IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DEMETRIUS CHARLES HOWARD, Defendant and Appellant.	CRIM. No. S050583 Automatic Appeal (Capital Case) San Bernardino County Superior Court No. FSB 03736

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California
for the County of San Bernardino

HONORABLE STANLEY W. HODGE

MICHAEL J. HERSEK
STATE PUBLIC DEFENDER

KATE JOHNSTON
Deputy State Public Defender
California Bar No. 127633

801 K Street, Suite 1100
Sacramento, CA 95814
(916) 322-2676

Attorneys for Appellant

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF CONTENTS (Continued)

PAGE(S)

TABLE OF AUTHORITIES

FEDERAL CASES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

STATE CASES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

JURY INSTRUCTIONS

CALJIC No.

TABLE OF AUTHORITIES (Continued)

JURY INSTRUCTIONS (Continued)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (Continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DEMETRIUS CHARLES HOWARD, Defendant and Appellant.	**CRIM. No. S050583** **Automatic Appeal** **(Capital Case)** **San Bernardino County Superior Court No. FSB 03736**

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code section 1239[1], subdivision (b), from a conviction and judgment of death entered against appellant, Demetrius Charles Howard, (hereinafter "appellant"), in San Bernardino County Superior Court, on December 7, 1995. (CT 463; RT 2782.)[2]

The appeal is taken from a judgment that finally disposes of all issues between the parties.

---

[1] All further code section references are to the Penal Code unless otherwise noted.

[2] "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript; "ACT" refers to the Augmented Clerk's Record; and "ART" refers to the Augmented Reporter's Record.

STATEMENT OF THE CASE

By a Grand Jury Indictment filed March 3, 1994, appellant and his co-defendant, Mitchess Lee Funches,[3] were charged in Count I with murder, in violation of Penal Code section 187, and in Count II with attempted second degree robbery, in violation of section 664/211. (CT 1-2.) The Indictment further alleged that the murder was committed while the defendants were engaged in the commission of a robbery within the meaning of section 190.2(a)(17). (CT 2.)[4] Additionally, both offenses were alleged as serious felonies within the meaning of section 1192.7(c)(1), precluding a plea bargain. (CT 1-2.)[5]

On May 17, 1993, appellant entered a not guilty plea to the Indictment and denied the special allegations. (ACT Suppl. A-1:55;

---

[3] The original felony Complaint against appellant was filed on March 3, 1993. (ACT Suppl. A-1:31-34.) (ACT, Suppl., A-1:31-34.) The matter was initially continued and reset for preliminary hearing numerous times either on the court's own motion or at the request of the defendants. (ACT Suppl. A-1:59, 63, 65, 70, 86, 88, 90, 91, 96, 100, 104, 107, 109.)

[4] Section 190.2 provides for a penalty of death or life without the possibility of parole for first degree murder given special circumstances. Subdivision(A)(17), provides a list of enumerated felonies constituting "special circumstances", including, *inter alia*, "robbery" under subdivision (A)(17)(a). The Indictment, however, did not specify under which subdivision of section 190.2(A)(17), appellant and his co-defendant were charged. (CT 1-2.)

[5] Mr. Funches was additionally charged with attempted premeditated murder, in violation of section 664/187 (Count III); exhibiting a deadly weapon to a police officer to resist arrest, in violation of section 417.8 (Count IV); and with being a felon in possession of a firearm, in violation of section 12021(a) (Count V). (CT 3-4.) In Count 1, he was also charged with a personal use enhancement, in violation of section 12022.5(a). (CT 2.)

ART A:16-21.) The matter was transferred to the Victorville Judicial District on April 4, 1994, by stipulation of the parties. (ACT Suppl. A-1:102; RT1(A):28.) On April 8, 1994, the prosecution filed its notice of intent to seek the death penalty. (ACT Suppl. C-1:319.)

On April 22, 1994, the trial court overruled co-defendant Funches' Demurrer to the Indictment. (ACT Suppl. E(1):533-549, 569; RT 5-28.) On August 12, 1994, the trial court denied appellant's Motion to Bifurcate the Special Circumstance Allegation from First Degree Murder Charge and his Motion to Dismiss the Special Circumstance Allegation pursuant to section 995. (CT 60; RT 72-75; 79-80.)

