAN ROBBERY.

There was conflicting evidence about whether Justin formed the intent to take Noriega's property prior to the shooting. Justin did not say anything to Brown suggesting that his motive was to take Noriega's property. Justin took Noriega's duffel bag only after he shot him. (6RT 1916, 1940-1941.) Reeder testified that Justin said he shot Noriega because he feared he was a "narc." (7RT 2022.) This testimony suggests that Justin's motive was not the taking of Noriega's property, but to silence him. Sams testified that Justin said he shot someone for the person's drugs. (9RT 2368-2369.) This testimony suggests that Justin's motive was the taking of Noriega's property. When Justin made this alleged statement, he

obviously did not understand the sequence of events determined whether he committed robbery or theft. The jury could have concluded, based on the evidence, that Justin formed the intent to take Noriega's property after the shooting.

"A victim of robbery may be unconscious or even dead when the property is taken, so long as the defendant used force against the victim to take the property." (*People v. Jackson* (2005) 128 Cal.App.4th 1326, 1330-1331.) If the defendant's intent to steal property arose only after force was used, the offense was theft and not robbery. (*People v. Kelly* (1992) 1 Cal.4th 495, 528.) Similarly, if the defendant formed the intent to take the property after the victim became unconscious or was deceased, then theft and not robbery occurred. (*People v. Frye* (1998) 18 Cal.4th 894, 956.) Brown's testimony, and the forensic evidence, suggests that Noriega was either unconscious, or dead, immediately after being shot. Multiple shots were fired at Noriega from close proximity. (6RT 1913, 1938-1939; 8RT 2306, 2311, 2313-2314.) Brown saw Noriega fall to the ground immediately after being shot. (6RT 1939-1940.)

F. THE TRIAL COURT HAD A SUA SPONTE DUTY TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE OF THE SPECIAL CIRCUMSTANCE ALLEGATION OF ROBBERY AND FOR THE FELONY MURDER ALLEGATION.

1. This Court's Precedents Rejecting the Requirement of Jury Instructions for Lesser Included Offenses for Felony Special Circumstance Allegations, and Felonies under the Felony Murder Doctrine, are Flawed and Should not be Followed.

The trial court has a duty to instruct the jury on a lesser included offense "when the evidence raises a question as to whether all of the elements of the charged offense were

present, but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1989) 19 Cal.4th 142, 154-155.) The trial court should instruct the jury on "lesser included offenses that find substantial support in the evidence." (*Id.*, at p. 162.) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*) As explained above, a reasonable juror could have concluded that appellant committed only theft when he took Noriega's property after shooting him. The evidence was clear that Noriega was unconscious when Justin took his property.

A trial court does not have a *sua sponte* duty to instruct the jury on lesser included offenses for special circumstance allegations in death penalty proceedings when the special circumstance allegation has not been separately charged as a felony. (*People v. Cash* (2002) 28 Cal.4th 703, 737; *People v. Silva* (2001) 25 Cal.4th 345, 371.) The trial court's sua sponte duty to instruct on lesser included offenses does not extend to felonies alleged under the felony murder rule. (*People v. Memro* (1995) 11 Cal.4th 786, 888-890.)

This Court should reconsider and reverse its earlier rulings and hold that the trial court does have a *sua sponte* duty to instruct the jury on lesser included offenses when the greater offense is alleged as a special circumstance allegation, but the special circumstance allegation is not separately charged as a felony. This duty of instruction should also apply to a felony used to establish felony-murder.

Due process required the trial court to instruct the jury on theft as a lesser included

offense of the robbery special circumstance allegation and the robbery felony murder instruction. In *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392], the defendant was found guilty of the capital offense of robbery after a victim was intentionally killed. Under the Alabama death penalty scheme, the required intent to kill necessary to impose the death penalty could not be based on the felony-murder doctrine. Felony-murder was therefore a lesser offense of the capital crime of robbery-intentional killing. Alabama law, however, prohibited the judge from giving jury instructions on lesser included offenses in a capital prosecution. Alabama law provided for the giving of lesser included offenses in non-capital prosecutions "if there is any reasonable theory from the evidence which would support the position." (*Beck v. Alabama, supra*, 447 U.S. at p. 630, fn. 5, quoting *Fulghum v. State* (1973) 291 Ala. 71, 75, 277 So.2d 886, 890.) The State conceded that, under the above standard, the evidence was sufficient to raise the question of the defendant's guilt of the lesser included offense of felony-murder. The trial court judge did not give jury instructions on the lesser included offense of felony murder because of the prohibition in Alabama law against such instructions in capital prosecutions.

The defendant argued before the Supreme Court that the Alabama prohibition on giving jury instructions on lesser-included offenses in capital proceedings violated his rights under the Sixth, Eighth, and Fourteenth Amendments by "substantially increasing the risk of error in the factfinding process." (*Beck v. Alabama, supra*, 447 U.S. at p. 632.) The Supreme Court agreed because "when the evidence unquestionably establishes that the

defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the third option of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) The Court has invalidated rules which impair the reliability of the sentencing determination in a capital case. (*Ibid.*, at p. 638.) Hence, "the same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Ibid.*) Procedures that undermine the reliability of the fact finding process in a capital prosecution thus violate the Eighth and Fourteenth Amendments. (*Ibid.*)

Alabama's prohibition on giving lesser included offenses also violated the Fifth and Fourteenth Amendments requirement of proof beyond a reasonable doubt: "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 642.)

Beck v. Alabama required instructions on lesser included offense for a murder charge because the failure to give such instructions increased the risk of an erroneous conviction. (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) Similarly, the trial court's failure to instruct the jury on theft as a lesser included offense of the special circumstance allegation of robbery, and for the felony murder instruction, erroneously increased the risk that Justin

would become eligible for, and receive, the death penalty. Hence, due process of law required the trial court to give jury instructions for theft as a lesser included offense.

This Court's holding that instructions on lesser included offenses are not necessary for special circumstance allegations falls squarely within the procedure condemned by the Supreme Court in *Beck v. Alabama*. *Beck v. Alabama* found the Alabama death penalty statute unconstitutional because it deprived the jury of the option of finding the defendant guilty of a lesser offense which would have removed him from eligibility for the death penalty. (*Beck v. Alabama, supra*, 447 U.S. at pp. 636-638.) Similarly, this Court's failure to require jury instructions on lesser included offense for the special circumstance allegation deprives the jury of the option of finding appellant committed a crime less than that charged and which would make him ineligible for the death penalty. This outcome cannot be reconciled with *Beck v. Alabama*.

The prohibition against cruel and unusual punishment in the Eighth Amendment, as applied to the States through the Fourteenth Amendment, also requires the above result. The function of special circumstance findings is to narrow the class of defendants eligible for the death penalty to the worst offenders. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 [208 S.Ct. 546, 98 L.Ed.2d 568] [to pass constitutional muster under the Eighth Amendment, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to the others found guilty of murder].) The special circumstances listed

in section 190.2, subdivision (a), that make a defendant eligible for the death penalty do not include theft. The statutory scheme erected in California to determine eligibility for the death penalty cannot perform the narrowing function required by the Eighth Amendment if the jury is precluded from considering whether the defendant committed a lesser included offense which would exclude him from eligibility for the death penalty.

This Court's reason for not requiring lesser included offense instructions for a felony-murder charge and special circumstance allegation is flawed. *People v. Silva* cited *People v. Miller* (1994) 28 Cal.App.4th 522 and *People v. Memro* (1995) 11 Cal.4th 786, 888-890 (conc. & dis. opn. of Kennard, J.) for the proposition that the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant only as to predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) In *People v. Memro*, Justice Kennard dissented from language in the majority opinion that could be interpreted to imply a defendant had the right to a jury instruction on a lesser included offense when the greater crime only served as a predicate offense for a felony-murder charge. The majority opinion concluded that a lesser included offense instruction was not required because the evidence did not raise the defendant's guilt of that offense. (*People v. Memro, supra*, 11 Cal.4th at pp. 870-873.)

Any language in *People v. Memro* from the majority opinion, or Justice Kennard's concurring and dissenting opinion, concerning instructions on lesser included offenses for predicate felonies under the felony-murder doctrine constitutes dicta. Neither opinion

addressed how the trial court's failure to instruct on lesser offenses for special circumstances impacted the constitutionality of California's sentencing scheme under the Eighth Amendment.

People v. Silva erred by relying on Justice Kennard's concurring and dissenting opinion in *People v. Memro*, and the opinion in *People v. Miller*, for the proposition that in a capital prosecution, the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) Neither case supported this broad conclusion.

In *People v. Cash, supra*, 28 Cal.4th 703, this Court revisited this issue. The defendant argued the trial court's failure to instruct the jury on theft as a lesser included offense of the robbery that formed the basis for the felony murder charge, and the special circumstance allegation, violated his Sixth Amendment right to present a defense and Eighth Amendment right not to be subject to cruel and unusual punishment. This Court rejected the argument because "[d]efendant's claim does not fall within the limited situations in which such claims implicate rights under the federal Constitution. California requires a sua sponte instruction on lesser included charged offenses regardless of whether the case is a capital, or a noncapital, one. Therefore, the unavailability of a lesser included offense instruction to an uncharged crime does not operate to weigh the outcome in favor of death for defendants facing capital charges." (*People v. Cash, supra*, 28 Cal.4th at p. 738, citing *Hopkins v.*

Reeves (1998) 524 U.S. 88, 96 [118 S.Ct. 1895, 141 L.Ed.2d 76], *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 and *People v. Waidla* (2000) 22 Cal.4th 690, 736, fn.5.)

The reasoning in *People v. Cash* was flawed because the failure to give jury instructions for a lesser included offense does weigh the outcome in favor of imposition of the death penalty. The failure to give the instruction makes the defendant eligible for the death penalty when he otherwise would not be eligible for that punishment. Furthermore, because special circumstances are factors that make some murders worse than other types of murders, each special circumstance found true by the jury presumably played some role in convincing the jury to select death as the appropriate punishment.

2. The United States Supreme Court Precedents under *Jones v. United States* (1999) 526 U.S. 227 [143 L.Ed.2d 311, 119 S.Ct. 1215], *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], et. al., Require Felonies Alleged as Special Circumstances, and Felonies used to Prove Felony Murder, to be Treated as an Element of the Offense of Murder and Therefore Subject to the Rule Requiring Instructions for Lesser Included Offenses.

This Court's conclusion that lesser included offenses should not be given for felonies alleged under the felony-murder doctrine or as special circumstances because the included offense doctrine applies only to charged offenses cannot withstand the decisions in *Jones v. United States* (1999) 526 U.S. 227 [143 L.Ed.2d 311, 119 S.Ct. 1215], *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428], *Blakely v. Washington* (2004) (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]), and *Alleyne v. United States* (2013) ___U.S.____ [133 S.CT.

2151, 186 L.Ed.2d 314].)

In *Jones v. United States*, the Court considered the federal carjacking statute, which provided for three maximum sentences depending on the level of harm sustained by the victim: 15 years in jail if there was no serious injury to a victim, 25 years if there was "serious bodily injury," and life in prison if death resulted. The structure of the statute suggested that bodily harm was a sentencing provision. The Court nevertheless concluded that harm to the victim was an element of the crime. (*Jones v. United States, supra*, 526 U.S. at p. 232.) The Court reached this conclusion in order to avoid reducing the jury's role " to the relative importance of low-level gatekeeping," (*Id.*, at p. 244), and noted that its decision was consistent with a "rule requiring jury determination of facts that raise sentencing ceiling" in state and federal sentencing guideline systems. (*Id.*, at p. 251.)

In *Apprendi v. New Jersey*, the defendant pled guilty to a number of charges. The trial court enhanced the defendant's sentence by 10 years because it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or a group of individuals because of race. The issue, according to the Court, was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." (*Apprendi v. New Jersey*, 120 S.Ct. at p. 2351.) The Court noted there was no historical distinction between an "element" of an offense and a "sentencing factor." Hence, "the judge's role in sentencing

is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition elements of a separate offense." (*Id.*, at p. 2359, fn. 10.)

In *Blakely v. Washington*, the Supreme Court concluded a Washington State enhancement statute that depended on findings of fact made by the trial judge was unconstitutional: "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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, *Bishop*, *supra*, §§ 87, at 55, and the judge exceeds his proper authority." (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 303-304.)

In *United States v. Booker* (2005) 543 U.S.220 [125 S.Ct. 738, 160 L.Ed.2d 621], the Court further explained its decisions in *Apprendi v. New Jersey* and *Blakely v. Washington.* The Court noted that under those decisions, any fact that impacted the defendant's maximum potential sentence constituted an element of a crime:

> The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.,* at 478, 120 S.Ct. 2348. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. *Id.,* at 476, 120 S.Ct. 2348.

(*United States v. Booker, supra*, 125 S.Ct. at p. 748.)

In *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428], the Court considered the constitutionality of the capital sentencing scheme in Arizona. In Arizona, the jury determined the defendant's guilt of first-degree murder. The trial judge then determined the presence or absence of aggravating facts and whether a judgment of death should be imposed.[47] In *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511], the Supreme Court had upheld the constitutionality of Arizona's sentencing scheme because the additional facts found by the trial judge were sentencing considerations and not "element[s] of the offense of capital murder." (*Walton v. Arizona, supra*, 497 U.S. at p. 649.)

Ring v. Arizona reconsidered *Walton v. Arizona* in light of its decision in *Apprendi v. New Jersey*. The Court noted "*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question, 'who decides,' judge or jury." (*Ring v. Arizona, supra*, 536 U.S. at pp. 604-605.) The Court thus concluded "[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, *Apprendi*, 530 U.S. at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ring v. Arizona, supra*, 536 U.S. at p. 609.) The Ninth Circuit has similarly concluded California's special circumstance allegations operate as the functional equivalent of an element of a greater offense. (*Webster v. Woodford* (9th Cir. 2004) 369 F.3d

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[47] Under Arizona law, the aggravating facts included the defendant's criminal background as well as facts concerning the commission of the charged murder.

1062, 1068.)

In *Cunningham v. California* (2007) 549 U.S. 270, 288-289 [127 S.Ct. 856, 166 L.Ed.2d 856]. the Court concluded California's determinate sentencing scheme violated the holding of *Blakely v. Washington.* The Court concluded, "because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, see supra, at 862, the DSL violates Apprendi's bright line rule: Except for a prior conviction, `any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Cunningham v. California, supra,* 549 U.S. at p. 288-289, quoting *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.)

In *Alleyne v. United States* (2013) ____U.S.___, [133 S.Ct. 2151, 186 L.Ed.2d 314], the Supreme Court completed the evolution of eliminating the concept of a sentencing factor. The defendant was convicted of carrying a carrying a firearm for a crime of violence and was subject to a mandatory minimum of five years in prison. The trial judge found that the defendant had brandished the firearm and increased the sentence to seven years. In *Harris v. United States* (2002) 536 U.S. 545, 560-561 [122 S.Ct. 2406, 153 L.Ed.2d 524], the Supreme Court had held judicial factfinding which increased the minimum sentence was permissible. *Alleyne v. United States* overruled *Harris v. United States.*

The plurality opinion in *Alleyne v. United States*, which was written by Justice Thomas and joined by three other judges, concluded that the distinction in *Harris v. United*

States between facts which increase the statutory maximum, and facts which increase only the mandatory minimum, was not tenable. (*Alleyne v. United States*, *supra*, 133 S.Ct. at pp. 2160-2161.) The Court stated, "the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." (*Alleyne v. United States, supra*, 133 S.Ct. at pp. 2162.) Justice Sotomayor filed a concurring opinion which was joined by two other justices. Her concurring opinion was largely limited to explaining why stare decisis did not require the Court to adhere to *Harris v. United States*. (*Alleyne v. United States, supra*, 133 S.Ct. at pp. 2164-2166 [conc. opinion of J. Sotomayor].) *S. Union Co. v. United States* (2012) ___U.S.____[132 S.Ct. 2344, 2351-2353, 183 L.Ed.2d 318] affirmed the Supreme Court's broad reading of the holding of *Apprendi v. New Jersey* when it held that imposition of fines was subject to the requirement of a jury finding to trigger its imposition.

The above cases eliminated the concept of a "sentencing factor" as it pertains to facts-that must be found to determine the maximum sentence for which a defendant is eligible. The impact of these United States Supreme Court decisions is that special circumstance allegations which make a defendant eligible for the death penalty are elements of the crime of capital murder. Because lesser included offense instructions are required for substantive crimes, this requirement should also apply to special circumstance allegations alleged in connection with the crime of murder. In other words, murder with a special circumstance

allegation is simply a variation of the crime of murder. *Beck v. Alabama* held that due process requires jury instructions for lesser included offenses when the state seeks to impose the death penalty for murder. (*Beck v. Alabama, supra*, 447 U.S. at pp. 634-636.) If a special circumstance allegation is viewed as an element of capital murder–as required by *Apprendi v. New Jersey* and its progeny—then the issue of whether lesser included offense instructions should be given for special circumstance allegations is functionally identical to *Beck v. Alabama*. A finding of fact must be made in the verdict form for a special circumstance allegation in the same manner as a finding of guilt must be made for a substantive crime.

Justice Kennard filed a concurring and dissenting opinion in *People v. Memro*. She dissented from language in the majority opinion which she believed suggested the defendant was entitled to a lesser included offense instruction for a felony alleged in a felony murder instruction. (*People v. Memro, supra*, 11 Cal.4th at p. 888-889 (J. Kennard, diss. & conc.).) She noted that instructions for lesser included offenses are required so that the defendant is convicted of the appropriate crime. She also observed that an instruction for a lesser included offense to a felony used for a felony-murder charge could cause the jury to reject the felony-murder theory. Justice Kennard then concluded, "whether the acceptance or rejection of the felony-murder theory presents the jury with an all-or-nothing choice will depend on whether the jury has been given alternative theories or other verdict options relating to the charged offense of murder. It will not depend on whether the jury has been instructed on offenses that are necessarily included within the uncharged offense." (*People v. Memro, supra*, 11 Cal.4th

at p. 889 (J. Kennard, diss. & conc.).)

The reasoning in Justice Kennard's concurring and dissenting opinion does not provide a basis to reject Justin's arguments and hold that lesser included offense instructions should not be given for felony special circumstance allegations and a felony used in a felony murder charge. As argued above, *Apprendi v. New Jersey* and its progeny require felony murder special circumstance allegations, and a felony used in a felony murder charge, to be treated as elements of an offense. Because lesser included offenses are required for substantive offenses, felony murder special circumstance allegations, and a felony used in a felony murder charge, are simply species of the crime of murder and subject to the rule requiring the giving of lesser included offenses when warranted by the evidence. This result is required regardless of whether the all-or–nothing situation is present which was one of the reasons *Beck v. Alabama* required the giving of lesser included offense instructions in that case.

Justice Kennard also failed to give appropriate deference to the fact that instructions for lesser included offenses increase the likelihood of the jury reaching the correct verdict. One rationale for requiring instructions for lesser included offenses is to prevent the jury from being put in an all-or-nothing choice; either the jury convicts the defendant of the charged crime–even if the evidence does not warrant that conviction–or the defendant receives the windfall of walking free even though he was guilty of a lesser offense. (*See People v. Barton* (1995) 12 Cal.4th 186, 203.) However, the jury can still reach the correct

result even if instructions for lesser included offenses are not given; the evidence may warrant either a conviction or an acquittal. However, the giving of lesser included offense instructions increases the likelihood of the jury reaching the correct result. If Justin was guilty only of theft, the jury should not have found true the special circumstance allegation of robbery and should not have found him guilty of murder based on the felony-murder theory.

Beck v. Alabama noted it was the universal rule in state courts, and in federal courts, that jury instructions should be given for lesser included offenses raised by the evidence. (Beck v. Alabama, supra, 447 U.S. at pp. 636-637.) Alabama accorded defendants in non-capital cases the right to jury instructions for lesser included offenses. *(Beck v. Alabama, supra*, 447 U.S. at p. 637.) The availability of a lesser included offense instruction in non-capital cases was one factor which convinced the Court that due process was violated by depriving a capital defendant of the right to instructions for lesser included offenses:

> Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law. In the federal courts, it has long been "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States, supra*, at 208.11 Similarly, the state courts that have addressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it. Indeed, for all noncapital crimes Alabama itself gives the defendant a right to such instructions under appropriate circumstances. See n. 5, *supra.*

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this.

(*Beck v. Alabama, supra*, 447 U.S. at pp. 635-637.)

The robbery special circumstance allegation in this case was the functional equivalent of the aggravating factors which the Supreme Court in *Ring v. Arizona* concluded had to be found by the jury. If the above cases require the felonies alleged as aggravating circumstances to be treated as elements of an offense, then this Court's conclusion that lesser included offenses should not be given for such allegations because the included offense doctrine applies only to charged offenses cannot withstand constitutional scrutiny. If a finding by the jury that Justin had committed only theft removed him from eligibility for the death penalty, there is no reason why the jury should not have been given that option. The Fifth and Fourteenth Amendments right to due process of law, and the Sixth and Fourteenth Amendments right to a jury trial, as interpreted in the above cases, requires that special circumstance allegations be treated as elements of an offense.

The equal protection clause also requires the above result. California law imposes a sua sponte duty on the trial court to instruct the jury on all lesser included offenses in non-capital prosecutions. (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 979.) The equal protection guarantees of the federal and state constitutions require that persons "similarly situated" receive like treatment under the law. (*In re Gary W.* (1971) 5 Cal.3d 296, 303.)

"The basic rule of equal protection is that those persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. . . . The equal protection provisions of the federal and state Constitutions protect only those persons similarly situated from invidiously disparate treatment. ... Accordingly, the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Macias* (1982) 137 Cal.App.3d 465, 472.)

A defendant charged with a capital offense and special circumstance allegations, which are not also alleged as substantive crimes, should have the same entitlement to sua sponte instructions on lesser included offenses as a defendant charged with a non-capital crime, or a defendant charged with capital crimes and special circumstances, which are also alleged as substantive offenses. For the reasons above, this Court should reverse its holdings in *People v. Valdez*, *People v. Cash*, and *People v. Silva* that jury instructions on lesser included offenses are not required for special circumstance allegations. This Court should hold that the trial court erred by failing to instruct the jury with theft as a lesser included offense of the special circumstance allegation of robbery and the robbery felony murder instruction.

E. PREJUDICE

The trial court's failure to instruct the jury on the lesser included offense of theft violated Justin's right to federal due process of law, right to a jury trial, and the Eighth and

Fourteenth Amendments' prohibition against cruel and unusual punishment. It also violated Justin's corresponding rights under the California Constitution and his federal due process right to have the state follow its own laws and procedures when taking the liberty of individuals. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Hence, the true finding to the robbery special circumstance finding must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Similarly, the first degree murder conviction cannot be affirmed based on the theory of felony murder if the trial court's failure to instruct on theft as a lesser included offense was not harmless.

The failure to instruct the jury on theft as a lesser included offense was not harmless beyond a reasonable doubt. The test under *Chapman* is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432].) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Ibid.*)

Dorothy Brown was the only witness who allegedly saw the shooting and the events leading up to it. She did not provide any testimony suggesting that Justin's motive for shooting Noriega was robbery. John Sams testified that Justin said he shot someone for his drugs, but Sams did not believe Justin and thought he was bragging. (9RT 2369-2369.) This testimony was not reliable evidence that Justin actually formed the intent to take Noriega's property prior to the shooting. Justin made this statement several years after the incident. It

was likely Justin associated simply taking Noriega's drugs with robbery. Kimberly Reeder's testimony suggests that Justin shot Noriega to silence him rather than to commit a robbery. (7RT 2022.)

The jury was instructed for the robbery special circumstance allegation that "the defendant must have intended to commit the felony of robbery before or at the time of the act causing death." (13RT 2899.) The jury was further instructed, "an act of force accompanied by a theft does not constitute robbery unless the act of force was motivated by an intent to steal. If the intent to steal does not arise until after force has been used against the victim no robbery has taken place. If an individual kills for reasons unrelated to theft, for example, because of anger, fear or revenge, and then decides to take advantage of the situation by stealing some object from the person of the decedent, the taking will constitute at most theft, not a robbery." (13RT 2900.)

The instructions above did not render harmless the trial court's failure to give a lesser included instruction for theft. The above instructions did not define the elements of theft for the jury. The elements of theft are defined in CALCRIM 1800, and this instruction was not given to the jury. The jury was not provided a verdict form to find that Justin had committed only theft and not robbery. The jury had no realistic option but to find the robbery special circumstance allegation true because of the evidence that Justin shot Noriega and took his property and the lack of another option being provided through the verdict forms. (*Beck v. Alabama, supra*, 447 U.S. at p. 636 [noting that the failure to give lesser included offense instructions increases the risk of an erroneous conviction; *People v. Barton* (1995) 12 Cal.4th 186, 196-198 [recognizing that the lack of a jury instruction for a lesser included offense

puts undue pressure on the jury to convict the defendant of the greater offense].)

For the reasons above, this Court cannot conclude beyond a reasonable doubt that the jury would have returned a true finding to the robbery special circumstance allegation if it had been given an instruction for theft as a lesser included offense. The first degree murder conviction cannot be affirmed based on the felony murder theory of robbery because the trial court's failed to instruct the jury with the lesser included offense of theft. Because the first degree murder conviction cannot be affirmed on the felony murder theory, and it cannot be affirmed based on a theory of premeditation for the reasons in Issues V and VI, Justin is not eligible for the death penalty because he has not been convicted of first degree murder.

F. THE REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDING OF ROBBERY MUST RESULT IN REVERSAL OF THE JUDGMENT OF DEATH

Assuming the first degree murder conviction can be affirmed on the theory of an intentional killing, and the Texas special circumstance allegation is affirmed, then this Court would have a basis to affirm the judgment of death. However, the reversal of the true finding to the robbery special circumstance allegation must result in reversal of the judgment of death. Justin incorporates from Issue IV the prejudice discussion. Under *Brown v. Sanders*, "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.) The jury's conclusion that Justin committed robbery when he killed Noriega added an improper element to the aggravation scale. The judgment of death must be reversed.

X

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S ACCOMPLICE INSTRUCTION LOWERED THE PROSECUTION BURDEN OF PROOF BY INSTRUCTING THE JURY THAT THE CORROBORATING EVIDENCE FOR BROWN'S TESTIMONY HAD TO BE ONLY SLIGHT, IN VIOLATION OF JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION

A. SUMMARY OF ARGUMENT

Dorothy Brown's testimony from the Texas trial was read into the record. Brown testified that Justin shot Noriega. The trial court instructed the jury that Brown's testimony had to be corroborated if she was an accomplice, but that corroboration had to be only "slight." The defense counsel requested that the language in the accomplice instruction be modified to delete the reference to the corroborating evidence being only slight. The trial court erroneously refused to delete this language. The inclusion in the instruction of language that the evidence corroborating Brown's testimony had to be only "slight" gave accomplice testimony special status independent of the other type of evidence presented by the prosecution and unconstitutionally lightened the prosecution burden of proof.

The evidence against Justin was weak. Brown's testimony was the only evidence

placing Justin at the scene of Noriega's death. The language regarding "slight" corroborating evidence in the instruction was prejudicial. The judgment must be reversed.

B. STANDARD OF REVIEW

Issues pertaining to jury instruction are reviewed de novo. ((*People v. Guiuan* (1998) 18 Cal.4th 588, 569.)

C. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The trial court, at the recommendation of the prosecution, agreed to modify the accomplice instruction to refer specifically to Brown. (13RT 2798.) The defense counsel noted that Brown was a critical witness because she was the only witness that connected Justin to Noriega's death. (13RT 2799.) The defense counsel argued that the portion of the accomplice instruction which stated that the evidence corroborating the accomplice's testimony may be slight lowered the prosecution's burden of proof in violation of Justin's right to due process of law and the Eighth Amendment prohibition against the imposition of cruel and unusual punishment and the corresponding provisions of the California Constitution. (13RT 2799.) The defense counsel argued the accomplice instruction should incorporate the proof beyond a reasonable doubt standard. (13RT 2799.) The trial court rejected the defense request. (13RT 2799-2800.)

CALCRIM No. 334 is the instruction for accomplice testimony when it is a question of fact whether the witness was an accomplice. CALCRIM No. 335 is the instruction for accomplice testimony when the witness is an accomplice as a matter of law. The trial court gave a modified version of CALCRIM No. 334. It stated: (1) the jury had to determine

whether Brown was an accomplice; (2) Brown was an accomplice if she was subject to prosecution for the crime charged against Justin; (3) the burden was on Justin to prove that it was more likely than not that Brown was an accomplice; (4) if the jury concluded that Brown was an accomplice, it may convict Justin only if Brown's testimony was supported by other evidence if believed, the supporting evidence was independent of Brown's testimony, and the supporting evidence tended to connect Justin to the crime; (5) the supporting evidence may be slight; (6) the supporting evidence is not enough if it merely shows that a crime was committed or its circumstances, but it must tend to connect the defendant to the commission of the crime; and (7) the testimony of an accomplice which tends to incriminate the defendant should be viewed with caution. (13RT 2890-2891.) This instruction was substantially similar to CALCRIM No. 334.

The prosecutor, during his opening argument, argued that Brown's testimony was corroborated:

> Consider Dorothy Brown's testimony. Consider her testimony that was read to you, in light of everything else. What did she tell you and what's corroborated? Well, first thing, Dorothy Brown said she was selling speed with Justin Thomas. He was her supplier. How do you know that's true? Justin Thomas told Martin Silva that's true. That's corroborated, the defendant himself. You know what the nice thing about it is? Virtually every critical fact is going to be corroborated . . ..

(13RT 2931-2932.)

The prosecutor continued to argue that there was corroboration of Brown's testimony. (13RT 2932-2933.) He argued: (1) Brown's testimony that Justin kept his dope by the egg

ranch was corroborated by the testimony of Barger, LeBlanc, Andy Anchondo, and Justin's statement to Investigator Silva that he had sold dope to Brown at the egg ranch; (2) Brown's testimony that Justin used her phone to call Noriega was corroborated by Justin's statement to Detective Silva that he used Brown's telephone to set up drug deals; (3) the testimony of the Barajas sisters that Noriega went to the egg ranch corroborated Brown's testimony; and; (4) Justin's statement to Sams about killing someone and taking the victim's bag of speed corroborated Brown's testimony. (13RT 2933-2934.)

The defense counsel, during his closing argument, argued Brown was an accomplice to Noriega's murder and was not credible. (13RT 2952.) He argued Brown's testimony had to be viewed with caution. (13RT 2953.) The defense counsel later argued, "those accomplice instructions talk about corroborating these accomplices. Yeah, it's doesn't have to be great corroboration, but at least it has to leave you without those little nagging voices in the back of your mind that says, Jesus, hey, there's something wrong here. There's some problems. The Glock. But there can't be a Glock." (13RT 2962.)

The prosecutor, during his rebuttal argument, relied on the slight corroborating evidence standard in the instruction to argue Justin had killed Noriega:

> When you look at the fact that Kim LeBlanc —and this is something the defense could never explain away, because there is no explanation for it —Kim LeBlanc, I don't know, 1,000 miles away in Texas —I'm just guessing —three years later, two years later, had detailed information about the facts and circumstances of Rafael Noriega's death, his killing, and the after effects. She had detailed information that exactly matched what Dorothy Brown said.

> That, folks, is what they call "accomplice corroboration." Now the instruction on accomplice says the defense has the burden to prove she is an accomplice. She has to be literally liable for the same crime and she could be prosecuted for the same murder. That doesn't mean that she helped after the fact, that means she intended for it to happen and assisted it. They have to prove she was an accomplice. They haven't.
>
> Regardless, she's corroborated. The instruction itself, "corroboration need not be established every fact she testified to. It may be slight. It only has to connect the defendant to the commission of the crime, that's it.
>
> Do we have evidence that connects Justin Thomas to the commission of this killing if you took Dorothy Brown out? Do we have that evidence? We do. Kim Leblanc had detailed information about this killing that she got from him, that corroboration. You're done. That tends to connect him to the commission of this crime. When he confesses to it to his girlfriend, I think that tends to connect him to the crime.

(13RT 2966.) The prosecutor later argued that just about all of Brown's testimony was corroborated with the exception of her testimony about driving a stolen truck the night of Noriega's death. (13RT 2974.)

D. THE TRIAL COURT ERRED BY INCLUDING THE "SLIGHT" CORROBORATING EVIDENCE STANDARD FROM CALCRIM NO. 334.

1. Legal Standards Governing Accomplice Testimony

Penal Code section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." In order to be chargeable with the identical offense, the witness must be a principal in the crime. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113–1114.) Section 31 defines principals to include "[a]ll persons concerned in the

commission of a crime ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ... ." (§ 31.) "Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104.) It is the defendant's burden to establish by a preponderance of the evidence that a witness was an accomplice. *(People v. Frye* (1998) 18 Cal.4th 894, 967–969.)

An accomplice's testimony must be corroborated by independent evidence which, without aid or assistance from the accomplice's testimony, tends to connect the defendant with the crime charged. (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.) To determine if sufficient corroboration exists, the court must eliminate the accomplice's testimony from the case, and examine the evidence of other witnesses to determine if there is any inculpatory evidence tending to connect the defendant with the offense. (*People v. Falconer, supra*, 201 Cal.App.3d at p. 1543; *People v. Shaw* (1941) 17 Cal.2d 778, 803-804.) Only the testimony of the accomplice connecting the defendant with the crime must be corroborated with independent evidence. *(People v. Zapien* (1993) 4 Cal.4th 929, 982.) Such evidence " 'is sufficient if it tends in some degree to implicate the defendant. The corroborative evidence may be slight and entitled to little consideration when standing alone.'" (*People v. Perry* (1972) 7 Cal.3d 756, 769.) Unless the corroborating evidence "could not reasonably tend to connect a defendant with the commission of a crime, the

finding of the trier of fact on the issue of corroboration may not be disturbed on appeal." (*People v. Perry, supra*, 7 Cal.3d 756, 774.)

2. The Requirement of Proof Beyond a Reasonable Doubt to Satisfy Due Process of Law.

The due process clause requires the prosecution to prove each element of an offense beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583].) An instruction undermines the requirement of proof beyond a reasonable doubt if there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard. (*Victor v. Nebraska, supra*, 511 U.S. at p. 6.)

3. The Jury Instructions Taken as a Whole did not Adequately Convey the Requirement of Proof Beyond a Reasonable Doubt Because of the Requirement for "Slight" Corroborating Evidence in CALCRIM No. 334.

The trial court gave CALCRIM No. 220, the standard reasonable doubt instruction. (13RT 2881-2882.) This instruction has been sanctioned as a correct statement of the prosecution's burden of proof under the due process clause. The problem, however, is that the reasonable doubt instruction was in effect modified by CALCRIM No. 334 and created conflicting instructions. The accomplice instruction was a specific instruction to the jury regarding Brown's credibility and violated due process by undermining the general reasonable doubt instruction. (*See Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822-823 [concluding that an erroneous instruction regarding prior bad acts was a specific instruction which controlled over the general reasonable doubt instruction and violated due process].)

CALCRIM No. 334 also violated Justin's Sixth Amendment right to a jury trial by impairing the jury's ability to find the elements of the offense beyond a reasonable doubt.

This Court has approved of the language in the corroboration instruction regarding "slight" evidence which "tends to connect" the defendant to the crime. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.) This Court's approval of the language should be reconsidered. The first portion of CALCRIM No. 334 told the jury that if it concluded Brown was an accomplice, Justin could not be convicted "based on her testimony alone." (13RT 2890.) The next portion told the jury the statements or testimony of an accomplice could be used to convict Justin only if the three requirements applicable to independent evidence were met. (13RT 2890-2891.) The requirement of proof beyond a reasonable doubt was not applied to the jury's assessment of Brown's credibility or to the required finding of independent evidence to support her testimony. The next portion of the instruction told the jury, "Supporting evidence, however, may be slight." (13RT 2891.) This standard obviously requires far less proof than beyond a reasonable doubt. The beyond a reasonable doubt requirement was further undermined by the phrase, "The supporting evidence must tend to connect the defendant to the commission of the crime." (13RT 2891.) Even very weak evidence can tend to connect an individual with a crime.

The requirement for "slight" corroboration of accomplice testimony that "tends to" connect the defendant to the crime worked its way in to California's criminal jurisprudence without being subject to adequate constitutional scrutiny. The requirement the supporting

evidence be "slight" and "tend to connect" the defendant with the crime evolved early in California law. The requirement for corroboration for the testimony of an accomplice was in Section 375 of the Criminal Practice Act. In *People v. Ames* (1870) 39 Cal. 403, 404, the Court construed section 375 and concluded the corroborating evidence "must tend, in some slight degree at least, to implicate the defendant." *People v. Ames* did not discuss whether that standard was consistent with the requirement of proof beyond a reasonable doubt.

People v. Melvane (1870) 39 Cal. 614, 615-616, next discussed the corroboration requirement. The Court cited English cases and Wharton's American Criminal Law in support of the rule, "[c]onclusive testimony is not required, but connections of even a slight character have been held to be sufficient." (*People v. Melvane, supra*, 39 Cal. at p. 614.) *People v. Melvane* also did not discuss how that standard was consistent with the requirement of proof beyond a reasonable doubt. The principle that the corroborating evidence had to be only "slight" and "tend to connect" the defendant with the crime became established California law from the above cases. (E.g., *People v. Guiuan* (1998) 18 Cal.4th 558, 569; *People v. Hathcock* (1973) 8 Cal.3d 599, 617; *People v. Perry* (1972) 7 Cal.3d 756, 769; *People v. Mclean* (1890) 84 Cal. 480, 482.) This Court has held the corroboration of accomplice testimony is not an element of proof beyond a reasonable doubt. (*People v. Frye* (1998) 18 Cal.4th 894, 966.) The Court has also approved allocating to the defendant the burden of proving by a preponderance of the evidence that a witness is an accomplice. (*Ibid.*, at p. 967; *People v. Tewksbury* (1976) 15 Cal.3 953, 967-968.)

Justin's argument is that the jury instruction for accomplice testimony undermined the beyond a reasonable doubt standard burden of proof. The above cases failed to engage in any meaningful discussion about whether the accomplice instruction was consistent with the requirement of proof beyond a reasonable doubt. The jury instruction for reasonable doubt defined that concept in an abstract manner without reference to any particular item of evidence. The corroboration requirement, in practical effect, modified the reasonable doubt standard and did so by reference to a specific item of evidence, which was Brown's testimony. The requirement of proof beyond a reasonable doubt was not applied specifically to Brown's testimony in CALCRIM No. 334. The language for the corroboration requirement required far less convincing evidence than proof beyond a reasonable doubt. Hence, the giving of CALCRIM No. 334 with the language that the corroborating evidence had to be slight was erroneous.

Case law decided outside the context of accomplice law demonstrates the inclusion of language that corroborating evidence need only be slight implicates the proof beyond a reasonable doubt standard. CALJIC No. 2.15 was the instruction when a defendant was prosecuted for possession of stolen property. The instruction told the jury that if the defendant was in conscious possession of stolen property, it could infer his guilt from corroborating evidence which "need only be slight." CALJIC 2.15 did not have any language referring to the proof beyond a reasonable doubt standard. CALCRIM No. 376 is the corresponding CALCRIM instruction. The CALCRIM committee added the following

sentence to CALCRIM No. 376: "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty is that crime has been proved beyond a reasonable doubt." The Committee would not have added this language if it did not believe the instruction implicated the proof beyond a reasonable doubt standard. Under federal conspiracy law, jurors were formerly instructed that once a conspiracy was proved, only slight evidence was needed to connect the defendant to the crime and to convict him. This instruction has been disregarded because it violates the requirement of proof beyond a reasonable doubt. (*United States v. Toler* (11th Cir. 1998) 144 F.3d 1423, 1427.) Hence, the trial court's instruction to the jury that the evidence corroborating Brown's testimony had to be only "slight" implicated the requirement of proof beyond a reasonable doubt.

E. THE ERRONEOUS LANGUAGE IN CALCRIM NO. 334 VIOLATED JUSTIN'S FEDERAL CONSTITUTIONAL RIGHTS.

For the reasons above, the language in CALCRIM No. 334 regarding the supporting evidence being slight and tending to connect Justin to the crime violated the due process requirement of proof beyond a reasonable doubt. An instruction impairing the jury's ability to properly find the facts beyond a reasonable doubt also violates a defendant's Sixth Amendment right to a jury trial. In *Sullivan v. Louisiana*, the trial court gave an unconstitutional reasonable doubt instruction. The Court concluded the instruction violated the defendant's right to a jury trial because, "it would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge

to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.) The accomplice instruction was in practical effect an instruction that the jury only had to find that Justin was probably guilty.

The erroneous instruction also violated the prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17 of the California Constitution. The prohibition against cruel and unusual punishment required heightened reliability during capital proceedings. (*Beck v. Alabama* (1980) 447 U.S. 625, 632 [100 S.Ct. 2382, 65 L.Ed.2d 403]; *People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) Justin's jury was unable to accurately determine his guilt if it applied the requirements that only slight evidence corroborate accomplice testimony and the corroborating evidence only needed to tend to connect Justin to the crime.

F. PREJUDICE

Because the version of CALCRIM No. 334 given to the jury violated Justin's federal constitutional rights, the judgment must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The judgment must also be reversed under the more likely than not standard for state law error. (*People v. Watson, supra*, 46 Cal.2d at pp. 836-837.)

Justin incorporates the prejudice argument from Issue I in this portion of the brief. The evidence against Justin was remarkably weak. Brown was the only witness connecting Justin

to Noriega's death. She was a drug user who died in a shootout with the police. She told the police that Justin had killed Noriega after she had been arrested for narcotics and had multiple prosecutions pending. Brown's motive to falsely accuse someone of Noriega's murder was strong. Brown told Detective Wilson that she knew for a fact that Justin used a Glock .9 millimeter firearm to shoot Noriega. (6RT 1923.) The ballistics evidence, however, conclusively established that a Glock .9 millimeter firearm did not fire the shots that killed Noriega. (1RT 2730, 2739; Exhibit 156.) Sams believed Justin's comment that he killed people was bragging, not truthful, and Justin was "full of bullshit." (9RT 2370-2371, 2384.) Reeder was not a credible witness for the reasons explained in Issue I.