On April 3, 1995, the trial court granted appellant's Motion for Severance from co-defendant Mitchell Funches and his Motion to Exclude Gang Evidence. (CT 98, RT 461, 478.) On the same day, the trial court denied appellant's Motion to Exclude Use of his Prior Felony Conviction for Impeachment and the prosecution voluntarily agreed not to use defendant's statements which were impermissibly taken after invocation of appellant's *Miranda* rights. (CT 98; RT 475, 494.) On April 4, 1995, the trial court denied appellant's Motion to have his Shackles and Electronic Device Removed. (CT 123; RT 504-505.)[6]

Juror selection also commenced on April 4, 1995. (CT 122-123; RT 517.) On April 19, 1995, the trial court denied appellant's Motion to Quash the Jury Panel. (CT 180; RT 1524.) On April 20, 1995, twelve jurors and four alternates were sworn. (CT 181-182; RT 1562, 1568.) On April 25, 1995, the trial court denied appellant's Motion for a Continuance

---

[6] The original reporter's transcript skipped from pages 479-514, and the missing pages were subsequently augmented into the record.

and following an Evidence Code section 402 foundational hearing, found admissible a gun, identified as belonging to appellant. (CT 185; RT 1619.)

Counsel gave opening statements on April 25, 1995. (CT 185; RT 1641, 1650.) On April 26, 1995, the trial court denied appellant's Motion to Exclude Sgt. Blackwell's testimony, holding that certain statements were admissible. (CT 187; RT 1796.) Both sides rested on May 4, 1995. (CT 200-201; RT 2309.) On May 8, 1995, counsel gave closing arguments. (CT 202-203; RT 2395-2446.) The same day, the jury was instructed and commenced deliberations. (CT 203; RT 2446.)

On May 9, 1995, the trial court received two requests from the jury for read back. (CT 204-205.) The first request asked for read back of Mr. and Mrs. Manzella's testimony and the second request asked for read back of appellant's testimony. (CT 206-207; RT 2450, 2468.) On May 10, 1995, the jury returned a verdict, finding appellant guilty on all counts and the special circumstance allegation to be true. (CT 210-213a; RT 2519.)

The penalty phase commenced on May 22, 1995. (CT 298; RT 2529.) Counsel made opening statements and the prosecution began presenting its case. (CT 298; RT 2533-2535.) On the same day, the trial court denied appellant's Motion for a Continuance to Allow a Demographic Study of the Jury and his Motion for Retrial (Mistrial). (CT 299; RT 2532.)[7] The trial court also denied appellant's request that the jury be given proposed pinpoint instructions prior to penalty phase deliberations. (ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl.(C) 371-374, 377, CT 319; RT 2568-2572, 2582, 2589.)

---

[7] These motions were made orally by appellant personally and not brought by counsel. (CT 299; RT 2532.)

On May 23, 1995, both sides rested without the defense having presented any witnesses. (CT 300-301; RT 2309.) Following closing arguments, the jury was instructed and deliberations commenced late on the morning of May 23, 1995. (CT 301.) One of the jurors became ill and pursuant to a stipulation was replaced with an alternate juror. (CT 301; RT 2593.) On May 24, 1995, the trial court received two inquiries from the jury. (CT 302-305; RT 2621-2622.) The first inquiry concerned whether appellant could get paroled if the death penalty were overturned and the second inquiry was whether or not appellant could ever be released from prison if he were sentenced to life without the possibility of parole. (CT 304, 307; RT 2623.)[8] After conferring with counsel, the trial court further instructed the jury. (RT 2624.) The jury's second request was for a read back of testimony from Sergeant Blackwell and Cedric Torrence. (CT 305; RT 2627-2728.) On May 30, 1995, the jury made a third request, for the read back testimony of Laura Carroll. (CT 310.)

On May 31, 1995, seven days after the jury commenced deliberations, it returned a penalty verdict of death. (CT 329-331; RT 2746.) Appellant requested and was granted a continuance to prepare a Motion for a New Trial on the basis of newly-discovered evidence. (CT 357-372; RT 2753-2754.) A second continuance followed on the court's own motion to allow more time for review. (RT 2756-2757.)