Justin was prejudiced by the dilution of the reasonable doubt standard with the language in CALCRIM No. 334 that only "slight" corroborating evidence that tended to connect him to Noriega's death was sufficient to prove guilt. The evidence corroborating Brown's testimony was clearly no more than "slight." There was no forensic evidence connecting Justin to Noriega's death. The prosecutor stressed the slight corroboration standard during his opening argument. (13RT 2933-2934, 2966.) Justin was deprived of a fair trial. The judgment of guilt must be reversed.

XI

JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION, REQUIRE REVERSAL OF THE JUDGMENT OF GUILT BECAUSE: (1) CALCRIM NO. 319 ERRONEOUSLY PREVENTED THE JURY FROM CONSIDERING FOR THE TRUTH OF THE MATTER ASSERTED BROWN'S STATEMENT TO SILVA THAT A HEATED ARGUMENT PRECEDED JUSTIN'S SHOOTING OF NORIEGA; AND (2) CALCRIM NO. 318 WAS A ONE SIDED INSTRUCTION IN FAVOR OF THE PROSECUTION AND FORCED THE JURY TO ACCEPT BROWN'S TESTIMONY AS TRUE.

A. SUMMARY OF ARGUMENT

Dorothy Brown was allegedly with Justin when he shot Noriega. Brown was shot and killed by a police officer who was attempting to arrest her. Brown was not available to testify. Her testimony from the penalty phase of the Texas trial was read into the record. (6RT 1905, 1932.) During 1998, Brown was interviewed by Detective Silva. She told him that a heated argument preceded the shooting. Justin offered into evidence Brown's statements to Silva. (13RT 2870-2873.)

The trial court instructed the jury with CALCRIM Nos. 318 and 319. CALCRIM No. 318 instructed the jury that it could use Brown's prior statements as evidence that the statements were true. The instruction failed to tell the jury that it was free to disbelieve

Brown's prior statements. The trial court also instructed the jury with CALCRIM No. 319. It instructed the jury that it could not consider Brown's statements to Silva "as proof that the information contained in them is true . . .." (13RT 2888.) This portion of CALCRIM No. 319 erroneously precluded the jury from considering as true Brown's statement to Silva that a heated argument preceded the shooting. The jury's failure to consider this statement for its truth erroneously prevented the jury from using it to determine whether Justin shot Noriega as the result of provocation and thus was guilty only of second-degree murder. Because the giving of CALCRIM Nos. 318 and 319 were prejudicial, the judgment of guilt must be reversed.

B. STANDARD OF REVIEW

Errors pertaining to jury instructions are questions of law which are reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 588, 569.) Appellate review of an instructional issue does not entail any deference to the trial court. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584.) "The independent or de novo standard of review is applicable in assessing whether [jury] instructions correctly state the law, and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration." (*People v. Posey* (2004) 32 Cal.4th 193, 218].)

C. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Brown's testimony from August 22, 1996, from the penalty phase of the Texas trial, was read into the record during the prosecution guilt phase of the instant case. (6RT 1905-1961.) She testified that Justin shot Noriega. (6RT 1904, 1913-1914, 1938-1939.) During

discussion of the jury instructions prior to the commencement of the defense case-in-chief during the guilt phase, the trial court stated that it intended to give CALCRIM No. 318. The defense counsel neither requested nor objected to the instruction. (13RT 2792-2794.) The defense counsel stated that he intended to call Detective Silva to testify to prior inconsistent statements made by Brown. (13RT 2794.) The trial court then stated that it would also give CALCRIM No. 319.[48] (13RT 2795.)

During September 1998, Silva interviewed Brown. (13RT 2870.) During the guilt phase of the defense case-in-chief, Silva testified about Brown's statements during the interview. (13RT 2870-2876.) Brown said during the interview: (1) she was heavily intoxicated on methamphetamine when Noriega was shot and had not slept for days; (2) she and Justin had used methamphetamine prior to the shooting; (2) she had exited the vehicle and started walking, but could not remember when she first heard the sound of shots; (3) Justin used a .9 millimeter Glock firearm to shoot Noriega and she was present when Justin purchased it; (4) Noriega and Justin were in a heated argument in Spanish before the shooting and there was a duffel bag containing stuff. (13RT 2871-2873.) Later during the interview, Brown said that she walked up and looked over, saw headlights pointed at each other, and then saw shooting. (13RT 2875-2876.)

The trial court instructed the jury with CALCRIM Nos. 318 and 319. (13RT 2888.) CALCRIM No. 318 instructed the jury as follows:

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[48] The trial court did not refer to it as CALCRIM No. 319 during the discussion. However, it was apparent the Court was referring to CALCRIM No. 319.

> You have heard evidence of statements that a witness made before trial. Except as otherwise instructed, if you decide that the witness made those statements, you may use those statements in two ways
>
> One, to evaluate whether the witness's testimony in court is believable;
>
> And two, as evidence that the information in those earlier statements is true.

(13RT 2888.)

CALCRIM No. 319 instructed the jury as follows:

> Dorothy Brown did not testify in this trial, but her testimony taken at another time was read for you. In addition to this testimony, you have heard evidence that Dorothy Brown made other statements. I am referring to the statements about which Martin Silva testified. If you conclude that Dorothy Brown made those statements you may only consider them
>
> (Brief interruption.)
>
> UNIDENTIFIED JUROR: Sorry.
>
> The Court: Let me start that paragraph again.
>
> If you conclude that Dorothy Brown made those other statements, you may only consider them in a limited way. You may only use them in deciding whether to believe the testimony of Dorothy Brown that was read here at trial. You may not use those other statements as proof that the information contained in them is true, nor may you use them for any other reason.

(13RT 2888.)

The prosecutor repeatedly referred to Brown's testimony during his opening argument, and rebuttal argument, to argue Justin was guilty. (13RT 2906, 2931-2932, 2933, 2934-

2935.)

D. THE ISSUE OF WHETHER CALCRIM NOS. 318 AND 319 WERE CORRECT STATEMENTS OF THE LAW CAN BE REVIEWED DESPITE THE LACK OF AN OBJECTION IN THE TRIAL COURT.

The defense counsel did not object to the giving of CALCRIM No. 318 or CALCRIM No. 319. (13RT 2792-2795.) Section 1259 provides, "the appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." This Court has applied section 1259 to review whether jury instructions were correct despite the defendant's failure to make an objection in the trial court. (*E.g., People v. Cleveland* (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506.) Hence, the lack of an objection does not preclude this Court from determining whether the above instructions were correct statements of the law.

The invited error doctrine, furthermore, does not preclude appellate review of this issue. The test for invited error is not whether the record provides an inference of acquiescence to the error, but whether the record affirmatively shows the error was at the deliberate behest of counsel based on a tactical decision. (*People v. Wickersham* (1982) 32 Cal.3d 307, 333-335.) The defense counsel did not make a tactical decision to request CALCRIM No. 318. Hence, this Court can review whether CALCRIM No. 318 was a prejudicially erroneous statements of the law.

E. THE GIVING OF CALCRIM NO. 318 WAS ERRONEOUS.

CALCRIM No. 318 permitted jurors to consider Brown's out of court statements as

substantive evidence and to judge her credibility as a trial witness. The instruction specifically told the jury that it could use Brown's statement before trial to: (1) evaluate whether Brown's trial testimony was true; and (2) as evidence that the statement was true. This instruction allowed the jurors to consider as substantive evidence Brown's 1998 statement to Silva. Brown said during that statement that Noriega and Justin had a heated argument prior to Justin shooting Noriega with the .9 millimeter Glock firearm, which Justin purchased while Brown was present. (13RT 2871-2873.) CALCRIM No. 319 directly contradicted CALCRIM No. 318.

CALCRIM No. 319 first told the jurors they could consider Brown's statement to Silva "in deciding whether to believe the testimony of Dorothy Brown that was read here at trial." (13RT 2888.)[49] This portion of CALCRIM No. 319 was consistent with the portion of CALCRIM No. 318 which instructed the jurors to use Brown's out-of-court statement to decide whether to believe her trial testimony. CALCRIM No. 319 further instructed the jury, "you may not use those other statements as proof that the information contained in them is true, nor may you use them for any other reason." (13RT 2888.) This portion of CALCRIM No. 319, which prevented the jury from considering Brown's statements to Silva for their truth, contradicted the portion of CALCRIM No. 318 which instructed the jury that it could consider "those statements . . . as evidence that the information in those earlier statements

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[49] The Use Notes to CALCRIM No. 318 make it clear that CALCRIM Nos. 318 and 319 are alternative instructions. The Use Note states, "if prior testimony of an unavailable witness was impeached with a prior inconsistent statement, use CALCRIM No. 319."

is true." (13RT 2888.) These instructions were obviously conflicting and likely resulted in the jury being confused about whether it could consider Brown's statement to Silva for the truth of the matter asserted.

Justin was the proponent of Brown's out-of-court statement to Silva. (13RT 2870.) Silva's testimony about what Brown told him was admitted without the jury being told the statements were not being admitted for the truth of the matter asserted. Brown told Silva that Noriega and Justin had a heated argument prior to the shooting. (13RT 2872.) The giving of CALCRIM No. 319 erroneously prevented the jury from considering as substantive evidence Brown's statement to Silva that a heated argument preceded the shooting. This argument was relevant to whether Justin was provoked to shoot Noriega and should have been found guilty of second degree murder.

CALCRIM No. 318 was also an argumentive instruction. "A court may – and indeed, must – refuse an instruction that is argumentative, i.e. of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1276, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1139.) Jury instructions should be neutral statements of the law and avoid singling any particular piece of evidence for scrutiny by the jury. (*People v. McNamara* (1892) 94 Cal. 509, 513.) "An argumentative instruction is one which is "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Sanders* (1995) 11 Cal.4th 475, 558.)

The second subparagraph of CALCRIM No. 318 told the jury that it could consider Brown's out of court statements "as evidence that the information in those earlier statements is true." (13RT 2888.) This instruction was argumentative because it related a particular fact—Brown's out of court statements—to the legal issue of whether those statements established Justin's guilt because they were true. The only inference allowed by the instruction was that Brown's out of court statements were true. CALCRIM No. 318 was in practical effect an "opinion of the court as to [a] fact in issue," (*People v. Wright*, supra, 45 Cal.3d at p. 1135), which was that Brown's out-of-court statements were true. The problem with CALCRIM No. 318 was neither cured, nor ameliorated, by the use of the permissive word "may" in the introductory clause The instruction still limited the jury's consideration of Brown's out of court statements for their truth. Brown's out-of-court statements to Silva were inculpatory because she said Justin shot Noriega during those statements. CALCRIM No. 318 was impermissibly argumentative in favor of the prosecution because it: (1) instructed the jurors that Brown's testimony from the Texas trial, and her statements to Detective Silva,[50] were true and deserving of belief; and (2) failed to tell jurors they could reject the truth of Brown's out of court statements.

F. THE GIVING OF CALCRIM NOS. 318 AND 319 VIOLATED JUSTIN'S FEDERAL CONSTITUTIONAL RIGHTS

The federal constitution guaranties a criminal defendant the right to trial before an

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[50] For this issue and for ease of reference, Brown's testimony from the Texas trial, and her statements to Detective Silva will be referred to as her "out of court statements" unless specifically stated otherwise.

impartial judge and jury. (*United States v. Gaudin* (1995) 515 U.S. 506, 514-515 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *Gray v. Mississippi* (1987) 481 U.S. 648, 668 [107 S.Ct. 2045, 95 L.Ed.2d 622].) "In reviewing an ambiguous instruction . . . , we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L. Ed.2d 385].) The "reasonable likelihood" standard "is not a harmless-error test at all. It is, rather, the test for determining, in the first instance, whether constitutional error occurred when the jury was given an ambiguous instruction." (*Calderon v. Coleman* (1998) 525 U.S. 141, 146 [119 S.Ct. 500, 142 L.Ed.2d 52].)

There is a reasonable likelihood that the jury applied CALCRIM Nos. 318 and 319 in a manner that violated Justin's federal constitutional rights. The wording of CALCRIM No. 318 compelled the jury to accept Brown's out-of-court inculpatory statement as true. Under the due process clause and the Sixth and Fourteenth Amendments, the determination of whether Brown was credible was vested exclusively in the jury. CALCRIM Nos. 318 and 319 were confusing and contradictory because CALCRIM No. 318 allowed the jurors to consider Brown's statements to Silva for the truth of the matter asserted, but CALCRIM No. 319 told the jurors that they could not consider those statements for the truth of the matter asserted. It was crucial for Justin's defense that the jury believe that a heated argument occurred prior to Justin shooting Noriega. The ambiguous and conflicting jury instructions prevented the jury from considering for the truth of the matter asserted Brown's statement

to Silva that an argument occurred prior to the shooting. Hence, the instructions violated Justin's right to due process of law.

In *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444], the Court decided the defendant's right to a jury trial had been deprived when the trial court decided the element of materiality in a prosecution for making a false statement. Similar reasoning applies to the instant case. CALCRIM No. 319 told the jury not to consider for the truth of the matter asserted Brown's exculpatory statement to Silva that a heated argument preceded the shooting. Because of this instruction, the jury could not have accurately determined whether Justin shot Noriega because of provocation and thus should have been found guilty of only second-degree murder.

CALCRIM No. 318 was also a one sided instruction which favored the prosecution. It allowed the jury to consider inculpatory evidence solely for its truth and in practical effect guaranteed a guilty verdict. Justin's jury could not have accurately assessed the facts and determined witness credibility when it was guided by a one sided instruction which required it to accept Brown's testimony as true. CALCRIM No. 318 deprived Justin of a jury determination of a material fact in the same way that the trial court's resolution of the materiality issue in *United States v. Gaudin* deprived that defendant of due process and the right to a jury determination of the facts.

G. PREJUDICE

Because the giving of CALCRIM Nos. 318 and 319 violated Justin's federal constitutional rights, the judgment must be reversed unless the error was harmless beyond

a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24) This standard requires reversal unless the prosecution can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*)

Justin incorporates the prejudice argument from Issue I in this portion of the brief. It will not be repeated for purpose of brevity. The giving of CALCRIM No. 319 was prejudicial. The instruction prevented the jury from considering for the truth of the matter asserted whether a heated argument occurred prior to Justin shooting Noriega. The instruction was prejudicial with regard to the jury finding Justin guilty of first degree murder rather than second degree murder. In order to be guilty of first degree murder based on an intentional killing, the jury had to find Justin shot Noriega willfully, deliberately, and with premeditation. (13RT 2896-2897; 17 CT 4326; CALCRIM No. 521.) This Court cannot conclude beyond a reasonable doubt the jury would not have found Justin guilty of second degree murder if it had been allowed to consider for the truth of the matter asserted Brown's statement to Silva that a heated argument preceded the shooting.

The giving of CALCRIM No. 318 was prejudicial because it was argumentative. Brown's testimony was the only evidence linking Justin to Noriega's murder. Because CALCRIM No. 318 was given, this Court has no way to determine whether the jury properly assessed Brown's credibility. Brown was the classic witness who had more credibility with the jury than she deserved because her testimony was read into the record. The jury did not get the benefit of watching her lie. Brown was a drug addict with multiple criminal cases

pending against her when she first accused Justin of killing Noriega. Brown had every motive to falsely accuse Justin to negotiate a better disposition of her criminal cases. She was shot by the police following a traffic stop when she reached for her belt area. It was highly unlikely the jury would have found Brown credible absent the giving of an instruction which, in practical effect, required the jury to find her credible. The evidence against Justin was weak. The judgment of guilt must be reversed.

XII

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ADMITTED INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHS OF THE BODIES OF NORIEGA AND HARTWELL IN VIOLATION OF JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION, AND EVIDENCE CODE SECTIONS 350 AND 352.

A. SUMMARY OF ARGUMENT

The trial court, over defense objection, admitted into evidence photographs of the bodies of Noriega and Hartwell. These photographs were marginally relevant, if relevant at all, to any fact in dispute and extremely prejudicial. There was no dispute Noriega was shot and killed. There was no dispute Hartwell was stabbed and killed. Gruesome photographs of the victims' bodies did nothing to help the jury resolve whether Justin killed Noriega. The admission of these photographs deprived Justin of a fair trial and due process of law. Because the admission of these photographs was prejudicial, the judgment of guilt must be reversed.

B. STANDARD OF REVIEW

The trial court's rulings on the admission and exclusion of evidence is reviewed under the abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128.)

C. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The admission of the photographs of the bodies of Noriega and Hartwell was first discussed during litigation of the pretrial motions. (3RT 1280-1297.) The defense counsel objected to the admission of any photographs pertaining to Hartwell's death based on lack of relevance and being inflammatory. (3RT 1280.) He also made a global objection to the admission of the photographs of Noriega's body based on the prejudice outweighing the probative value and supplemented that objection with argument as each exhibit was discussed. (3RT 1280-1281.)

The following chart lists the exhibits in issue[51], the citation to the defense objections,, and the reason for the admission.

NO.	ADDITIONAL DEFENSE OBJECTION OR ARGUMENT	DESCRIPTION OF PHOTOGRAPH	REASON FOR ADMISSION
8-13	3RT 1282-1283	Various photographs of legs sticking out from pallet; Exh. Nos. 11, 12, and 13 appear to show human decay.	To demonstrate condition of body when found and it was human remains. (3RT 1283.)
14	3RT 1283-1284	Decayed body in coroner's bag. (3RT 1283-1284.)	Same as above. (3RT 1284.)
18, 20, 22, & 23	3RT 1286-1289	Decayed human remains. (3RT 1286-1287.)	To demonstrate autopsy results. (3RT 1288-1289.)
31	3RT 1290	Photograph of Noriega while alive. (3RT 1290.)	To identify the victim. (3RT 1290.)
32	3RT 1290-1291	Photograph of Hartwell while alive. (3RT 1291.)	To establish Hartwell's identity. (3RT 1291.)

[51] All the exhibits listed in the chart were photographs admitted into evidence.

34-37	3RT 1291	Charred vehicle from the Texas case. (3RT 1291.)	Not articulated. (3RT 1291.)
45 & 46	3RT 1294-1295;	Gruesome photographs of burned human remains from The Texas case. (3RT 1295.)	To show stab wounds. (3RT 1294-1295.)

Gary Thompson, a deputy sheriff who went to the location were Noriega's body was found, testified about Exhibits eight through 14. (6RT 1794, 1802-1805.) Thompson testified, "The victim was decomposing and stunk really bad." (6RT 1805.) Exhibits eight through 10 are photographs taken from several feet away from the pallet under which Noriega's body had been placed. A boot and a foot are clearly shown in Exhibit 11. Exhibit 12 shows a clear shot of a foot and what appears to be decayed human remains mixed in with dirt. Exhibit 13 is similar to Exhibit 12 with a slightly different angle for the shot. Exhibit 14 shows decayed human remains on a sheet. Clothes cover a portion of the human remains.

Heather Kelley testified that Exhibit 31 was a photograph of Noriega. (6RT 1865, 1867.) Reeder testified Exhibit 32 was a photograph of Hartwell. (7RT 2023.) It showed Hartwell smiling while talking on the telephone.

Dr. Ditraglia, the forensic examiner who performed the autopsy on Noriega's body, testified about Exhibits 18 and 22. (8RT 2291-2292, 2295.) Exhibit 18 showed Noriega's body. (8RT 2295.) According to Ditraglia, it was possible to see in Exhibit 18 the forehead, the eye sockets, the upper jaw, and some teeth. Ditraglia could not determine whether the clothing was on the body from looking at Exhibit 18. (8RT 2296.) The photograph appears

to be a tangled mess of human remains and dirty clothing. Exhibit 22 also showed Noriega's body. It showed more of the skeleton than Exhibit 18. (8RT 2295, 2297.) The photograph shows decayed human flesh with bones visible. Ditraglia testified about the bullet wounds he found in the body and their location. Exhibit 23 was a photograph which showed a hole in the sternum. (8RT 2302.) Exhibit 147 was a diagram of the human body which showed the location of the bullet holes and injuries to Noriega's body. (8RT 2304-2306.)

Terry Duval, a retired fire chief from Bastrop County in Texas testified about Exhibits 34 through 37. They were photographs of the burned out vehicle where Hartwell's body was found. (10RT 2527-2529, 2538-2542.)

During a 402 hearing during the guilt phase, the trial court and the attorneys had additional discussion regarding the admission of Exhibits 45 and 46. (11RT 2612-2613.) They were photographs of Hartwell's body during the autopsy. The prosecutor argued the exhibits were relevant to show the location of Hartwell's stab wounds and the points of entry and exit. (11RT 2613.) The defense attorney objected to the admission of the exhibits because: (1) the prosecution only had to prove Justin had been convicted of the Texas murder and that could be accomplished through documentary evidence; (2) Justin was not disputing that he had been convicted of Hartwell's murder; and (3) the exhibits were not relevant. (11RT 2613-2615.) The trial court overruled the defense objections. (11RT 2616.)