The trial court denied appellant's Motions for New Trial and to Reduce (Modify) the Penalty on December 7, 1995. (CT 456; RT 2778, 2781.) On the same day, appellant also personally objected to his

---

[8] There are duplicate copies of the jury's notes to the trial court in the clerk's transcript. (CT 304-307, 310-311.)

forced anti-psychotic medication during trial, alleging an infringement of his constitutional rights to participate in his own defense. (RT 2767-2772.) The trial court denied appellant's claim, treating it as an additional new trial motion. (CT 456; RT 2772.) The court also found it was more appropriately brought by way of a petition for writ of habeas corpus. (RT 2772.)

The trial court sentenced appellant to death for Count I, the murder conviction, and to eight (8) months for Count II, the attempted robbery. (CT 462-463; RT 2782.) Timely notice of appeal was filed on December 7, 1995. (ACT Suppl. D-1: 508.)

* * * * *

STATEMENT OF FACTS

Appellant was in the wrong place at the wrong time on the evening of December 6, 1992. Earlier that evening, his girlfriend, Roxanne Winn, picked him up from a friend's house in San Bernardino to drive him to his uncle's apartment on Kendall Drive. (RT 2201-2202.) The two got into a fight over appellant's involvement with another woman and Roxanne kicked him out of the car, leaving him stranded in the rain. (RT 2203-2206, 2262.) Appellant was not sure of his uncle's apartment number and ended up sitting on the stairs of an apartment complex on Kendall Drive. (RT 2207.) One of the tenants allowed appellant to use his phone. (RT 2208.) Appellant called Cedric Torrence for a ride home and made plans for Torrence to pick him up at the El Loco Pollo restaurant across the street. (RT 2208.) Appellant saw police activity as he headed for the restaurant so he decided to wait for Torrence down the street at the Seven-Eleven store. (RT 2212, 2219.) From the Seven-Eleven, he phoned relatives, including his sister to ask her to contact his uncle. (RT 2214-2218.) While on the phone, police arrested him on suspicion of murdering a woman at the nearby apartment complex. A nervous parolee fearing he would be targeted for a crime he did not commit, appellant initially lied to authorities about his identity. (RT 2028, 2218.)

Roxanne Winn testified that she could not remember the exact day in December 1992 that she drove to San Bernardino from Los Angeles to pick up appellant but knew it was around 3:00 p.m. on a cloudy and drizzly day. (RT 2258-2261.) She also confirmed that while in the car together they fought and that she told appellant to get out of the car. (RT 2262-2263.) She left him on a street which had an apartment complex on one side and a

Seven-Eleven store on the corner. (RT 2263.)

Willy Kelly, appellant's uncle, corroborated appellant's testimony stating that on the Wednesday or Thursday before the Sunday appellant had been arrested, he had offered appellant some cash. (RT 2295.)[9] Mr. Kelly wanted to help appellant make a fresh start after appellant's recent release from prison and had told him to stop by his apartment on Kendall Drive that Sunday evening. (RT 2295.)

Patricia Washington testified that appellant, who is her cousin's son, was living with her in December of 1992. (RT 2297.) Both Patricia and her daughter, Segonia Washington, remembered a woman named Roxanne coming to their home to pick up appellant. (RT 2301-2304.)[10] Later that same day, Segonia received a phone call from appellant saying Roxanne had kicked him out of the car and that he was stranded. (RT 2305.)

Appellant, testifying on his own behalf, said that on the Sunday in question, he hung out with Cedric Torrence and some other men playing football. (RT 2190-2192.)[11] He denied any participation in the crime, said he did not have a gun and never discussed a "jacking"with Mitchell Funches, and never even went inside a garage near Torrence's house where

---

[9] Mr. Kelly was himself incarcerated at Avenal State Prison at the time of trial and his written statement was admitted pursuant to stipulation. (RT 2294.)

[10] "Segonia" is also spelled "Cegonia" in the transcript. (RT 2186.) Because of the two Ms. Washingtons, they will be referred to by their first names.