Dr. Bayardo was a retired medical examiner from Travis County in Texas. He performed the autopsy on Hartwell's body. (11RT 2618, 2622.) Exhibit 45 was a photograph

of the spine. The spine appeared in the photograph. (11RT 2625-2626.) A probe in the photograph demonstrated the entry point of the knife. The photograph showed the neck from an internal view. Teeth were visible in the far right hand portion of the photograph. (11RT 2627.) Exhibit 46 was another photograph of Hartwell's internal chest cavity. Bayardo used the probe to estimate the depth of penetration of the stabbing instrument. Exhibit 46 showed a ruler next to the probe. The ruler measured from the top of the collarbone area to the back of the spine where the knife hit the spine. (11RT 2627-2628.)

Following the testimony of the prosecution witnesses, the prosecutor offered the above exhibits into evidence. The defense counsel renewed the prior objections which were overruled. (12RT 2759-2761.)

D. THE TRIAL COURT ERRED BY ADMITTING THE PHOTOGRAPHS INTO EVIDENCE OVER A DEFENSE OBJECTION.

Evidence Code section 350 provides, "no evidence is admissible except relevant evidence." Relevant evidence is defined as 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.) Evidence Code section 352 provides that the trial court may exclude evidence when its prejudicial effect outweighs its probative value. Pursuant to these Evidence Code provisions, this Court has "repeatedly cautioned against the admission of photographs of murder victims while alive unless the prosecution can establish the relevance of such items." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230; *People v. Kelly* (1990) 51 Cal.3d 931, 963; *People v. Edwards* (1991) 54 Cal.3d 787, 836 [guilt phase]; *People v. Cox*

(1991) 53 Cal.3d 618, 663- 664.)

Exhibit 31 was a photograph of Noriega while he was alive. The photograph was not relevant to any fact in dispute and evoked undue emotional sympathy. Ditraglia performed the autopsy on Noriega's body. (8RT 2291-2314.) Justin did not dispute that Noriega's body was the subject of the autopsy or that Noriega was dead. (9RT 2295.) The sole purpose of admitting Exhibit 31 was to inflame the passion of the jury by contrasting a photograph of Noriega as a live, young man with the photographs of his decaying corpse.

This Court has upheld the admission of a photograph of the victim while alive when it was used by a witness to establish identity. (*E.g. People v. DeSantis, supra*, 2 Cal.4th at p. 1230.) Heather Kelley viewed Exhibit 31 and testified that it was a photograph of Noriega. (6RT 1865, 1867.) The mere fact that Heather was shown Exhibit 31 by the prosecutor and asked to identify it as a photograph of Noriega did not mean Exhibit 31 was admissible. Noriega had lived with Heather's family and she did not need to view a photograph of him to testify about his disappearance. The prosecutor should not be allowed to evade the general rule against the admission of the photographs of victims while alive by the subterfuge of simply choosing a witness to view photograph of the victim and make an identification. Similarly, Exhibit 31 did not aid in identifying the body found in the foothills by Ronald Jones, and his companions, as Noriega's body.

Exhibit 32, the photograph of Hartwell while alive, was also inadmissible because it was not relevant to any fact in dispute and also evoked undue emotional sympathy. Reeder

identified the person shown in Exhibit 32 as Hartwell. (7RT 2023.) This identification was obviously not necessary for the prosecution to present its case. Reeder had known Hartwell many months when Hartwell died. Reeder did not need to identify Hartwell from a photograph to give her testimony about the events leading up to Hartwell's death.

The photographs of Noriega's decayed body, and the photographs from Hartwell's autopsy, were similarly inadmissible. Exhibits 18, 22, and 23 were presumably admissible to show Ditraglia's opinions about the cause of Noriega's death and the location of various bullet wounds. These exhibits were not used for that purpose. Ditraglia testified that Exhibits 18 and 22 showed the decayed remains of Noriega. (8RT 2295-2297.) Exhibit 23 showed a hole in the sternum. (8RT 2302.) Ditraglia used Exhibit 147, a diagram, to show the location of the injuries to Noriega's body and the location of bullet holes. (8RT 2304-2305.) Exhibits 18, 22, and 23 were unnecessary photographs used to create undue prejudice against Justin.

The admission of the photographs pertaining to Hartwell's death compounded the prejudice from the admission of the photographs of Noriega's decayed body. Exhibits 34 through 37 were the photographs of the burned vehicle where Hartwell's body was found. (10RT 2527-2529, 2538-2542.) These photographs were not gruesome. However, the photographs were obviously designed to manipulate the passion of the jury by demonstrating the inferno into which Hartwell's body had been cast. Exhibits 45 and 46 were gruesome photographs of the interior of Hartwell's body, including her spine. The fact that the prosecution was able to conclusively prove that Justin killed Hartwell by simply admitting

certified copies of the Texas conviction made exhibits 45 and 46 especially unnecessary. Assuming the prosecution should have been allowed the opportunity to establish the facts regarding Hartwell's death, exhibits 45 and 46 were still unnecessary and unduly inflammatory. Bayardo was able to explain his opinions about the cause of Hartwell's death without showing photographs of her interior body. Justin was not in a position to dispute any of Bayaro's opinions given his conviction for killing Hartwell.

For the reasons above, the trial court erred by admitting the above exhibits over a defense objection.

E. THE ADMISSION OF THE PHOTOGRAPHS VIOLATED JUSTIN'S FEDERAL CONSTITUTIONAL RIGHTS.

The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 481, 116 L.Ed.2d 385]; *People v. Partida* (2005) 37 Cal.4th 428, 439.) The admission of the above photographs rendered Justin's trial fundamentally unfair. Appellant's defense to the slaying of Noriega was identity. The prosecution was perfectly capable of presenting its case without the emotionally charged photographs of Noriega's foot protruding from under the pallet and his decayed remains as shown in Exhibits 18 and 22. The photographs of Noriega and Hartwell also appealed to the passion of the jury without providing the jury any relevant facts. The photographs of Hartwell's internal organs and body, and the burned vehicle where her body was found, only compounded the unfair prejudice to Justin from the admission of the photographs of Noriega's decayed corpse. The contrast created by the photographs of Noriega and Hartwell

while they were alive, and their corpses, was especially emotionally powerful and unfair.

The admission of the photographs also deprived Justin of his right to an accurate jury determination of the facts as guaranteed by the Sixth and Fourteenth Amendments right to a jury trial and Article I, section 16 of the California Constitution. (*Ring v. Arizona* (2002) 536 U.S. 584, 536 [122 S.Ct. 2428, 153 L.Ed.2d 556] [the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444] [the right to have a jury requires the trier of fact to determine the truth of every accusation].) The jury could not have accurately determined whether Justin killed Noriega when its assessment of the evidence was skewed by inflammatory and prejudicial photographs of the decayed corpse of Noriega and Hartwell's internal organs and body.

Justin's right to be free of cruel and unusual punishment under the Eight and Fourteenth Amendments, and Article I, section 17, of the California Constitution, was also violated by the admission of the photographs. (*Beck v. Alabama*, 447 U.S. at p. 632 [the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution]; *People v. Ayala*, *supra*, 23 Cal.4th at pp. 262-263 [the California Constitution also requires heightened reliability during the guilt phase of a capital prosecution].) As argued above, the jury's fact finding mission was impaired by the admission of the inflammatory and emotionally charged photographs.

F. PREJUDICE

Because the admission of the photographs deprived Justin of his federal constitutional

rights, the judgment must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The judgment must also be reversed under the more likely than not standard for state law error. *(People v. Watson, supra,* 46 Cal.2d at pp. 836-837.) This standard requires Justin to demonstrate a reasonable chance the jury would not have found him guilty if the photographs had not been admitted into evidence. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

Appellant incorporates herein the discussion of prejudice from Issue I. The prosecution evidence was weak. Brown's testimony was the only evidence connecting Justin to Noriega's death. Brown was an unreliable witness for numerous reasons. She had an incentive to curry favor with the prosecution, and falsely accuse Justin, because of her own criminal problems. Reeder claimed that Justin admitted to killing someone, but she was also an unreliable witness. Reeder either participated in Hartwell's murder or at least helped try to conceal the crime by disposing of the body. Reeder was wrong about major details such as where Noriega's body was left after his death. (7RT 2022,) Sams did not take seriously Justin's statements about killing someone and thought Justin was "full of bullshit." (9RT 2370-2371, 2384.)

In a case where the prosecution evidence is weak, the emotional power of the photographs erroneously admitted by the trial court was substantial . The jurors must have had an visceral reaction to seeing the photographs of Hartwell and Noriega alive and then viewing the photographs of Noriega's body as a tangled mess of decayed flesh and organs and Hartwell's body as dissected remains. The jury should have evaluated Justin's guilt in an objective, dispassionate manner based on the evidence connecting him to Noriega's death.

The admission of the photographs prevented the jury from evaluating Justin's guilt in that manner. The judgment must be reversed.

The admission of the photographs was prejudicial for the imposition of the death penalty even if it was not prejudicial with regard to guilt. The discussion of prejudice from Issue XVI is incorporated in this argument. Justin presented substantial evidence in mitigation. His father taught him how to use drugs at an early age. Justin's mother tried to commit suicide multiple times. (17RT 3474.) Justin's drug use resulted in paranoia. (17RT 3508.) Justin allegedly killed Noriega and Hartwell because he feared they would report him to the police. (7RT 2092-2093.) Justin's thought process and choices were riddled by the disease of addiction which was visited upon by him by his parents at his most vulnerable stage of life. The admission of the photographs resulted in a verdict of death based on emotion and prejudice. The judgment of death must be reversed.

PENALTY PHASE ISSUES

XIII

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY DENIED JUSTIN'S MOTION TO WAIVE HIS RIGHT TO COUNSEL AND REPRESENT HIMSELF IN VIOLATION OF JUSTIN'S RIGHT TO SELF-REPRESENTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 15, OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

Following the jury finding true the Texas murder special circumstance allegation, Justin asked the trial court to dismiss his attorneys and allow him to represent himself. (14RT 3088-3090.) The trial court denied the request. (14RT 3103.) The trial court erred by denying Justin's request for self-representation because he had the right to waive representation by counsel and the request was not accompanied by a demand for a continuance. Because the erroneous denial of Justin's request for self-representation was prejudicial per se, the judgment of death must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Justin was arraigned on the complaint on June 13, 2000. (1Aug. RT 1.) The case was continued numerous times up through 2006. During a sealed hearing on February 23, 2007, Justin informed the trial court that he wanted to waive his right to counsel and represent himself. (1Aug. RT 132-134.) The trial court then resumed proceedings in open court with

the prosecutor present. (1RT 135.) Justin waived his right to counsel and chose to represent himself. (1Aug. RT 135-164.) At the next hearing on March 9, 2007, attorney Exum was appointed standby counsel. (1Aug. RT 173.)

Justin represented himself until July 13, 2007, when attorneys Scalisi and Exum were reappointed. (2 Aug. RT 355-358.) On September 12, 2007, the trial court denied Justin's request for appointment of new counsel. (2Aug. RT 384-387.) During a hearing on October 3, 2007, attorneys Scalisi and Exum moved to withdraw from the case because they believed Justin's defense would be perpetrating a fraud on the court. The trial court denied the request. (2Aug. RT 397-401.)

Trial testimony commenced on October 29, 2007. (6RT 1750.) On November 27, 2007, the trial court denied Justin's request to replace his appointed attorneys and appoint new counsel. (13B RT 2855-2859.) On December 6, 2007, the jury found Justin guilty of murder. (14RT 3023-3024.) On December 10, 2007, the trial court held the jury trial on the Texas murder special circumstance allegation. The jury found the allegation true that day. (14RT 3031-3048, 3087-3088.)

Shortly after the return of the special circumstance verdict, attorney Exum informed the trial court that Justin wanted to make a *Faretta* motion. (14RT 3090.) The trial court requested that Justin complete a *Faretta* form. (14RT 3091.) Justin completed the *Faretta* form, but without the input of counsel who did not want to participate in assisting Justin in his request to represent himself. (14RT 3092, 3094.) Justin explained that he did not agree with his defense counsel's penalty phase strategy. He also stated that the only reason he withdrew his prior pro-per status was because of difficulty obtaining funding for his defense.

(14RT 3095.)

The trial court stated: (1) it was not denying the motion because of Justin's penalty phase strategy; (2) Justin had the mental capacity to waive representation by counsel; (3) Justin's trial attorneys had provided excellent representation; (4) Justin had previously represented himself once during the case; (5) there was not a significant amount of the trial left, but the penalty phase was an important stage of the trial; (6) Justin was not requesting a delay, but the trial court would not grant a request by either party for a delay; (7) Justin had behaved in the courtroom and had not been disruptive, but the leg chain around his leg presented a problem for him regarding the presentation of evidence. (14RT 3100-3102.) Justin stated that the leg restraint was not an issue because he did not intend to use the visual display device and would stay seated. (14RT 3102-3103.) The trial court believed that some amount of disruption of the trial was inevitable if Justin represented himself. The motion was denied. (14RT 3103.) The case proceeded to the penalty phase. (15RT 3131.)

C. LEGAL STANDARDS GOVERNING *FARETTA* MOTIONS

A defendant has a federal constitutional right to counsel at all critical stages in a criminal proceeding where substantial rights of an accused may be affected. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134 [88 S.Ct. 254, 256, 19 L.Ed.2d 336].) The right to counsel may be waived by a defendant who wishes to represent himself or herself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 815-816 [95 S.Ct. 2525, 45 L.Ed.2d 562].) By such waiver a defendant relinquishes "many of the traditional benefits associated with the right to counsel." (*Id.* at p. 835, 95 S.Ct. at 2541.) For this reason a knowing and intelligent waiver of the right to counsel is required before a criminal defendant is permitted to represent

himself or herself. (*Id.*)

A defendant must make an unequivocal assertion of the right for self-representation within a reasonable time before the trial begins. (*People v. Lynch* (2010) 50 Cal.4th 693, 721) If a timely motion to proceed pro se has been made, the trial court "must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*People v. Dent* (2003) 30 Cal.4th 213, 217.) The erroneous denial of a timely request for self-representation requires automatic reversal of the judgment without a showing of actual prejudice. (*People v. Joseph* (1983) 34 Cal.3d 936, 945.) When the motion is untimely, self-representation is no longer a matter of right but is subject to the court's discretion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365.) The purpose of the timeliness requirement is "to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton* (1989) 48 Cal.3d 843, 852.) Timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. (*People v. Lynch* (2010) 50 Cal.4th 693, 724.)

In *People v. Windham* (1977) 19 Cal.3d 121, 128, the Court set forth the factors that should be considered by a court in deciding whether to grant an untimely *Faretta* motion: (1) the defendant's proclivity to substitute counsel; (2) the quality of counsel's representation of the defendant; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay which might reasonably be expected to follow if the defendant is allowed to represent himself.

D. THE TRIAL COURT ERRED BY DENYING JUSTIN'S MOTION FOR SELF-REPRESENTATION

Justin made his motion for self-representation after the jury found true the Texas special circumstance allegation. A motion for self-representation made during guilt phase deliberations in a capital trial is untimely. (*People v. Hamilton* (1988) 45 Cal.3d 351, 369.) A motion for self-representation following the jury returning its guilt phase verdict, but made seven days prior to commencement of the penalty phase, is untimely. (*People v. Hardy* (1992) 2 Cal.4th 86, 193.) Significantly, in the context of self-representation as late during a trial as sentencing, the Court of Appeals for the Seventh Circuit noted: *Faretta* imposed no restrictions on the right to self-representation except that it must be exercised knowingly and intelligently. (*Silagy v. Peters* (7th Cir. 1990) 905 F.2d 986, 1007.) Under *Silagy v. Peters*, Justin's request for self-representation was timely and should have been granted regardless of any other factors.

Justin's motion for self-representation was made one day before the commencement of the penalty phase. (14RT 3091; 15RT 3131.) Despite the holdings of the aforementioned cases, Justin's motion was timely because he did not request a continuance of the penalty phase. (14RT 3099-3100, 3103.) *People v. Hardy* did not state whether the defendant was requesting a continuance of the penalty phase when he requested self-representation. *People v. Hardy* did not consider, therefore, whether a *Faretta* motion made prior to the commencement of the penalty phase, which was not accompanied by a request for a delay, was timely. In *People v. Hamilton*, the defendant made the motion for self-representation during the guilt phase jury deliberations. (*People v. Hamilton, supra*, 45 Cal.3d at p. 369.)

The opinion did not state whether the defendant was requesting a continuance in connection with the request for self-representation. Hence, *People v. Hamilton* did not resolve whether a *Faretta* motion made prior to the commencement of the penalty phase, without a request for a continuance, was timely.

The timeliness requirement is designed to prevent the defendant from misusing a Faretta motion to unjustifiably delay the trial or obstruct the orderly administration of justice. (*People v. Burton, supra*, 48 Cal.3d at p. 852.) Justin was not attempting to delay the trial, or obstruct the orderly administration of justice, because he did not request a continuance of the trial. Justin's *Faretta* motion was therefore timely. (*Armant v. Marquez* (9th Cir. 1985) 772 F.2d 552, 555 [a Faretta motion made before the jury was impaneled was timely unless it was a tactic to secure delay].) Because the denial of a timely Faretta motion is prejudicial per se, the judgment of death must be reversed. *(People v. Joseph, supra*, 34 Cal.3d at p. 945.)

More recently, *People v. Doolin* (2009) 45 Cal.4th 390, 455 considered a post-verdict request for self-representation at sentencing. In *People v. Doolin*, a capital case, this Court concluded the defendant's request for self-representation was untimely. (*Id.* at p. 452.) On the scheduled day for the sentencing hearing, the defendant first made a *Marsden* motion and moved for a two-week continuance. After the trial court denied both motions, the defendant requested to represent himself, and have an assistant to prepare a motion for new trial and for a reduced sentence. The trial court denied the request. (*Ibid.*)

Doolin held the trial court improperly referenced the defendant's poor education and evidence he was a "slow learner" when denying the *Faretta* request. (*People v. Doolin,*

supra, 45 Cal.4th at p. 454.) Nevertheless, the California Supreme Court recognized the request was "manifestly untimely." (*Ibid.*) The defendant: "appeared on the day set for sentencing and sought, not to act as his own counsel, but to replace his appointed lawyer with a new one and to secure a continuance. Only when this approach failed did defendant seek self-representation, and only then with the appointment of an assistant . . . " (*Ibid.*) The defendant in *Doolin* "was not prepared to proceed and could not provide a reasonable estimate of when he would be ready." Accordingly, *Doolin* held the trial court's ruling was within the scope of its discretion. (*Id.* at pp. 454-455.) *Doolin* contrasted the facts with those in the Court of Appeal case of *People v. Miller* (2007) 153 Cal.App.4th 1015:

> The circumstances of defendant's posttrial request for self-representation are in stark contrast to a recent Court of Appeal decision that held such a motion in a noncapital case is timely if made "a reasonable time prior to commencement of the sentencing hearing." (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024].) In *Miller,* the defendant moved for self-representation after the jury rendered its verdict and a new trial motion was made and denied, but more than two months before the scheduled sentencing hearing. At the time he made his motion, the defendant indicated to the court he planned to conduct his own investigation and that he would be prepared on the date the court had set. (*Id.* at pp. 1020, 1024.) In holding the trial court erred by denying the defendant's motion as untimely, the court observed that concerns about trial delay or disruption do not apply to separate sentencing hearings. (*Id.* at p. 1024.) Because the defendant's request was timely, he "had an absolute right to represent himself at sentencing and the trial court was required to grant his request for self-representation, which was unequivocal, as long as he was mentally competent and the request was made 'knowingly and intelligently, having been apprised of the dangers of self-representation.'" (*Ibid.*, quoting *People v. Welch*, *supra*, 20 Cal.4th at p. 729.) In this case, for the reasons stated, defendant's right to self-representation at sentencing was not absolute but subject to the court's discretion.

(*Id.* at p. 455, fn. 39.)

Thus, the rule is that to be timely, so as to entitle a defendant to represent himself as a matter of right at a hearing or proceeding separate and distinct from trial, a self-representation request must be made a reasonable time in advance of the hearing or proceeding such that the request occasions no delay. (*People v Miller, supra*, 153 Cal.App.4th 1024.) What constitutes a "reasonable time" will, of course, depend on circumstances, most notably the nature of the hearing. Properly understood, the timeliness rule is concerned not with when the defendant makes the *Faretta* request, but rather the *future delay* that would result if the request were granted. (See *People v. Nicholson* (1994) 24 Cal.App.4th 584, 593 [finding "only two reported decisions in which the trial courts denied *Faretta* motions when the defendants were ready to proceed without a continuance," and noting that "[i]n both cases, the denials resulted in reversals"].) Under the above language from *People v. Doolin*, Justin's request for self-representation was timely, and should have been granted, because he did not seek a continuance.

Justin's position is that his *Faretta* request was timely. However, the trial court erred by denying Justin's motion for self-representation even if it was untimely. The denial of an untimely *Faretta* motion is reviewed under the abuse of discretion standard. *(People v. Bradford v. Bradford* (1997) 15 Cal.4th 1229, 1365.) Justin had not demonstrated a proclivity to request self-representation. Justin's prosecution had been pending since June 1999. (1CTP 1.) Justin's first request for self-representation was made and granted on February 23, 2007.