[11] Cedric Torrence is the former boyfriend of appellant's sister and father of his nephew. (RT 1656.) Torrence and appellant were not close friends. (RT 2187.)

the men were gathered before and after playing football. (RT 2191-2200.) Others gave conflicting accounts about whether appellant had a gun and whether he and another man, Mitchell Funches, discussed doing a "jacking" or robbery. (RT 2072, 2078, 2263, 2274, 2279-2285, 2288-2289.)

Roxanne Winn did not see appellant with a gun when he left the car that rainy day. (RT 2263.) George Rivera played football with Torrence and others that day, hung out at the garage, and said people were smoking marijuana and drinking beer; he never saw appellant with a gun and never heard him discuss anything about a "jacking." (RT 2274, 2279-2280, 2283-2285.) George barely knew appellant and had no reason to protect him by giving false testimony. (RT 2281.)[12] He also last saw appellant and Funches walking down the street together but could not say if they were leaving together or going their separate ways. (RT 2282.) Danny Rivera, George's brother who was part of the football group that day, also did not remember seeing any guns. (RT 2072, 2078.)

Cedric Torrence and Danny each testified that earlier on the day of the homicide, appellant and Mitchell Funches, also known as "Lace," had been with them and others, including Roosevelt Eshmon, playing football or hanging out in a garage next to Cedric's house. (RT 1655-1656, 1659-1660, 2071-2074.)[13] Danny Rivera left the garage to go to Cedric's house and when he returned, appellant and Funches were gone. (RT 2076.) Roosevelt Eshmon testified that he had never seen appellant before appellant's trial and denied ever being in a garage with Cedric Torrence on

---

[12] Because there is more than one Mr. Rivera who testified, appellant uses first names.

[13] According to Danny Rivera's account, appellant only watched and did not play football. (RT 2074.)

Flores Street or ever hearing a discussion concerning a "jacking." (RT 2288-2289.)

Torrence claimed he heard appellant and Funches discuss a "jacking," which he understood to mean a robbery or theft. (RT 1662.) Mr. Torrence declined appellant's offer to participate in the "jacking." (RT 1663.) According to Torrence, appellant said they would go out shooting and not be caught. (RT 1663.) Torrence testified that appellant had a .357 gun and Funches had a .380 clip automatic. However, Torrence admitted that he had lied in an earlier conversation with Detective Blackwell about whether appellant had a gun. (RT 1694, 1697.)

Torrence said he received a phone call from appellant later that evening saying that he needed a ride from the El Pollo Loco near University and Kendall, and that he had a "strap on," which Torrence understood to mean that appellant had a gun. (RT 1666, 1668.) Torrence drove to the area but left when he saw a lot of police, not wanting to become involved. (RT 1667.) Torrence also testified that appellant asked him for a fabricated alibi and appellant did not deny this. (RT 1669, 2219.)[14] Torrence described appellant as wearing a white poncho type pullover sweater shirt and black pants that day, and identified the .357 weapon appellant was carrying as the same one retrieved from bushes in the general vicinity of the crime scene several days after the homicide. (RT 1672, 1676.) Torrence denied ever telling appellant's sister that he could hurt or help appellant's defense depending upon what she did regarding their custody dispute. (RT 1705.)

---

[14] Appellant testified he called his mother and asked her to ask Torrence for an alibi and never contacted Torrence directly. (RT 2219.)

A little before 7:00 p.m., a short time before appellant's arrest that night, Virginia Garduno heard a loud popping noise while inside her Acacia Park apartment. (RT 1720.) A young girl, approximately five (5) years old, then knocked at her door for help. (RT 1720.) The girl, crying, and covered in glass shards, said she was afraid that two African- American men were chasing her. (RT 1721.) One of the men had a bat and her mommy was bleeding from the nose and was dead. (RT 1721.) Mrs. Garduno turned off the apartment lights and called 911. (*Ibid.*)

Around the same time, Mr. Steven Mooney, another resident of the Acacia Park Apartments, heard from someone that there had been shots fired so he drove his vehicle with his wife and child to one of the carports to investigate. (RT 1988.) The carport light was not working so he had his wife shine the vehicle headlights into the carport. He found a woman inside a vehicle with the passenger-side window broken. (RT 1988-1989.) Mooney called the police. (RT 1988-1989.)