(1Aug. RT 132-134.) On July 13, 2007, Justin waived his pro-per status and chose to be represented by counsel. (2Aug. RT 355-358.) Justin was not constantly demanding and relinquishing pro-per status to manipulate the judicial system. (14RT 3103.) Justin was demanding to represent himself for specific reasons which he believed were important. He disagreed with his defense attorney's mitigation strategy and wanted to present a different case in mitigation. (14RT 3099-3100, 3103.) A defendant's demand to represent himself during the middle of the trial obviously had the potential to be disruptive. However, Justin already had the discovery he needed and his only request was to keep the assistance of paralegal Diane Kaiser. (14RT 3099.) Justin's request was made during a logical hiatus in the proceedings because it was made after the special circumstance verdict was returned, but prior to the penalty phase commencing. Justin's request was not made at a time that would have been inherently disruptive such as cross-examination of a witness.

The trial court stated that it would have been disruptive for Justin to represent himself because he would have been unable to put documents on the visual display device because his leg was chained. This concern was not a legitimate basis to deny Justin's request because Justin stated that he did not intend to change his position or display anything on the visual display device. (14RT 3102.)

For the reasons above, the trial court erred by denying Justin's motion for self-representation because it was unequivocal and made in a timely manner. Even if the motion was untimely, the trial court erred by denying it because Justin did not request a continuance.

E. THE ERRONEOUS DENIAL OF JUSTIN'S *FARETTA* MOTION VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS.

A defendant's right to represent himself is rooted in the Sixth and Fourteenth Amendments. (*Faretta v. California, supra*, 422 U.S. at p. 814 [stating that the Sixth Amendment right to the assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help].) Hence, the trial court's erroneous denial of Justin's motion for self-representation violated his federal constitutional right to self-representation under the Sixth and Fourteenth Amendments and Article I, section 15 of the California Constitution. The denial of the motion also violated the prohibition against the imposition of cruel and unusual punishment under the Eighth and Fourteenth Amendments and Article I, section 17, of the California Constitution. The prohibition against cruel and unusual punishment in the federal and State Constitutions requires heightened reliability in the fact finding process for capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 653 [100 S.Ct. 2382, 65 L.Ed.2d 403]; *People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) *Faretta v. California* acknowledged the right of self-representation because the defendant's consent to representation was essential for effective representation:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own

> defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." Illinois v. Allen, 397 U.S. 337, 350-351 (BRENNAN, J., concurring).

(*Faretta v. California, supra*, 422 U.S. at p. 834.)

Hence, the trial court's erroneous denial of Justin's motion for self-representation violated his federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments.

F. PREJUDICE

Justin made a timely request to represent himself prior to the commencement of the penalty phase. (14RT 3092-3095.) The trial court erroneously denied this request. (14RT 3102-3103.) The erroneous denial of a timely Faretta motion is reversible per-se. *(People v. Butler* (2009) 47 Cal.4th 814, 824.) Hence, the judgment of death must be reversed without any inquiry into prejudice.

The California appellate courts have held that the denial of an untimely *Faretta* motion is tested for prejudice under *People v. Watson.* (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1051.) The erroneous denial of an untimely request for self-representation should be reversible per-se. Once it has been determined that the defendant's request for self-representation was

erroneously denied, it is irrelevant that the request was untimely. The defendant has been denied his right of self-representation in the same manner as a defendant who had a timely *Faretta* motion denied. The same rule of automatic reversal should apply. Prejudice cannot be easily measured from the erroneous denial of a request for self-representation. Courts apply a rule of per se reversal to fundamental errors where prejudice cannot easily be measured, or to issues which prevent a criminal trial from reliably serving its function as a vehicle for the determination of guilt or innocence. (*Rose v. Clark* (1986) 478 U.S. 570, 577-578 [106 S.Ct. 3101, 92 L.Ed.2d 460]; *Gideon v. Wainwrigh* (1963) 372 U.S. 335, 344-345 [83 S.Ct. 792, 8 L.Ed.2d 799] [complete denial of right to counsel]; *People v. Bigelow* (1985) 37 Cal.3d 731, 744-745 [finding reversible error per se from the trial court's failure to appoint advisory counsel]; *cf. United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 147-148 [126 S.Ct. 2557, 165 L.Ed.2d 409][deprivation of the right to counsel is complete when the defendant is erroneously deprived from being represented by the attorney of his choice and requires reversal of the judgment].) .) Hence, the judgment of death should be reversed even if Justin's request to represent himself was untimely.

Reversal is required even if the error is tested for prejudice. Justin obviously could not have done worse if he had represented himself because was sentenced to death. Justin did not want his family members, or Dr. Stalcup, called as witnesses. (14-C RT 3118, 3127.) During the penalty phase, the following mitigation witnesses testified for Justin: Andy Anchondo (17RT 3462), Cynthia Anchondo, (17RT 3477), and Dr. Stalcup. (17RT 3487.) The defense

attorneys presented evidence Justin had been exposed to drugs early in life, received poor parenting including a mother who tried multiple times to commit suicide, and suffered from the disease of addiction and fetal alcohol syndrome. (17RT 3465-3475, 3480, 3496-3497, 3499-3504.) The jury apparently viewed Justin's mitigation evidence as an attempt to make excuses for his choices. The jury was more likely to impose the death penalty if it viewed Justin as manipulating the facts of his past to escape responsibility for his conduct. Justin would not have presented these witnesses if his request for self-representation had been granted. Hence, the denial of the request was prejudicial.

For the reasons above, the sentence of death should be reversed.

XIV

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT COERCED A VERDICT BY FORCING THE JURY TO CONTINUE PENALTY PHASE DELIBERATIONS AFTER THE JURY HAD STATED THAT IT WAS DEADLOCKED IN VIOLATION OF PENAL CODE SECTION 1140 AND APPELLANT'S RIGHT TO: (1) FEDERAL AND STATE DUE PROCESS OF LAW; (2) A FAIR AND UNCOERCED JURY VERDICT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND; (3) BE FREE OF CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

A. SUMMARY OF ARGUMENT

The penalty phase evidence was not lengthy and involved the testimony of only one expert witness. The jury deliberated during the afternoon of December 19, several hours on December 20, and the morning of December 21, 2007. (17CT 4463; 18 CT 4512-4514; 18RT 3709.) During the first day of deliberations, the jury asked for a readback of Dr. Stalcup's direct examination and Justin's personal statement. (18CT 4511.) On December 21, 2007, the jurors sent a note to the trial court they were deadlocked 11-1. (18RT 3709.) The majority of jurors believed that the deadlock could not be broken. (18RT 3714-3715.)

The trial court ascertained the number of ballots and the numerical breakdown of the jury. It then denied a defense motion for a mistrial. (18RT 3713-3716.) The jurors returned on January 3, 2008, and deliberated a short period of time before reaching a verdict. (18CT 4517.)

The trial court coerced the jury's sentence of death by compelling the jurors to deliberate after they were hopelessly deadlocked. Because this error was reversible per-se, the judgment of death must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Jury selection commenced on October 15, 2007. (3RT 1102.) Trial testimony commenced on October 29, 2007. (6RT 1750.) The guilt phase verdict was returned on December 6, 2007, after six days of jury deliberations. (14RT 3022-3023.) The penalty phase evidence commenced on December 11, 2007. (15RT 3131, 3138.) The jury commenced penalty phase deliberations on December 19, 2007, at 2:20 p.m. (17CT 4463.) At 3:02 p.m., the jury asked question number one. (17CT 4463.) Question number one asked to hear the direct examination of Dr. Stalcup and for a reading of Justin's personal written statement. It also stated the jury wanted to leave early and start fresh in the morning because, "we feel overwhelmed." (17RT 3705; 18CT 4511.)

The jury resumed deliberations on December 20, 2007, at 10:00 a.m. (18CT 4512.) The jury asked in note two to recess early because a juror was not feeling well. (18CT 4513.) The jury ended deliberations that day at 12:05 p.m. (18CT 4512-4514.) The jury resumed deliberations on December 21, 2007 at 9:30 a.m. (18CT 4515.) At noon, the jury submitted question number three to the trial court. (18CT 4515.) The note stated, "We are deadlocked 11 to 1. What do we do from here?" (18RT 3709.) The trial court stated the bailiff had been informed by the jury foreperson that the jurors were exhausted and preferred to end deliberations for the day. (18RT 3709.) The trial court intended to bring the jurors in to find

out how many ballots had been taken. It also stated the jurors had been informed during jury selection that if they did not reach a verdict by December 21, they would not be in session during the Christmas and New Year holidays. (18RT 3709-3710.) However, the trial court intended to give the jurors the option of returning early to resume deliberations. (18RT 3709.)

The jurors were brought into the courtroom. (18RT 3712.) The foreperson stated in response to a question from the trial court that three to four ballots had been taken. (18RT 3712.) The trial court asked the split for the ballots. (18RT 3713.) The jury foreperson stated that previous day the jury was split was six to four with two jurors uncertain. The last ballot was taken 10 minutes ago and the split was 11 to one. The trial court asked whether additional deliberations would result in a verdict. Juror number nine, the foreperson, responded, "Your Honor, it's so thick and heated in that room right now. And we've all came together as mature adults here and tried to, you know, work it out and weigh the evidence. I really don't think so, your Honor." (18RT 3713.) Juror number nine continued, "I don't think further negotiations will help us at this point in time." (18RT 3713-3714.) The trial court asked about the jury's fatigue. (18RT 3714.) The foreperson responded, "I think the jury's, kind of, frustrated, tired. We're — I think a lot of people are ready to go back to work and just, kind of, end this, and I don't think people would like to come back next year, to be honest." (18RT 3714.)

The trial court polled the jurors and asked if additional deliberations would be helpful.

(18RT 3714.) Jurors one through five said no. (18RT 3714.) Juror number six said, "Absolutely not." (18RT 3715.) Juror number seven reserved until he or she heard from the other jurors. Juror number eight said, "Probably not." Juror number 10 said, "probably not." Juror number 11 said maybe. Juror number 12 said, "Probably not." (18RT 3715.) The trial court then reminded the jurors that they would not be in session over the holidays and would return to resume deliberations on January 7. (18RT 3715.) The trial court told the jurors to determine whether they preferred to continue deliberations during the holidays or resume deliberations after the holidays. (18RT 3715-3716.) Juror number seven then stated that he or she did not think additional deliberations would help. (18RT 3716.) The jury departed the courtroom. (18RT 3716.)

The defense counsel requested a mistrial. (18RT 3716.) The trial court commented, "I think there was equivocation as to three or four of them. The difficulty partly is we don't know who the equivocators were." (18RT 3716-3717.) The prosecutor argued the jury should be required to resume deliberations. The defense counsel renewed the request for a mistrial. (18RT 3717.) The trial court believed the jurors had not deliberated long enough and he intended to require the jurors to continue deliberations. (18RT 3718-3719.)

The jurors reentered the courtroom. (18RT 3719.) The trial court informed the jurors that they were to return on January 3 or 4. Juror number seven commented, "tensions are really high. We discussed it when we went back that rather than — there's a lot of pressure being put on people, and we all agreed that we would let what we discussed sink in and come

back with how our hearts truly felt on the 3rd." (18RT 3719.) The jurors confirmed that they would prefer to resume deliberations after the holiday. (18RT 3720.)

The jury resumed deliberations on January 3, 2008, at 11:58 a.m. They recessed at 1:15 p.m., and resumed deliberations at 1:36 p.m. The jury reached a verdict at 2:17 p.m. (18CT 4517.) The jurors were polled and confirmed the verdict of death. (18RT 3723.)

C. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT COERCED A VERDICT BY COMPELLING THE JURY TO CONTINUE DELIBERATING AFTER IT WAS DEADLOCKED, IN VIOLATION OF JUSTIN'S STATUTORY, FEDERAL, AND CONSTITUTIONAL RIGHTS

1. The Trial Court Violated Justin's Federal and State Constitutional Rights by Compelling the Jury to Continue Deliberations After it was Deadlocked.

The trial court's coercion of a jury verdict violates a defendant's Fifth, Sixth and Fourteenth Amendments rights to due process of law, a fair trial, a jury trial, and the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment. The corresponding provisions of the California Constitution, Article I, sections 1, 7, 15, 16, and 17, are also violated by a coerced verdict. Section 16 of the Constitution of this State." Article I, Section 16 of the California Constitution provides in part that, "[t]rial by jury is an inviolate right."

Jury deliberations are a critical stage of the criminal trial. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-613 [66 S.Ct. 402, 90 L.Ed. 350].) The defendant's right to due process of law is violated by a jury verdict that has been coerced. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237-239 [108 S.Ct. 546, 98 L.Ed.2d 568]; *Jiminez v. Myers* (9th Cir. 1994) 40 F.3d 976, 979.) If the trial court "fails to discharge a jury which is unable to reach

a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." (*Arizona v. Washington* (1978) 434 U.S. 497, 509 [98 S.Ct. 824, 54 L.Ed.2d 717].) The question of whether holdout jurors have been coerced to join other jurors to reach a unanimous verdict is a mixed question of law and fact requiring the application of legal principles to the historical facts. (*Jimenez v. Myers, supra*, 40 F.3d 979.) The appellate court determines de novo the constitutional weight to be given the facts. (*Ibid.*) Whether the trial court coerced a jury verdict requires consideration of the trial court's actions "in its context and under all the circumstances." (*Lowenfield v. Phelps, supra*, 484 U.S. at p. 237.)

The jury had deliberated for several hours on December 19 and 20, and the morning of December 21 when it announced that it was hopelessly deadlocked. The juror foreperson told the trial court that the debate was "thick and heated," and he or she did not feel additional deliberations would result in a verdict. (18RT 3713-3714.) The foreperson stated the jurors were frustrated, ready to "end this," and did not want to return after the holidays. (18RT 3714.) The trial court told the jurors, "the question is do you believe that further deliberations would be productive? In other words, is there a reasonable probability that further deliberations would end in a verdict?" (18RT 3714.) The trial court then asked the jurors, "do you feel that further deliberations would be so inclined. . .." (18RT 3714.)

Jurors one through six said no. (18RT 3714-3715.) Juror number said, "absolutely

not." (18RT 3715.) Jurors eight, 10, and 12 said, "probably not." (18RT 3715.) Juror number 11 said, "maybe." (18RT 3715.) After hearing the opinions of the other jurors, juror number seven said no. (18RT 3716.) Despite the defense requests for a mistrial, the trial court forced the jurors to return after the holidays to resume deliberations. (18RT 3719-3720.)

The trial court erred by failing to grant the defense counsel's motions for a mistrial. All of the jurors, with the exception of juror number 11, believed that the jury was hopelessly deadlocked. The jury's penalty phase deliberations had not been lengthy when the jury announced it was deadlocked. However, the length of the penalty phase deliberations is not the exclusive measure of whether a verdict was coerced. The entire time commitment made by the jury must be considered. The jury likely measured its frustration level from its entire time commitment to the case and not simply the length of penalty phase deliberations.

Jury selection commenced on October 15, 2007. (3RT 1102.) Trial testimony commenced on October 29, 2007. (6RT 1750.) By December 21, the jury had committed about seven and one-half weeks to the case. The guilt phase deliberations had obviously been arduous because it lasted seven days.[52] It was obvious from the jurors comments on December 21 that they were frustrated, fatigued, and ready to end the case. Instead of yielding to the jurors' desire to end the case, the trial court forced them to return on January 3 to resume deliberations. The coercive nature of the trial court's decision to force the jurors

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[52] The jury commenced guilt phase deliberations on November 27, 2007, at 3:56 p.m. The jury recessed at 4:15 p.m. (16CT 4287.) The jury deliberated on November 28, 29, 30, and December 3, 4, 5, and 6. (17CT 4348, 4357, 4361, 4364, 4365, 4366.)

to resume deliberations was demonstrated by the alacrity of the jury's verdict when it resumed deliberations on January 3. The jury reached a verdict after about two hours of deliberations. (18CT 4517.) The verdict was the result of the holdout juror yielding to the pressure exerted by the trial court and the majority. The requirement for the jury to return after the Christmas and New Year holidays to continue deliberations was especially coercive. The jurors knew the trial court was going to force them to continue deliberations, regardless of length, until a penalty phase verdict was reached.

The trial court's inquiry into the numerical division of the jury also coerced the jury in violation of Justin's rights listed above.[53] The jury note, which stated that the jury was deadlocked, also stated that the vote was 11-1. It appears this numerical breakdown was provided by the jury foreperson without any solicitation by the trial court. (18RT 3709.) However, when the jurors were brought into the courtroom, the trial court ascertained how many votes had been taken and the trend of the votes. (18RT 3712-3713.) Courts have recognized the danger of inquiry into the numerical division of the jury. The United States Supreme Court concluded in *Brasfield v. United States* (1926) 272 U.S. 448, 450 [47 S.Ct. 135, 71 L.Ed. 345], that the trial court's inquiry into the numerical split of the jury was prejudicial per se because it had a tendency to coerce the jurors. *Lowenfield v. Phelps*

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[53] Tis Court has authorized the trial court to conduct a numerical inquiry into the vote of the jury. (*People v. Valdez* (2012) 55 Cal.4th 82, 160; *People v. Carter, supra*, 68 Cal.2d at p. 815.) *Brasfield v. United States* (1926) 272 U.S. 448, 450 [47 S.Ct. 135, 71 L.Ed. 345]), noted that the trial court's inquiry into the numerical division of the jury was likely to be coercive. In Justin's case, the trial court's inquiry was an additional factor among many leading to a coerced verdict.

concluded the rule from *Brasfield v. United States* was based on the Court's supervisory power rather than the federal constitution, but stated "Although the decision in *Brasfield* was an exercise of this Court's supervisory powers, it is nonetheless instructive as to the potential danger of jury polling." (*Lowenfield v. Phelps, supra*, 484 U.S. at p. 240.) Justice Stone stated in *Brasfield v. United States*:

> We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

(*Brasfield v. United States, supra*, 272 U.S. at p. 450.) *Locks v. Sumner* (9th Cir. 1983) 703 F.2d 403, 406, also concluded, "we do not wish to imply that an inquiry into the jury's balloting will never infringe on a defendant's right to an impartial jury and fair trial. This would occur if the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision."

The trial court's numerical inquiry into the split of the jury pushed it towards unanimity in violation of appellant's rights set forth above. The jury foreperson sent a note that the jury was split 11 to 1 and asked for guidance. (18RT 3709.) The trial court then

determined from the jury foreperson that three to four ballots had been taken and the split the previous day was six to four with two uncertain. (18RT 3712-3713.)

The pressure exerted by the trial court impermissibly coerced the jury's penalty phase verdict. A significant amount of pressure was exerted by the trial court's inquiry into the jury's numerical split because it communicated to the minority juror that the trial court was assessing the likelihood of any holdouts caving to majority pressure and voting for death. It was obvious to all the jurors, including the minority holdout juror, that the trial court was forcing the jury to continue deliberating so that the majority jurors would pressure the minority juror to vote for the death penalty. Because a single vote stood between Justin and a verdict of death, "the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved." (*Jiminez v. Myers, supra*, 40 F.3d at p. 981, quoting *Burton v. United States* (1905) 196 U.S. 283, 307 [49 L.Ed. 482, 25 S.Ct. 243].) *Jiminez v. Myers* concluded that the trial court coerced a verdict when it determined the jury was hung 11 to 1, told the jurors it approved its movement towards unanimity, and instructed the jury to continue deliberating. (*Jiminez v. Myers, supra*, 40 F.3d at p. 981.) Similar reason applies to the instant case. Justin's jurors could not reasonably have concluded that the trial court was compelling them to continue deliberating so that the 11 jurors who agreed upon the same penalty would change their votes.

Justice Stone's observation about the tendency of the trial court's inquiry into the jury's numerical split to coerce the jury applies to this case. (*Brasfield v. United States,*

supra, 272 U.S. at p. 450.) The trial court's inquiry regarding the numerical split of the jury communicated to the minority juror that it wanted him or her change their mind.[54] The only reason for the trial court to order the jury to continue deliberating after it announced it was deadlocked, and further deliberations were futile, was to allow the majority jurors to pressure the single minority juror into changing his or her vote. The minority juror was likely aware of this fact. The minority juror could not realistically have believed the trial court thought the majority jurors would change their minds. The minority juror knew deliberations were continuing for the sole purpose of convincing him or her to agree with the majority. The trial court's inquiry into the split of the jury violated due process because it was "likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." (*Locks v. Sumner, supra*, 703 F.2d at p. 406.) This improper inquiry can be considered by this Court in determining whether the verdict was coerced because it suggests the trial court erred by denying the defense motion for a mistrial.

The trial court's coercion of the verdict also violated appellant's right to jury trial under the Sixth and Fourteenth Amendments and Article I, Section 16 of the California Constitution. *Turner v. Louisiana* (1965) 379 U.S. 466, 472 [85 S.Ct. 546, 13 L.Ed.2d 424] explained that, "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Hence, "[t]he requirement that a jury's

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[54] The trial court in the instant case did not determine how many jurors favored imposition of the death penalty. It simply determined the numerical split of the jury without ascertaining whether the jurors who were voting for death were in the majority.

verdict must be based upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Id.*)

United States v. Gaudin (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444], explained the requirement under the constitution for a valid jury verdict:

> The right to have a jury make the ultimate determination of guilt has an impressive pedigree. Blackstone described "trial by jury" as requiring that "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors...." 4 *W. Blackstone, Commentaries on the Laws of England* 343 (1769) (emphasis added). Justice Story wrote that the "trial by jury" guaranteed by the Constitution was "generally understood to mean ... a trial by a jury of twelve men, impartially selected, who must unanimously *concur in the guilt of the accused before a legal conviction can be had.*" 2 *J. Story, Commentaries on the Constitution of the United States* 541, n. 2 (4th ed. 1873) (emphasis added and deleted). This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *Id.,* at 540-541.