Responding to the 911 dispatch, Officer Jeffrey Lotspeich of the San Bernardino Police Department arrived at the apartment complex where he found Ms. Sherry Collins, with an apparent gunshot wound, lying inside a parked blue Hyundai in an open garage unit. (RT 1776-1779.)[15] Lead Detective Dale Blackwell also responded to the scene where he found the Hyundai's passenger door locked, the passenger-side window shattered, and the driver-side door open. (RT 1732-1734.) Ms. Collins was in a supine position with her left leg up and somewhat perpendicular to the ground. (RT 1734-1735.)

---

[15] Ms. Collins and her daughter were identified by Mr. Michael Collins, Ms. Collins' brother. (RT 2108-2110.)

Dr. Frank Sheridan, the forensic pathologist of the San Bernardino Coroner's Office, testified that Ms. Collins died instantaneously from a bullet wound to the left side of her head. (RT 2042, 2046, 2049, 2053.) The bullet had been fired from the passenger-side of the car, hitting Ms. Collins while she was seated in the driver seat but turned either to her left or towards the back of the vehicle. (RT 2054-2055.)

After speaking with Randy Collins, the victim's young daughter, Officer Lotspeich broadcast a description of two male African-American suspects, one wearing dark colored clothing and the other a white shirt and dark colored pants. (RT 1778, 1780.)

A nearby resident, Mr. Steven Larsen, heard on his police scanner that the two Acacia Park apartment suspects were heading west towards his house. (RT 1835.) He went to his deck with a flashlight and a shotgun where he saw two African-American males, about eight to ten feet from him, walking along a wall towards University Avenue. (RT 1835-1836.) He yelled at them to stop but they took off. (RT 1836-1837.) He told his wife to call 911 and then went to his front yard where he saw them as they were coming onto his street. (RT 1838.) They were under a street light north of his house approximately fifty feet away when he yelled at them for a second time to stop. (RT 1839.) They stopped momentarily, the one in a white shirt mumbled something, and then they took off running to the north. (RT 1839.) Larsen told Detective Michael Potts that one of the men was wearing a white T-shirt and later said it was a long white T-shirt. (RT 2178- 2182.)

Shortly after 7:00 p.m., Ms. Theresa Brown heard helicopters circling over her apartment on Kendall Drive and University Parkway. (RT 1825-1827.) From her window, she saw a man in a stairwell landing

who was out of view of the helicopters. (RT 1827-1828.) She saw him knock on an apartment door. (RT 1827.) A few minutes after the helicopter noise stopped, she looked outside again and this time saw the man standing with his back up against a recessed wall. (RT 1830.) She called 911 and described the man as a somewhat "portly" African-American male wearing thick braids, medium height, eighteen to twenty-one years old, medium to dark complected, wearing a dark jacket and dark pants. (RT 1829-1830.) At the request of the 911 dispatcher, she looked out a different window and saw a second man who was very thin, much darker complected than the first man, wearing a cap, a white pullover with a hood, and dark baggy pants, walking quickly down the center walkway away from her building and into the nearby apartment complex. (RT 1831, 1834.) She only saw this second man for a few seconds, from the knees up, and only his profile. (RT 1831.) Scared, she hid in the bathroom and then heard gunfire, screams, and people talking on megaphones from helicopters. (RT 1831.)[16]

Michael and Laurie Ann Manzella were in their apartment on Kendall Drive watching television that night when someone knocked at their door. (RT 1848, 1854.) Mr. Manzella opened the door (with Mrs. Manzella standing behind him) and saw an African-American man talking with someone in the next apartment. (RT 1848, 1852, 1855.) Mr. Manzella figured the man had knocked on his apartment by mistake so he shut the door. (RT 1848.) A few seconds later they heard helicopters and gunshots.

---

[16] Neither Mr. Larsen nor Ms. Brown could subsequently identify appellant; they could only identify clothing worn by appellant as similar to that worn by the second, smaller man. (RT 1832, 1847.)