Ring v. Arizona (2002) 536 U.S. 584, 609 [122 S.Ct. 2428, 153 L.Ed.2d 556], held that the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty. A coerced juror has not decided the factual issues presented to him or her for resolution as required by *Ring v. Arizona.*

Furthermore, jurors who are coerced into reaching a verdict are not impartial and indifferent jurors under the Sixth Amendment or Article I, Section 16 of the California Constitution. A juror who consents to a verdict through coercion has not based his or her

verdict on the evidence developed at trial, but on the improper influence of the trial judge. (*Lowenfield v. Phelps, supra*, 484 U.S. at pp. 237-239.) Hence, Justin's right to a uncoerced jury verdict under the Sixth and Fourteenth Amendments was violated.

The trial court's coercion of a verdict also violates the prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, Section 17 of the California Constitution. The Eighth Amendment requires a greater degree of reliability when the death sentence is imposed. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) The Eighth Amendment requires the jury to decide the facts necessary to impose the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at pp. 606-607.) A coerced verdict is neither a reliable verdict nor a verdict in which the jury has determined the aggravating facts necessary to impose the death penalty. Hence, the jury returned a verdict in violation of the prohibition against the imposition of cruel and unusual punishment in the Eighth Amendment and Article I, Section 17 of the California Constitution.

The trial court erred by forcing the jury to resume deliberations after it was hopelessly deadlocked. Hence, the sentence must be vacated.

2. The Trial Court Coerced a Verdict in Violation of Penal Code Section 1140 by Compelling the Jurors to Continue Deliberating after They were Hopelessly Deadlocked

Penal Code section 1140 states as follows:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears

that there is no reasonable probability that the jury can agree.

The determination of whether there is a reasonable probability of jury agreement rests in the discretion of the trial court. (*People v. Breaux* (1991) 1 Cal.4th 281, 319; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency." (*People v. Breaux, supra*, 1 Cal.4th at p. 319.) A coerced verdict violates section 1140. (*People v. Carter* (1968) 68 Cal.2d 810, 817.) The question of coercion depends on the facts and circumstances of each case. (*People v. Breaux, supra,* 1 Cal.4th at p. 319.) In determining whether there is a reasonable probability of agreement, California law permits the trial court to ascertain the numerical division of the jury. (*People v. Carter, supra,* 68 Cal.2d at p. 815; *but see Brasfield v. United States* (1926) 272 U.S. 448, 450, [71 L.Ed.2d 345, 47 S.Ct. 135][holding it to be reversible error for the trial court to inquire into the numerical division of the jury].) In determining whether the trial court abused its discretion by requiring the jury to continue deliberations, the court should consider the length of the trial, the amount of evidence, and the complexity of the issues. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 776.)

In *People v. Carter, supra,* 68 Cal.2d at p. 814,, this Court observed:

> the surrender of the independent judgment of a jury may not be had by command or coercion. It is not enough to cure the error to conventionally say that it is the function of the jury to decide questions of fact. Pressure of whatever character, whether acting on the fears or hopes of the jury, if so exerted as to

> overbear their volition without convincing their judgment, is a species of restraint under which no valid judgment can be made to support a conviction. No force should be used or threatened, and carried to such a degree that the juror's discretion and judgment is overborne, resulting in either undue influence or coercion. A judge may advise, and he may persuade, but he may not command, unduly influence, or coerce.

The verdict in this case was coerced in violation of section 1140 for the same reasons the verdict was coerced in violation of Justin's federal and state constitutional rights. Eleven jurors thought the deadlock could not be broken when the trial court polled them. (18 RT pp. 3714-3716.) The jurors knew when they returned on January 3 that they would deliberate until a penalty phase verdict was reached. The only explanation for the jury reaching a verdict was the coercion exerted by the trial court. Hence, the jury's verdict violated section 1140.

D. CONCLUSION

The trial court coerced the jury's verdict for the reasons stated above. The coercion of the jury's verdict violated section 1140, Justin's right to federal due process of law and a fair trial under the Fifth and Fourteenth Amendments, appellant's right under the Sixth and Fourteenth Amendments to have the jury determine the facts necessary to convict him and impose the death penalty, as well as his Eighth Amendment right to be free from cruel and unusual punishment, and the corresponding rights under the California Constitution. The coercion of a verdict in violation of the aforementioned is reversible per se. (*People v. Carter, supra*, 68 Cal.2d at p. 820; *Jimenez v. Myers, supra*, 40 F.3d at p. 981; *Jenkins v.*

United States (1965) 380 U.S. 445, 446 [85 S.Ct. 1059, 13 L.Ed.2d 957]; *Brasfield v. United States, supra*, 272 U.S. at p. 450.) Hence, the sentence of death must be reversed.

XV

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT INQUIRED INTO THE NUMERICAL DIVISION OF THE JURY IN VIOLATION OF: (1) PENAL CODE SECTION 1140; (2) APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW; (3) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS; AND (4) THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS

As discussed in Issue XIV, the trial court learned the numerical split of the jury when it received the note that the jury was deadlocked 11 to one. (18RT 3712.) The trial court then asked how many ballots had been taken and the split for the ballots. (18RT 3712-3713.) The jury foreperson provided the breakdown for the first and last ballots. (18RT 3713.) This Court has approved of the trial judge asking the jury its numerical breakdown. (*People v. Valdez* (2012) 55 Cal.4th 82, 160; *People v. Carter, supra*, 68 Cal.2d at p. 815.) The United States Supreme Court has forbidden the practice pursuant to its supervisory powers over the federal courts. (*Lowenfield v. Phelps, supra*, 484 U.S. at pp. 239-240; *Brasfield v. United States, supra*, 272 U.S. at p. 450.) This Court should reconsider its holding in *People v. Carter* and rule that the trial court's inquiry into the numerical breakdown of the jury's deliberations is inherently prejudicial.

This Court can review whether the trial court erred by inquiring into the numerical breakdown of the jury despite the lack of an objection by the defense counsel. The requirement for an objection is excused when it would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) It would have been futile for the defense counsel to have

objected to the trial court's inquiry into the numerical division of the jury. *People v. Carter* approved of the practice. Case law, furthermore, has not required an objection when the trial court has unlawfully invaded the province of the jury by inquiring about its numerical breakdown. (*Brasfield v. United States, supra*, 272 U.S. at p. 450.)

People v. Carter should be overruled because it relied on a series of cases that were flawed and failed to adequately discuss the issue. In *People v. Talkington* (1935) 8 Cal.App.2d 75, the trial court asked the jury foreman the jury's numerical breakdown and how many jurors had voted for guilty or not guilty. The Court of Appeal stated, "[w]hile a number of cases might be cited to the effect that reversible error was not committed when the trial court simply asked as to the numerical division of the jury, the great weight of authority is to the effect, however, that reversible error is committed if the trial court, in addition to asking the numerical division of the jury, also asks as to how they have voted with reference to the guilt or innocence of the defendant." (*People v. Talkington, supra*, 8 Cal.App.2d at p. 84, citing *Brasfield v. United States, supra,* 272 U.S. 448.)

People v. Talkington thus concluded *Brasfield v. United States* found error when the trial court inquired into the numerical division of the jury and how many jurors had voted for guilty or not guilty. In *Brasfield v. United States*, however, the court dealt with a situation in which, "[t]he jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically, and was informed by the foreman that it stood nine to three, without indicating which number favored conviction." (*Brasfield v. United States*, *supra*, 272 U.S. at p. 449.) The Supreme Court found error based on the trial court's numerical inquiry into the vote of the jury regardless of whether that inquiry also ascertained

how the vote was split.

The erroneous description in *People v. Talkington* of the holding of *Brasfield v. United States* worked its way into established California law. In *People v. Von Badenthal* (1935) 8 Cal.App.2d 404, 410, the court cited *People v. Talkington* for the proposition, "[t]here was no error in the fact that the court by inquiry ascertained how the jury was numerically divided." *People v. Curtis* (1939) 36 Cal.App.2d 306, 325, cited *People v. Talkington* when it concluded, "the weight of authority seems to be that only when the inquiry of the court as to how the jury stands numerically is coupled with the purpose on the part of the court to ascertain how the jury is divided as to the guilt or innocence of the defendant, is the province of the jury invaded and reversible error committed." In *People v. Lammers* (1951) 108 Cal.App.2d 279, 282, the court cited *People v. Curtis* and concluded, "it was not error for a court to inquire how the jurors are numerically divided so long as inquiry is not made for ascertaining how the jury is divided as to the innocence or guilt of the defendant."

People v. Carter cited *People v. Lammers* and *People v. Curtis* for the proposition, "the court in such cases may inquire of the jury as to its numerical division without seeking to discover how many jurors are for conviction and how many are for acquittal." *(People v. Carter, supra,* 68 Cal.2d at p. 815.) The holdings of *People v. Lammers* and *People v. Curtis* were flawed because those cases relied on the flawed description in *People v. Talkington* of the holding of *Brasfield v. United States.*

People v. Carter also cited *People v. Tarantino* (1955) 45 Cal.2d 590, in support of its conclusion the trial court may properly ask the jury its numerical division. *(People v.*

Carter, supra, 68 Cal.2d at p. 815.) *People v. Tarantino*, however, contained no substantive discussion of whether it was error for the trial court to inquire regarding the numerical division of the jury, but simply cited *People v. Walker* (1949) 93 Cal.App.2d 818 and *People v. Crowley* (1950) 101 Cal.App.2d 71, in support of its conclusion the jury's verdict had not been coerced. *(People v. Tarantino, supra*, 45 Cal.2d at p. 600.) *People v. Crowley* did not deal with the issue of the trial court's inquiry into the numerical division of the jury but, whether the trial court's comments urging the jurors to reach agreement coerced a verdict. (*People v. Crowley, supra,* 101 Cal.App.2d at p. 75-79.) *People v. Walker* reversed the defendant's conviction when the trial court ascertained how many jurors had voted guilty and made comments which pressured the jury to reach a verdict. The court stated without any citation to authority or substantive discussion that "[t]here was no impropriety in his [i.e., the trial judge] asking how the jury stood numerically . . . ." (*People v. Walker, supra,* 93 Cal.App.2d at p. 825.) *People v. Tarantino* did not therefore support this Court's conclusion in *People v. Carter* that the trial court was authorized to inquire into the numerical division of the jury. Since *People v. Carter* was decided, this Court has approved in other decisions the trial court's inquiry into the numerical division of the jury. (*People v. Johnson* (1993) 3 Cal.4th 1183, 1254; *People v. Breaux, supra,* 1 Cal.4th at p. 319.)

The foregoing discussion demonstrates that the rule the trial court may inquire into the numerical division of the jury became the law in California through misinterpretation of case authority. This Court should hold the trial court's inquiry into the numerical division of the jury violates Penal Code section 1140, a defendant's state and federal right to due process of law, and state and federal right to a jury trial. This Court should also hold that such an

inquiry violates the Eighth Amendment ban against cruel and unusual punishment in the context of capital prosecutions.

Brasfield v. United States condemned the practice of inquiring into the jury's numerical division because, "[i]ts effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury . . . ." (*Brasfield v. United States, supra*, 272 U.S. at p. 450.) Federal courts have preserved the rule the trial court's inquiry into the numerical division of the jury constitutes reversible error per se. (*Jiminez v. Myers, supra*, 40 F.3d at p. 980, fn. 3; *United States v. Noah* (9th Cir. 1979) 594 F.2d 1303, 1304.) It is completely contradictory for California to hold that judicial inquiry into the numerical division of the jury does not even constitute error while federal practice condemns it as error that is reversible per se. If the trial court's inquiry into the numerical division of the jury is coercive for the reasons explained in *Brasfield v. United States*, the coercive nature of that inquiry does not vanish because the case is being tried in state court.

This Court should hold that section 1140, and various constitutional provisions, forbid the trial court from inquiring into the numerical division of the jury. The Eighth Amendment requires a heightened degree of reliability when the jury decides a defendant's fate in a capital proceeding. (*Lockett v. Ohio, supra*, 438 U.S. at p. 604.) The reliability of the jury's verdict is undermined when the jury has been pressured to reach a verdict because the trial court inquired into the numerical division of the jury.

The pressuring of a jury to reach a verdict by inquiring into its numerical division also violated the defendant's Sixth and Fourteenth Amendments right to a jury trial. Under *Ring v. Arizona*, the Sixth Amendment requires the jury to find the facts necessary to impose the death penalty and to decide that death is the appropriate punishment. (*Ring v. Arizona, supra*, 536 U.S. at pp. 607-609.) Intrusion in the jury's fact finding and deliberative process by judicial inquiry into their numerical split undermines the ability of the jury to perform those functions.

Similar reasoning applies to a defendant's due process right. A defendant's right to a fair trial is undermined "if the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." (*Locks v. United States, supra*, 703 F.2d 406.) *Brasfield v. United States* held any judicial inquiry into the numerical division of the jury had some tendency to coerce a jury into reaching a verdict. (*Brasfield v. United States, supra*, 272 U.S. at p. 450.) Judicial inquiry into the numerical division of the jury therefore violates a defendant's right to due process of law and Sixth and Fourteenth Amendments right to a jury trial.

The federal courts have ruled judicial inquiry into the numerical division of the jury to be prejudicial per se. (*United States v. Noah, supra*, 594 F.2d at p. 1304.) This rule has been adopted pursuant to the Supreme Court's supervisory powers over the federal courts. (*Lowenfield v. Phelps, supra*, 484 U.S. at p. 239.) A similar rule of prejudice should be adopted by this Court to judicial inquiry into the numerical division of the jury in violation of section 1140, a defendant's right to federal and state due process of law, a defendant's right to a jury trial under the federal and state constitutions , and the prohibition against cruel

and unusual punishment in the federal and state constitutions. A rule of prejudice per se is appropriate because: (1) of the difficulty of precisely measuring the degree of coercion associated with judicial inquiry into the numerical split of the jury; and (2) some degree of judicial coercion is always associated with such an inquiry. (*Brasfield v. United States*, *supra*, 272 U.S. at p. 450.) Hence, the judgment of death should be reversed.

Reversal of the judgment of death is required, furthermore, even if the error is tested for prejudice under the harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], or the more likely than not test in *People v. Watson* (1956) 46 Cal.2d 818, 836. The minority juror obviously felt pressure from the majority jurors to give into their pressure and vote for death. The jury foreperson stated that the deliberations had been "thick and heated . . .." (18RT 3713.) The minority juror then had the added pressure from the trial court finding out the pattern of votes for the ballots which communicated that the trial court was hoping to push the jury towards a verdict. It must never be presumed that the decision of any jury to vote for death was easy. Despite relatively short penalty phase deliberations, Justin's jury was fatigued and frustrated. The verdict was not the result of the conscious decision of each juror, but the result of undue pressure exerted by the trial court. This Court cannot conclude beyond a reasonable doubt, or under the more likely than not standard, that the trial court's inquiry into the numerical division of the jury did not push the jury towards reaching a verdict. *Brasfield v. United States* recognized any judicial inquiry into the numerical division of the jury has some tendency to coerce a jury into reaching a verdict. (*Brasfield v. United States*, supra, 272 U.S. at p. 450.) The judgment of death must be reversed.

XVI

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO REQUIRE THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS IN ORDER TO IMPOSE THE DEATH PENALTY IN VIOLATION OF JUSTIN'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, RIGHT TO AN ACCURATE JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHT AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

During discussion of penalty phase jury instructions, the defense counsel requested that CALCRIM No. 766 be modified to instruct the jury it had to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. (17RT 3612-3613.) The trial court refused this request. (17RT 3614-3615.) The trial court's refusal to modify CALCRIM No. 766 resulted in the jury deciding whether to impose the death penalty without applying the beyond a reasonable doubt standard for the weighing of the aggravating and mitigation circumstances. Justin was therefore sentenced to death in violation of: (1) the prohibition against cruel and unusual punishment in the Eight and Fourteenth Amendments; (2) his right to an accurate jury determination of the aggravating and mitigating facts as required by the Sixth and Fourteenth Amendments; and (3) the federal

due process of law. Because the erroneous instruction was not harmless beyond a reasonable doubt, the judgment of death must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

During the penalty phase of the trial, the prosecution presented the following information in aggravation: (1) Deputy Webb found a shank in Justin's accordion folder, (15RT 3226-3228); (2) Deputy Montez found a broken toothbrush with two razors attached to its tip, (15RT 3156-3157); (3) Noreiga's family suffered greatly when they learned he was dead (15RT 3172); and (4) Justin had a difficult relationship with his former spouse which was punctuated by threats of violence and occasional domestic violence (15RT 3183, 3197-3198, 3208-3209, 3212.)

Justin testified during the penalty phase. His father exposed him to drug use at an early age. Justin was afraid to inject himself with a needle, but his father assisted him. (16RT 3302.) Justin also started drinking alcohol at an early age. (16RT 3312-3313.) Justin refused to cooperate with his attorneys and submit to magnetic resonance imaging. Justin did not believe that he had brain damage or was predisposed to drug use. Justin disagreed with the defense expert who believed he had an addictive personality. (16RT 3357-3358.) Justin did not believe that a sentence of life in prison without the possibility of parole was in his best interest. (16RT 3359.) Justin had no desire to stab anyone with the shanks he possessed and had them for protection. (16RT 3350-3361.)

Andy Anchondo, Justin's uncle, testified about Justin's difficult family circumstances.

Justin's mother, Judy, used alcohol while she was pregnant with Justin. Judy had a violent relationship with Justin's father. (17RT 3466-3467, 3469.) Judy tried to commit suicide four times. (17RT 3468.) Cynthia Achondo, Justin's aunt, believed that Judy blamed Justin for her problems. (17RT 3480.)

Alex Stalcup was a physician who was board certified in addiction medicine. (17RT 3487, 3534.) Stalcup interviewed Justin. Justin displayed the symptoms of alcohol fetal syndrome during the interview. (17RT 3518.) Stalcup diagnosed Justin with the disease of addiction. (17RT 351.) By the time Justin was 10 years old, he had the brain of an 80 year old person. Justin was addicted to drugs before he knew what they were. (17RT 3502-3503.) Justin was one of the worst cases of genetic inheritance of addiction that Stalcup had ever encountered. (17RT 3500, 3517.) Justin's use of methamphetamine caused him to become paranoid. Justin had toxic psychosis, which caused him to see and believe things that were not true. (17RT 3508-3509, 3512, 3552.)

CALCRIM No. 766 is the standard jury instruction for how the jury should weigh the evidence in deciding whether to impose the death penalty. During the discussion of the penalty phase jury instructions, the defense counsel argued the phrase, "to return the judgment of death you must be persuaded the aggravating both outweigh the mitigating and are so substantial in comparison. . . ." allowed the jury to impose death when it had not found beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and thus violated the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and its progeny. (17RT 3613.) The defense counsel objected to giving

CALCRIM No. 766 without the beyond a reasonable doubt language based on due process, the Sixth Amendment right to a jury determination of the facts, and the Eighth Amendment prohibition against imposition of cruel and unusual punishment. (17RT 3613.) The trial court suggested that the defense counsel wanted to add language to the effect of "To return a judgment of death the jury must be persuaded beyond a reasonable doubt . . .", and the defense counsel agreed with that language. (17RT 3614.) The prosecutor argued that the holding of *Apprendi v. New Jersey* did not apply to the jury's weighing process. The trial court agreed and refused to give the defense requested modification. (17RT 3614.)

The trial court instructed the jury, "the People are required to prove the defendant's other alleged crimes beyond a reasonable doubt before you may consider them as aggravating factors." (18RT 3628.) The trial court instructed the jury regarding the specific other crimes allegedly committed by Justin. (18RT 3635-3636.) The jury was told, "if you have a reasonable doubt whether the defendant committed an alleged crime, you must completely disregard any evidence of that crime." (18RT 3636.) The trial court instructed the jury with CALCRIM No. 763, which were the factors in aggravation and mitigation the jury was required to consider. (18RT 3644-3646.) The trial court then instructed the jury with CALCRIM No. 766, which stated as follows:

> In reaching your decision you must consider, take into account, and be guided by the aggravating and mitigating circumstances. Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.

> Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.
>
> Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death. To return a judgment of death each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(18RT 3647-3648.)

During his opening penalty phase argument, the prosecutor exploited the fact that CALCRIM No. 766 did not require the beyond a reasonable doubt standard to be applied to the decision to impose the death penalty. He argued:

> There is no burden of proof as to what your final decision is so I argue once, the defense once, and then you will make your decision. Because there's no burden of proof as to your final decision, I don't make a rebuttal argument.
>
> Now, the standard of proof beyond a reasonable doubt that you've heard the judge read to you applies only in a very limited way. It does not apply to your final decision. It applies to whether you consider aggravating factors, the alleged other crimes that you listed out, the domestic violence, the shanks, the murder of Regina Hartwell. Those must be proved to you beyond a reasonable doubt before you can consider them as aggravating factors.
>
> Now, as to each of these aggravating factors the judge already told you it's not a unanimous decision. You don't all 12 have to agree he committed the possession of a shank in his boxer shorts. If you believe that I've proven that beyond a reasonable

> doubt, individually you consider that as an aggravating factor. If someone else thought it wasn't proved beyond a reasonable doubt, that other juror would not consider that as an aggravating factor and would disregard that.
>
> So you don't have to come to a unanimous decision on each of the factors. You each make your own decision as to whether that's been proved beyond a reasonable doubt. And then you each make your own decision how much any of the aggravating factors or mitigating factors weigh. What's the value of those factors? You each must make that determination alone individually.

(18RT 3650-3651.)

The prosecutor then referred again to the "so substantial" standard in CALCRIM No. 766. (18RT 3651.) The prosecutor then discussed at length the factors in aggravation and mitigation. (18RT 3652-3662.) During jury deliberations, the jury requested the reading of Stalcup's direct examination and Justin's personal written statement. (18RT 3705.) The jury had a difficult time reaching a penalty phase verdict. After three days of deliberations, the jury foreman believed that a verdict could not be reached. (18RT 3713; 17CT 4463; 18 CT 4512-4513.) The defense counsel requested a mistrial which was denied. (18RT 3716-3719.) As explained above, the trial court coerced a verdict from the jury. (See Issues XIV and XV, *supra*.)

C. STANDARD OF REVIEW

The issue of whether jury instructions correctly stated the law is an issue of law which is reviewed de novo. ((*People v. Guiuan* (1998) 18 Cal.4th 588, 569.)

D. THE JURY WAS REQUIRED TO FIND BEYOND A REASONABLE DOUBT THAT DEATH WAS THE APPROPRIATE PENALTY

This Court has consistently rejected the argument that *Apprendi v. New Jersey* and its progeny require the State to prove beyond a reasonable doubt that death is the appropriate penalty. (E.g. *People v. Jones* (2012) 54 Cal.4th 1, 86; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250, fn. 22.) Appellant will briefly explain why this Court should change its path and hold that the balancing of aggravating and mitigating factors requires the jury to conclude beyond a reasonable doubt that death is the appropriate penalty.

Apprendi v. New Jersey held that, "The judge's role in sentencing is constrained at its outer limit by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 483, fn. 10.) Since *Apprendi v. New Jersey* was decided, the Court has rejected any distinction between the elements of a crime and sentencing factors which impact the sentence. (See *Cunningham v. California* (2007) 549 U.S. 270, 290-291 [127 S.Ct. 856, 166 L.Ed.2d 856] [holding that California's tripartite sentencing scheme violated the holding of *Apprendi v. New Jersey* because it required the trial judge to make findings of fact which exposed the defendant to the upper term sentence]; *United States v. Booker* (2005) 543 U.S. 220, 234-237 [125 S.Ct. 738, 160 L.Ed.2d 621] [concluding that findings of fact made by the trial judge under the United States Sentencing Guidelines which increased the defendant's sentence violated the defendant's right to a jury determination of the elements

of the crime]; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403 [holding that a Washington state statute which allowed the trial court judge to increase the defendant's sentence based on a finding that the crime involved deliberate cruelty violated the holding of *Apprendi v. New Jersey*].)

In *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.CT. 2428, 153 L.Ed.2d 556], the Court applied *Apprendi v. New Jersey* to the Arizona death penalty statute. Arizona allowed the trial court judge to find the facts in aggravation for imposition of the death penalty. The Supreme Court had earlier decided in *Walton v. Arizona* (1990) 497 U.S. 639, 649 [111 L.Ed.2d 511, 110 S.Ct. 3047], that the Sixth Amendment did not require the jury to find facts in aggravation because those additional facts qualified as sentencing factors and not an element of an offense. *Ring v. Arizona* rejected this distinction and held that the Sixth Amendment required the jury to find factors in aggravation true beyond a reasonable doubt. (*Ring v. Arizona, supra*, 536 U.S. at pp. 603-606.)

It is time for this Court to extend the principle that there is no distinction between the elements of a crime, and sentencing factors, to the jury's weighing process for imposition of the judgment of death.

Alleyene v. United States (2013)__U.S._ [133 S.Ct. 2151, 186 L.Ed.2d 314], is the most recent case from the United States Supreme Court applying the holding of *Apprendi v. New Jersey*. In *Harris v. United States* (2002) 536 U.S. 545, 560-567 [122 S.Ct. 2406, 153 L.Ed.2d 524], the Court upheld a provision of the United States Sentencing Guidelines which

imposed a mandatory minimum upon a finding of fact made by the trial court judge. *Alleyene v. United States* overruled *Harris v. United States*. *Alleyen v. United States* noted that "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an element or ingredient of the charged offense." (*Alleyene v. United States, supra*, 133 S.Ct. at p. 2158.) The Court rejected the distinction in *Harris v. United States* and *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 86 [106 S.CT. 2411, 91 L.Ed.2d 67], between judicial fact finding that impacted the minimum possible sentence and the elements of the crime. "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an element that must be submitted to the jury." (*Alleyene v. United States, supra*, 133 S.Ct. at p. 2155.)

The Court then explained in more detail what made a fact an element of the crime which had to be proved to the jury beyond a reasonable doubt:

> Consistent with this connection between crime and punishment, various treatises defined "crime" as consisting of every fact which "is in law essential to the punishment sought to be inflicted," 1 *J. Bishop, Criminal* Procedure 50 (2d ed. 1872) (hereinafter Bishop), or the whole of the wrong "to which the law affixes . . . punishment," id., §80, at 51. See also *1 J. Bishop, New Criminal Procedure* §84, p. 49 (4th ed. 1895) (defining crime as "that wrongful aggregation [of elements] out of which the punishment proceeds"); Archbold 128 (defining crime to include any fact that "annexes a higher degree of punishment"). Numerous high courts agreed that this formulation "accurately captured the common-law understanding of what facts are elements of a crime." *Apprendi*,

> 530 U. S., at 511-512, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (THOMAS, J., concurring) (collecting cases). If a fact was by law essential to the penalty, it was an element of the offense.

(*Alleyene v. United States, supra*, 133 S.Ct. at p. 2159.)

Justin's jury was required to find that the aggravating factors outweighed the mitigating factors in order to impose the death sentence. The factual finding that the aggravating factors outweighed the mitigating factors was necessary for the death penalty to be imposed and thus was an element of the offense which had to be found by the jury beyond a reasonable doubt.

The federal circuit courts that have addressed the constitutionality of the federal death penalty statute have rejected the argument that the jury must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. (See *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 532-534; *United States v. Runyon* (4th Cir. 2013) 707 F.3d 475, 516; *United States v. Fields* (10th Cir. 2008) 516 F.3d 923, 950; *United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 993-94, cert. denied, 553 U.S. 1094 (2008); *United States v. Sampson* (1st Cir. 2007) 486 F.3d 13, 32; *United States v. Fields* (5th Cir. 2007) 483 F.3d 313, 345-46, cert. denied, 552 U.S. 1144 (2008); *United States v. Purkey* (8th Cir. 2005) 428 F.3d 738, 750.) *United States v. Gabrion* concluded that the holding of *Apprendi v. New Jersey* applied only to finding of fact and the weighing process required for the imposition of the death penalty was a moral judgment and not a finding of fact. (*United States v. Gabrion, supra*, 719 F.2d at pp. 532-533.)

The clear trend of the United States Supreme Court has been to expand the holding

of *Apprendi v. New Jersey*. In *United States v. Gabrion*, Justice Moore dissented from the majority opinion in recognition of the relentless and inevitable expansion of *Apprendi v. New Jersey* to the weighing process for the death penalty. Justice Moore noted that 18 U.S.C. section 3593 required the jury to determine that the aggravating factors sufficiently outweighed any mitigating factors that death was the appropriate penalty. She concluded this process was factual:

> This makes the balancing of factors a "fact" for sentencing purposes under the FDPA. We were clearly instructed in *Blakely* that "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." 542 U.S at 303-04. Here, without the balancing, the maximum sentence the judge can impose under the statute is life in prison. Because the death penalty could not be imposed by a judge under the FDPA but for the balancing by the jury—and the majority does not offer a colorable argument otherwise—whether the court calls the jury's balancing a "finding of fact," a "mixed question of law and fact," or "Mary-Jane" is irrelevant. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." Id. at 304.
>
> At the very heart of *Apprendi* was a rejection of labels as a means of analyzing constitutional rights. 530 U.S. at 476 ("Merely using the label 'sentence enhancement' to describe [one of the procedural safeguards] surely does not provide a principled basis for treating them differently."). Because the clear language of the FDPA requires the jury to conduct this balancing before a defendant can be sentenced to death, the merits panel correctly held that "a jury's finding that the aggravating factors outweigh the mitigating factors is an element of the death penalty and must be found beyond a reasonable doubt, the same standard constitutionally required for

> all other findings of fact and mixed questions of law and fact." *Gabrion*, 648 F.3d at 325.

(*United States v. Gabrion, supra*, 719 F.3d at pp. 546-547 [J. Moore, diss.].)[55]

In *Oken v. State* (2003) 378 Md. 179, 269-270, the Maryland Court of Appeal upheld the constitutionality of the Maryland death penalty statute which required the jury to find by a preponderance of the evidence that the aggravating factors outweighed the mitigating factors. Three judges dissented from the majority opinion. The dissenters squarely concluded that *Ring v. Arizona* and *Apprendi v. New Jersey* required the jury to find beyond a reasonable doubt that the factors in aggravation outweighed the factors in mitigation:

> *Ring* describes a substantive element of a capital offense as one which makes an increase in authorized punishment contingent on a finding of fact. Using this description, the substantive elements of capital murder in Maryland are the jury's finding of the aggravating circumstances necessary to support a capital sentence and the fact that the aggravators outweigh the mitigators. It is the latter finding, that aggravators outweigh mitigators, including the determination that death is appropriate, that ultimately authorizes jurors to consider and then to impose a sentence of death. That is, the increase in punishment from life imprisonment to the death penalty is contingent on the factual finding that the aggravators outweigh the mitigators. Under the statute, then, when the jury finds that the aggravating outweigh the mitigating circumstances, the defendant is exposed to an increased potential range of punishment beyond that for a conviction for first degree murder. (Citation omitted.) It is evident by reading § 413 and § 414 that the Legislature intended

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[55]In *Woodward v. Alabama* (U.S.S.Ct. 2013) 2013 U.S. Lexis 8178, Justice Sotomayor dissented from the Court's denial of a petition for a writ of certiorari. Her dissent expressed the view that the balancing process for the imposition of the death penalty was a factual finding subject to the holding of *Apprendi v. New Jersey*. Justice Breyer joined Justice Sotomayor in dissenting from the denial of certiorari.

> to base a death sentence on a factual finding, first by mandating that the jury find that the aggravators outweigh the mitigators by a specific burden of proof, i.e., by a preponderance of the evidence, and second, by requiring that this Court review that finding for sufficiency of the evidence.
>
> Step three, the balancing of the aggravating and mitigating factors, in my view, is a factual determination. Unless, and until, the jury finds that the aggravating factors outweigh the mitigating factors, the defendant is not eligible for the death penalty. Because it is a factual determination which raises the maximum penalty from life to death, *Ring* requires that the standard be beyond a reasonable doubt.

(*Oken v. State, supra*, 378 Md. at pp. 278-279 [J. Raker, diss].) Other states have held that *Ring v. Arizona* and *Apprendi v. New Jersey* require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*Woldt v. People* (S.Ct. Colo. 2003) 64 P.3d 256, 265; *State v. Whitfield* (S.Ct. Mo. 2003) 107 S.W.3d 253, 259; *Johnson v. State* (S.Ct. Nev. 2002) 59 P.3d 450, 460; *State v. Rizzo* (S.Ct. Conn. 2003) 266 Conn. 171, 236.)

Justin's jury was instructed, "To return a judgment of death each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified." (18RT 3647-3648.) For the reasons above, this instruction was erroneous because it did not require the jury to find beyond a reasonable doubt that death was the appropriate penalty.

E. PREJUDICE

The instruction given to the jury to decide whether Justin should be sentenced to death applied an erroneous legal standard to make that decision. In *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] , the trial court judge gave a misleading description of the reasonable doubt standard. The Supreme Court concluded that this erroneous description "vitiates all the jury's findings," (*Sullivan v. Louisian, supra*, 508 U.S. at p. 281), and required automatic reversal because, "[a] reviewing court can only engage in pure speculation–its view of what a reasonable jury would have done." (*Ibid.*) Similarly, this Court can only speculate what Justin's jury would have done had it been property instructed. Because Justin's jury was provided the wrong standard to determine whether the death penalty should be imposed, *Sullivan v. Louisiana* requires reversal of the judgment of death without the necessity of a showing of actual prejudice.

The judgment of death must be reversed, furthermore, even if the erroneous instruction is tested for prejudice under the harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) Justin presented extensive evidence in mitigation. He was exposed to drug abuse at an early age. Justin's father taught him how to inject drugs. His mother tried to commit suicide multiple times. (17RT 3474.) Stalcup testified that Justin was one of the worst case of genetic inheritance of addiction he had ever seen. (17RT 3500, 3517.) Justin became paranoid as a result of his drug use. (17RT 3508.) Justin allegedly killed both Noriega and Hartwell because he feared they were going to report him to the police. (7RT 2092-2093.) The deaths

in this case obviously occurred as a result of Justin's distorted thought process caused by the drug abuse.

Justin's jury had a difficult time reaching a penalty phase verdict. The foreperson stated that the jury was hopelessly deadlocked and believed that nothing could be done to break the deadlock. (18RT 3712-3714.) The jurors were polled and 11 jurors said nothing could be done to break the deadlock. (18RT 3715-3716.) The trial court denied the defense request for a mistrial. (18RT 3716.) As explained above, the jury's verdict was coerced. This was a close case with regard to the jury's decision to impose the death sentence. The jury's failure to understand that it had to conclude beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors in order to impose the death sentence was not harmless beyond a reasonable doubt. The judgment of death must be reversed.

XVII

THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS

A. INTRODUCTION AND SUMMARY OF ARGUMENT.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because previous challenges to most of these features have been rejected by this Court, these arguments are presented in an abbreviated fashion for the purpose of alerting this Court to the nature of each component claim and its federal constitutional grounds. Justin also requests this Court's reconsideration of each claim in the context of California's entire death penalty system.

People v. Schmeck (2005) 37 Cal. 4th 240, 303-304, stated that "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than: (i) identify the claim in the

context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." In light of *Schmeck*, Justin presents the following challenges to preserve these claims for federal review and urge their reconsideration. Should this Court reconsider prior decisions relative to any of these claims, Justin requests the opportunity to present supplemental briefing.

This Court's previous decisions have considered the following claims in isolation from one another. To the extent Justin argues cumulative unconstitutionality, this argument presents a new claim. The U.S. Supreme Court has stated that: "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179 n. 6., [126 S. Ct. 2516; 165 L. Ed. 2d 429].) *Marsh* considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was constitutionally acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Marsh, supra.* 126 S.Ct. at 2527; See also *Pulley v. Harris* (1984) 465 U.S. 37, 51, [104 S.Ct. 871, 79 L. Ed. 2d 29] [while comparative sentence proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

Thus, even if individual components of a death penalty scheme can be deemed constitutional in isolation from one another, a reviewing court must also consider the cumulative operation of the entire scheme. Justin requests this Court consider the defects in the California scheme, "in context" and collectively, to hold that the cumulative operation of the scheme is unconstitutional.

Primarily, Justin avers California's sentencing scheme is so broad in its definitions of death-eligible defendants, and so lacking in procedural safeguards, that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. In light of the ever-growing number of grounds for death-eligibility described currently in 22 distinct subdivisions of section 190.2, nearly every murder in California permits a prosecutor to seek the death penalty. The fact that very few defendants actually receive the death penalty manifests an arbitrary and capricious selection process. The overbreadth is not limited to the categories of death-eligible offenders described by the special circumstances iterated in section 190.2. (See discussion, *post.*)

Additionally, beyond the indiscriminate selection process, there are no procedural safeguards during the penalty phase enhancing the reliability of that trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, who may not and need not agree with each other, and who are not required to make any findings. Paradoxically, the fact that "death is different" has been turned on its head to mean that procedural protections taken for granted in guilt trials

for lesser criminal offenses are unavailable when the question is a finding foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses from among the thousands of murderers in California a few scapegoats to be put to death.

B. THE CATEGORIES OF SPECIAL CIRCUMSTANCES DESCRIBED IN PENAL CODE SECTION 190.2 FAIL TO MEANINGFULLY NARROW THE CLASS OF FIRST DEGREE MURDERERS WHO MAY RECEIVE THE DEATH PENALTY

To be constitutionally valid, a state death penalty scheme must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J .). Meeting this criteria requires a state genuinely to narrow, by rational and objective criteria, the class of murderers eligible for death. (*Zant v. Stephens* (1983) 462 U.S. 862, 878 [103 S. Ct. 2733; 77 L. Ed. 2d 235.]) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. Justin was eligible for the death penalty based on the commission of a routine crime–robbery-during the course of a murder.

This Court's previous decisions concluded the requisite narrowing in California's death penalty scheme is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal. 4th 457, 468.) However, the special circumstances are so numerous, and common to many violent crimes against persons that special-circumstance murder in the statute now makes almost every murderer eligible for death at the discretion of the prosecutor. This Court should reconsider and overrule its prior precedent, and hold that section 190.2, subdivision (a), is so broad that it fails to adequately narrow the set of

murders eligible for death, in violation of the Eighth and Fourteenth Amendments.

C. THE BROAD APPLICATION OF SECTION 190.3, FACTOR (A), ALLOWING A JURY TO TREAT ANY CIRCUMSTANCE OF THE CRIME AS AGGRAVATION, VIOLATED JUSTIN'S CONSTITUTIONAL RIGHTS.

Section 190.3, subdivision (a), directs the jury to consider the "circumstances of the crime." That statutory provision was explained to jurors with CALCRIM No. 763, given during penalty trial, in pertinent part as follows:

> In reaching your decision you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence. An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime above and beyond the elements of the crime itself that increases the wrongfulness of the defendant's conduct, the enormity of the defense, or the harmful impact of the crime.
>
> . . .
>
> Under the law you must consider, weigh and be guided by specific factors where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to the case. If you find there is no evidence of a factor, then you should disregard that factor. The factors are:
>
> (a) the circumstances of the crime that the defendant was convicted of in this case and any special circumstances that were found true.

(18RT 3644-3645; 17CT 4501.) The instruction provided jurors no guidance whatsoever concerning what facts should be deemed aggravating and which should be deemed mitigating or neutral. There is no objective consensus on these issues in the real world. (See e.g., *Montana v. Egelhoff* (1996) 518 U.S. 37, at pp. 45-47, [116 S. Ct. 2013; 135 L. Ed. 2d 36]

[the fact of defendant's intoxication is treated at common law by some jurisdictions as enhancing culpability and by others as diminishing culpability].)

As a result of the broad and indefinite classification of "circumstances of the offense," prosecutors can argue in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. In this case, the prosecution relied on factor (a) when he argued for imposition of the death penalty. The prosecutor relied on "victim impact evidence," presented through the testimony of Noriega's sister. (18RT 3652-3653.) Victim impact comes within the ambit the "circumstances of the crime." (*People v. Zamudio* (2008) 43 Cal. 4th 327, 324-325.) There always will be victim impact with every murder. It will always be emotionally charged, and usually heartbreaking. This illustrates the unlimited reach of section 190.3, subdivision (a).

This Court has not yet applied a limiting construction to factor (a) despite previous requests. (*People v. Blair* (2005) 36 Cal. 4th 686, 749.) The "circumstances of the crime" factor can hardly be called "discrete." (See *Brown v. Sanders* (2006) 546 U.S. 212, 222 [126 S. Ct. 884; 163 L. Ed. 2d 723] [United States Supreme Court finds that lower federal court misdescribed California death penalty scheme as preventing sentencer "from considering evidence in aggravation other than discrete, statutorily-defined factors."]) The concept of "aggravating factors" has been applied in such a broad and contradictory manner that almost all contextual features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the

jury to assess death 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." (*See Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853, 100 L.Ed.2d 372]; *but see Tuilaepa v. California, supra*, 512 U.S. 967, 987-988 (rejecting "vagueness" challenge to factor (a)).

This Court has rejected the claim that permitting the jury to consider the "circumstances of the crime" results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal. 4th 595, 641.) Justin urges the Court to reconsider this decision.

D. USE OF A "SO SUBSTANTIAL" STANDARD TO DESCRIBE AGGRAVATING CIRCUMSTANCES WARRANTING A VERDICT OF DEATH IS IMPERMISSIBLY VAGUE

The question whether to impose the death penalty upon Justin 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." (18RT 3648; 17CT 4503; CALCRIM No. 766.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright, supra*, 486 U.S. 356, 362.)

This Court has previously concluded that the use of the phrase "so substantial" does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal. 4th 281,

316, fn. 14.) Justin asks this Court to reconsider that conclusion.

E. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY RESTRICTED CONSIDERATION OF MITIGATION BY JUSTIN'S JURY.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, [108 S. Ct. 1860; 100 L. Ed. 2d 384]; *Lockett v. Ohio* (1978) 438 U.S. 586, [98 S. Ct. 2954; 57 L. Ed. 2d 973]. These adjectives are contained in CALCRIM No. 763, which was given to Justin's jury. (18RT 3645-3646; 17CT 4501 .) Justin acknowledges that this Court has previously rejected this argument in *People v. Avila* (2006) 38 Cal. 4th 491, 614, but urges reconsideration of that conclusion.

F. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVENHANDED APPLICATION OF THE CAPITAL SENTENCING DECISION.

As a matter of state law, each of the sentencing factors introduced by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) - are relevant solely as possible mitigators. (*People v. Hamilton, supra*, 48 Cal. 3d 1142, 1184; *People v. Edelbacher, supra*, 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer to any of these "whether or not" sentencing factors established an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational

aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens, supra*, 462 U.S. 862, 879.)

The fact that this Court and the Legislature intended that the specified factors be solely mitigating is not the measure of their effect on a jury. The effect of an instruction on a jury is assessed by whether a reasonable juror could understand the instruction in an unconstitutional manner. (*Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *Francis v. Franklin* (1985) 471 U.S. 307, 325 [105 S.Ct. 1965, 85 L.Ed.2d 344.) "This analysis 'requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.'" (*Francis v. Franklin, supra*, 471 U.S. at 315, quoting *Sandstrom v. Montana* (1979) 442 U.S. 510, 514 99 S.Ct. 2450, 61 L.Ed.2d 39].)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect such as Justin's fetal alcohol syndrome) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments. (But see *People v. Morrison* (2004) 34 Cal 4th 698, 730: "instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors.")

The very real possibility that Justin's jury aggravated his sentence on the basis of "nonstatutory aggravation," including an absence of mitigating factors, deprived him of an important state-law generated procedural safeguard and liberty interest - the right not to be sentenced to death except upon the basis of statutory aggravating factors. (See *People v. Boyd, supra*, 38 Cal 3d 762, 772-775.) That possibility violated Justin's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra*, 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300: [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522 (same analysis of *Fetterly, supra*, applied to State of Washington capital sentencing statutes).)

The failure of the instruction to limit mitigation evidence solely to mitigation violated not only state law, but the Eighth Amendment, for it made it likely the jury treated Justin "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235, [112 S. Ct. 1130; 117 L. Ed. 2d 367].) "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S.Ct. 869, 71 L.Ed.2d 1].) Whether a capital sentence is to be imposed cannot be permitted to vary according to juries' potentially mistaken understandings of how many factors the law permits them to weigh on death's side of the scale.

G. THE DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT IS NOT PREMISED ON FINDINGS MADE BY A UNANIMOUS JURY.

For the penalty phase, Justin's jury was instructed that "the People are required to prove the defendant's other alleged crimes beyond reasonable doubt before you may consider them as aggravating factors." (18RT 3628.) The trial court then instructed the jury, "[e]ach of you must decide for yourself whether the People have proved that the defendant committed an alleged crime. You do not all need to agree on whether an alleged crime has been proved." (18RT 3636-3637.) The defense attorney did not object to the instruction. (17RT 3607-3608.) However, this Court can review whether the instruction was erroneous pursuant to section 1259.

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances warranting the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, [96 S. Ct. 2978; 49 L. Ed. 2d 944].) "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, [110 S. Ct. 1227; 108 L. Ed. 2d 369] (conc. opn. of Kennedy, J.).) Despite these federal precedents, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal. 3d 719, 749.) Justin requests that this Court reconsider its conclusion that non-unanimous findings regarding facts in aggravation are

sufficient to allow imposition of a death penalty.

The failure to require jury unanimity also violates the equal protection clause of the federal Constitution. In California, when 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., Pen. Code § 1158a). Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732, [118 S. Ct. 2246; 141 L. Ed. 2d 615]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994, [111 S. Ct. 2680; 115 L. Ed. 2d 836]), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances also is required by the equal protection clause of the Fourteenth Amendments.

This Court has acknowledged that other-crimes evidence in a penalty phase of a capital trial often has "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal. 4th 694, 763-764.) To require jury unanimity respecting an enhancing allegation that adds a year to a defendant's sentence (see, e.g., § 12022), but not as to facts likely to cause a jury to choose death over life imprisonment, violates the right to equal protection, and by its irrationality also violates both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. The failure to require unanimity cannot be deemed harmless in a case such as this, where the prosecution presented evidence

of unadjudicated criminal offenses occurring on separate occasions. There is a reasonable possibility that the jurors found a "patchwork" of aggravating facts upon which no true consensus was ever reached by the jury as a whole.

H. THE INSTRUCTIONS FAILED TO INFORM THE JURORS THAT IF THEY DETERMINED THAT MITIGATION OUTWEIGHED AGGRAVATION, THEY WERE REQUIRED TO RETURN A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California, supra*, 494 U.S. 370, 377.) Yet, CALCRIM No. 763 does not address this proposition, but only informs the jury of circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated Justin's right to due process of law. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

This Court has held that because CALCRIM No. 763 instructs the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal. 3d 955, 978; see also *People v. Kipp* (1998) 18 Cal. 4th 349, 381: ["We have determined that the trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation."].) Justin requests that this Court reconsider its decisions in *Duncan* and *Kipp*. These holdings conflict with

numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal. App. 3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal. App. 3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life without the possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474 [93 S. Ct. 2208; 37 L. Ed. 2d 82.])

I. THE CALIFORNIA SENTENCING SCHEME IS CONSTITUTIONALLY DEFECTIVE IN FAILING TO REQUIRE THAT THE PENALTY JURY MAKE WRITTEN FINDINGS.

The failure to require written, or other specific, findings by the jury regarding aggravating factors deprived Justin of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195, [96 S. Ct. 2909; 49 L. Ed. 2d 859.]) Because California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*, 16 Cal. 4th 1223, 1255-1256), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316, [83 S. Ct. 745; 9 L. Ed. 2d 770]: [failure

of state court to make express findings relative to imposition of capital sentence may require federal court on habeas review to hold hearings].)[56]

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal. 4th 792, 859; *People v. Rogers* (2006) 39 Cal. 4th 826, 893.) Justin requests that this Court reconsider its decisions in those cases. Ironically, such express findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal. 3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*In re Sturm, supra*, 11 Cal. 3d at p. 267.) The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (§1170, subd. (c).) Capital defendants are entitled to

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[56] *Townsend* was overruled on a different point in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, [112 S. Ct. 1715; 118 L. Ed. 2d 318].

more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra*, 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen. Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland*, *supra*, 486 U.S. 367, 383, fn. 15.)

Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal. 4th 1, 41-42) and "moral" (*People v. Hawthorne, supra*, 4 Cal. 4th at p. 79), the basis for the decision can be, and should be, articulated. The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system to compensate for the unreliability inevitably produced by the failure to require a statement of reasons for imposing death. (See *Kansas v. Marsh, supra.*) The failure to require written findings thus violated not only federal due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

J. THE CALIFORNIA SENTENCING SCHEME IS CONSTITUTIONALLY DEFECTIVE IN FAILING TO REQUIRE INTER-CASE PROPORTIONALITY REVIEW.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this prohibition to the process by which death is selected as a punishment has required that death judgments be both proportionate to one another and to the underlying facts, and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review -- a procedural safeguard this Court has expressly rejected. In *Pulley v. Harris, supra*, 465 U.S. at p. 51, the High Court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court, and applied in fact, has become just such a sentencing scheme. *Harris, supra*, in contrasting the 1978 statute with the 1977 law which the court upheld against a challenge for lack of comparative proportionality-review, noted that the 1978 law had "greatly expanded" the list of special circumstances that make convicted murderers eligible for the death sentence. (*Id.*, 465 U.S. at p. 52, fn. 14.) In particular, none of this Court's previous decisions have addressed the problem of applying a multiple murder special circumstance to first degree

murder convictions that may have bypassed findings that the killings were premeditated and deliberate, such as by application of the "drive by" first degree murder provisions.

The ever-expanding list of special circumstances conferring death-eligibility fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.*

As argued above, the statutory scheme lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor, the "circumstances of the crime," is an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative inter-case proportionality review in the context of the entire California sentencing scheme, as required by federal constitutional principles (see *Kansas v. Marsh, supra*), that scheme is unconstitutional.

Section 190.3 itself does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal. 4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal. 3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment, even if it did not do so

previously.

K. IMPOSITION OF THE DEATH PENALTY CURRENTLY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT IS CONTRARY TO INTERNATIONAL NORMS OF HUMANITY AND DECENCY.

The United States stands as one of a small number of industrially-developed, democratic nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Jan 15, 2015), on Amnesty International website [www.amnesty.org].)[57]

This Court and the United States Supreme Court have previously rejected claims that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S. Ct. 590; 2 L. Ed. 2d 630]; *People v. Cook* (2006) 39 Cal. 4th 566, 618-619; *People v. Ghent* (1987) 43 Cal. 3d 739, 778-779.) Those claims were presented in a historical context that no longer exists. Standards of decency that inform the Eighth and Fourteenth Amendments are never static. (*Trop, supra*, at 101.) Thus, Justin's claim that the death penalty currently violates

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[57] http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries.

international norms of humanity and decency must be evaluated differently than they were evaluated in prior cases.

In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554 [125 S. Ct. 1183; 161 L. Ed. 2d 1]), Justin urges the Court to hold the death penalty unconstitutional because, among other things, it violates the "evolving standards of decency that mark the progress of a maturing society" (*Trop*, 356 U.S. at 101), and violates international law. "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 421-422, [128 S.Ct. 2641, 2650, 171 L. Ed. 2d 525] [holding that imposition of death penalty for aggravated child rape is disproportionate and violates the Eighth Amendment.].)

XVIII

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO GIVE DEFENSE-REQUESTED INSTRUCTIONS REGARDING LINGERING DOUBT AND MERCY IN VIOLATION OF JUSTIN'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW AND IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS

A. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Justin submitted written special instructions for the penalty phase which included lingering doubt and mercy. (1CT 132-135.) The lingering doubt instruction stated:

> Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether the defendant killed the victim. Lingering or residual doubt is defined as the state of mind between a reasonable doubt and beyond all possible doubts.
>
> Thus, if any individual juror has a lingering or residual doubt about whether the defendant killed the victim, he or she must consider this as a mitigating factor and assign to it the weight you deem appropriate.

(1CT 133.) The requested mercy instruction stated, "In deciding the appropriate punishment, the jury may consider mercy for the defendant in weighing the factors in aggravation and mitigation." (1CT 134.) The prosecution filed a written opposition to the requested jury instructions. (17CT 4460-4461.) The opposition argued that factor K, which allowed the jury to consider other circumstances in mitigation, including "sympathy or compassion for the

defendant or anything you consider to be a mitigating factor," adequately instructed the jury regarding the role of mercy and lingering doubt. (*Ibid.*) The trial court refused to give the requested instructions because it believed factor K covered those concepts. (17RT 3615-3616.) The factor K instruction instructed the jury that it could consider in mitigation, "any other circumstance, whether related to these charges or not, that lessens that gravity of the crime even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor regardless of whether it is one of the factors listed above." (18RT 3646.)

B. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 588, 569.)

C. THE TRIAL COURT ERRED BY REFUSING TO GIVE THE DEFENSE-REQUESTED INSTRUCTIONS.

The trial court refusal to give the mercy instruction violated Justin's right to federal and state due process of law and the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17, of the California Constitution. The jury may return a verdict of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979 [the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not

comparatively substantial enough to warrant death].) The weighing process refers to each juror's personal determination that death is the appropriate penalty under all the circumstances. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244.)

The trial court refused to instruct the jury that mercy was a factor it could weigh in deciding the appropriate punishment. (1CT 134.) Mercy is a concept distinct from "sympathy" and "compassion," which were in the trial court's factor K instruction. (18RT 3646.) Sympathy and compassion are concepts rooted in specific facts pertaining to the individual defendant. Mercy is a broader concept. Mercy is defined as "refraining from harming or punishing offenders, enemies, persons in one's power, etc.; kindness in excess of what may be expected or demanded by fairness, forbearance and compassion." (Webster's New World Dictionary (2nd college ed. 1984), p. 889.) The trial court's refusal to give this instruction resulted in the jury not understanding it had the absolute power to return a sentence of life without the possibility of parole regardless of whether it felt sympathy or compassion for Justin.

The jury's failure to have a complete understanding of its sentencing authority violates due process and the ban on cruel and unusual punishment. "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra*, 438 U.S. at pp. 604-605.) Due process

and the Eighth Amendment required Justin's jury to understand its power to impose a life sentence based on mercy.

The trial court also erred by refusing to give the instruction that the jury could consider lingering doubt as a factor in mitigation. This Court has approved the jury considering lingering doubt as a factor in mitigation, but rejected the argument the jury must be instructed on lingering doubt. (*People v. Souza* (2012) 54 Cal.4th 90, 133; *People v. Brown* (2003) 31 Cal.4th 518, 567; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Milwee* (1998) 18 Cal.4th 96, 165.)

Despite the above authorities, the trial court erred by refusing to give the defense requested instruction on lingering doubt. (*People v. Gay* (2008) 42 Cal.4th 1195, 1218-1219 [a defendant has the right to present his guilt phase theory of the case during the penalty phase because of his right to have the jury consider any lingering doubt about his guilt].) A defendant is entitled, upon request, to a nonargumentative instruction that pinpoints his or her theory of the case. (*People v. Wright, supra,* 45 Cal.3d 1126, 1135-1136.) An instruction that directs the jury to consider certain evidence is properly refused as argumentative. (*Id.* at p. 1135) A proper pinpoint instruction does not pinpoint specific evidence, but the theory of the defendant's case. (*Id.* at p. 1137.)

Justin's defense was that he did not kill Noriega. The prejudice portion of the guilt phase arguments in this brief explained why the evidence linking Justin to Noriega's death was not strong. The lingering doubt instruction requested by the defense counsel properly

pinpointed the defense theory that Justin did not kill Noriega.

People v. Gay, supra, 42 Cal.4th 1195, established Justin's right to have the jury instructed on his theory of lingering doubt. The trial court in that case excluded the testimony of defense witnesses offered during the mitigation phase who would have testified the defendant did not commit the murder. This Court concluded the exclusion of the evidence was error because it deprived the defendant of the right to have the jury consider any lingering doubt about his guilt:

> In reversing the judgment and ordering a third penalty trial, we declared that the text of Penal Code former section 190.1, which sanctioned "the presentation of evidence as to 'the circumstances surrounding the crime ... and of any facts in ... mitigation of the penalty,'" encompassed evidence relating to a "defendant's version of such circumstances surrounding the crime or of his contentions as to the principal events of the instant case in mitigation of the penalty." (*People v. Terry* (1964) 61 Cal.2d 137, 146) Our decision, which was the first in which we recognized the theory of lingering doubt as a mitigating factor (see *People v. Johnson* (1992) 3 Cal.4th 1183, 1259 (conc. opn. of Mosk, J.)), further explained: "Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting to the defendant the opportunity of presenting his claim of innocence. The jury's task, like the historian's, must be to discover and evaluate events that have faded into the past, and no human mind can perform that function with certainty. Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*Terry, supra,* 61 Cal.2d at p. 146.)

(*People v. Gay, supra*, 42 Cal.4th at p. 1218.) Hence, this Court concluded that the trial court erred by refusing to admit the evidence offered by the defendant pertaining to lingering doubt about whether he was the shooter. (*Id.*, at pp. 1219-1220.)

People v. Gay dealt with the exclusion of evidence. The instant case deals with the trial court's refusal to give a defense-requested lingering doubt instruction pinpointing its theory of the case. Despite this Court's decisions holding to the contrary, if a defendant has the right to admit evidence during the penalty phase pertaining to his guilt phase theory of the case, then he also has the right to a lingering doubt instruction which incorporates his guilt phase theory of the case. Without such an instruction, the defendant's right to present mitigation via a theory of lingering doubt would be substantially eviscerated. Justin, furthermore, presented lingering doubt evidence. He testified and denied killing Noriega. (16RT 3286.) The jury was unable to credit this testimony because Justin's lingering doubt instruction was not given.

The trial court's failure to give the defense-requested lingering doubt instruction violated Justin's right to federal due process of law, Sixth Amendment right to a jury trial, the Eighth Amendment, and the corresponding constitutional provisions under the California Constitution. California law permits the jury to consider lingering doubt as mitigating evidence. (*People v. Brown, supra*, 31 Cal.4th at p. 567.) Because California state law considers lingering doubt to be proper mitigating evidence, the jury needed to be properly instructed on how lingering doubt applied to the facts of this case in order to give it proper

weight in its balancing of aggravating and mitigating factors.

The Sixth Amendment right to a jury trial means a verdict returned by the jurors after consideration of all the evidence. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472 [85 S.Ct. 546, 13 L.Ed.2d 424] [the requirement that a jury's verdict must be based upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444] [the right to trial by jury means requiring that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbors].) *Ring v. Arizona* (2002) 536 U.S. 584, 609 [122 S.Ct. 2428, 153 L.Ed.2d 556], held the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty. The trial court's failure to give the defense requested lingering doubt instruction precluded the jury from considering as mitigation whether Justin did not kill Noriega.

California law also protected Justin's right to have the jury properly consider lingering doubt as mitigating evidence. Article I, sections 7 and 15 of the California Constitution guarantees due process of law to defendants. Penal Code section 1042 provides that, "[i]ssues of fact shall be tried in the manner provided by Article I, Section 16 of the Constitution of this State. Article I, Section 16 of the California Constitution provides in part that, "[t]rial by jury is an inviolate right . . .." The trial court's failure to give the defense requested

lingering doubt instruction therefore violated Justin's rights under the California Constitution.

Because California law required the jury to consider lingering doubt as a factor in mitigation, the trial court's failure to give the defense-requested lingering doubt instruction violated Justin's right to federal due process of law. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 345 [100 S.Ct. 2227, 65 L.Ed.2d 175].) *Hicks v. Oklahoma* concluded thet right of a criminal defendant under state law to have his punishment fixed in the discretion of the jury gave him "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citation omitted], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. " (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

Similar reasoning applies to the instant case. Justin had a right protected under the federal due process clause to have the jury consider as mitigation the evidence suggesting that he did not kill Noriega. The trial court's refusal to give the defense-requested lingering doubt instruction deprived Justin of due process.

D. PREJUDICE

The trial court's refusal to give the lingering doubt and mercy instructions violated Justin's federal constitutional rights. Reversal of the judgment of death is required unless the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Reversal is also required under the *Watson* standard because there was a

"reasonable chance" (*People v. Wilkins, supra*, 56 Cal.4th at p. 351) the failure to give the instructions was prejudicial.

The trial court's failure to give the lingering doubt instruction was not harmless beyond a reasonable doubt because the evidence linking Justin to Noriega's death was weak and suspect. Dorothy Brown was the precise type of witness the jury need to hear and view giving live testimony, rather than someone reading her testimony from a prior hearing, to understand how truly unworthy she was of belief. (*People v. Louis* (1986) 42 Cal.3d 969 989 [finding prejudicial the reading of the witness's testimony into the record because he was precisely the type of career criminal the jury need to hear live in order to assess his credibility].) It was likely the jury still had some doubt about Justin's connection to Noriega's death, notwithstanding the guilty verdict.

The jury deliberated a lengthy period of time for its guilt phase deliberations. The guilt phase deliberations commenced at 3:16 p.m. on November 27, 2007. (13RT 2849, 2897l; 16CT 4287.) The jury deliberated on November 29, 30, December 3, 4, 5 and 6. (17CT 4357, 4361, 4364, 4365, 4366, 4367, 4369.). It was likely at least some jurors would have voted for life in prison if they had been instructed that any residual doubt of guilt could be considered in deciding the punishment. The penalty phase deliberations commenced at 10:00 a.m. December 20, 2007. (18RT 3702; 18CT 4512.) The jury deliberated on December 21, 2007. (18CT 4515.) The jury resumed deliberations on January 3, 2008, and reached its verdict at 2:17 p.m. (18CT 4517.)

The failure to give the mercy instruction was also not harmless. It cannot be assumed that the jury took lightly the decision to impose the death penalty. The jury needed to know that it could refuse to impose the death penalty as an act of mercy. Appellant lacked guidance as a youth. His father intentionally exposed him to drug use before he was even a teenager. The judgment of death must be reversed.

Dated: 1/23/2015

John L. Staley

I declare under penalty of perjury that this Opening Brief contains 90,454 words.

John L. Staley

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

(People v. Thomas, Superior Court Case No. RIF-086792;
Supreme Court No. S161781)

I reside in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 16935 West Bernardo Drive, Suite 260, San Diego, CA 92127. On January 24, 2015, I serve the foregoing document described as: **APPELLANT'S OPENING BRIEF, VOLUMES I AND II** on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope with postage prepaid to be placed in the United States mail in San Diego, California. Executed on January 24, 2015, in San Diego, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Constance I. Gallagher