(RT 1850.)[17] Mr. Manzella could not identify appellant as the man he saw. (RT 1850.) Mrs. Manzella identified appellant as the man she saw; her identification was based principally on appellant's white sweater. (RT 1856.)

James Chism and his girlfriend were walking out of his University Village apartment on Kendall Drive in the early evening hours that night when appellant, who identified himself as "D-Bald," and who had been sitting on some nearby steps, approached him for a ride. (RT 1864-1865.) Chism told him that neither he nor his girlfriend could give him a ride but he did allow him to use the phone in his apartment. (RT 1865, 1874.) Appellant called a friend and then gave the phone to Chism to give him directions to the nearby El Pollo Loco restaurant. (RT 1865-1866.)

Chism pretended he had to leave his apartment to get appellant to leave. (RT 1866.) Appellant told Chism he would "hang out" in front of his apartment and wait for his girlfriend who lived upstairs to come home. (RT 1866.) As Chism was getting ready to leave, his two roommates came home and told him a man had been shot, that someone had run into their apartment complex, and that police were at the El Pollo Loco. (RT 1865-1867.) Appellant then asked Chism for directions out of the apartment complex. (RT 1867.) Chism found this odd since the complex had a wall around it with only one entrance and exit; if appellant had not come in via the only entrance he would have had to scale the wall. (RT 1867-1868.) When Chism left the apartment with his roommates, he told appellant how to get to El Pollo Loco. (RT 1872-1873.) As Chism and

---

[17] Mrs. Manzella said she heard the helicopters before hearing the knock on the door. (RT 1854.)

his roommates walked in the direction of El Pollo Loco and the police, appellant went in the opposite direction. (RT 1872-1873.) Chism reported appellant's suspicious behavior to the police. (RT 1875.) Chism subsequently identified appellant as the man he knew as D-Bald. (RT 1869.)

That same night, Office Edward Brock of the California State University police was on duty and heard that two suspects involved in a shooting at the nearby Acacia Park Apartments were headed north into his area. (RT 1911-1912.) He initially searched the university grounds in his squad car and then drove to University and Kendall, south of the university, in response to an updated broadcast that the suspects had been seen in that area. (RT 1913.) He saw an African-American man about five feet ten inches tall with thick shoulder length braids in the mini-mall area. (RT 1914.) Although the man did not match the description he had received, something did not seem right so Brock stopped the man by an Econo Lube. (RT 1914- 1916.)[18] Officer Brock had gotten out of his patrol car and had his hand on his gun as the man approached him. (RT 1915.) Approximately ten feet from the suspect, Officer Brock removed his hand from his weapon and the suspect quickly pulled a gun from behind his back, held it in a combat stance with both hands, feet apart, and fired at him three times. (RT 1917.) The suspect fled on foot and Brock attempted to pursue him in his squad car until he realized he had been hit below his bullet proof vest. (RT 1915.) He pulled over and radioed for help. (RT 1915, 1918-1919.)

---

[18] Officer Brock had not received the updated description of the suspects. (RT 1914.)

Officer John Richards with the San Bernardino Police Department responded to Officer Brock's call for help and stayed with him until paramedics arrived. (RT 1939-1940.) While recovering from the gunshot injuries in the hospital, Officer Brock picked out Mitchell Funches as his assailant from a photographic lineup. (RT 1920, 1928.)

After being dispatched to an apartment complex on Kendall Drive that night in response to the Acacia Park apartment shooting, Officer Rodney Reynolds of the San Bernardino Police Department heard a volley of gunshot fire. (RT 1944-1945.) With the help of lighting from a police helicopter known as "40 King," Officer Reynolds was able to see an African-American man with a gun, running from the Econo Lube. (RT 1946.)[19] Officer Reynolds kept out of sight while the suspect, later identified as Mitchell Funches, scaled a fence and was on the ground on all fours. (RT 1946-1947.) He then ordered him to drop his gun but instead, Funches pointed his gun at Officer Reynolds and Reynolds opened fire. (RT 1947-1948.) Mr. Funches ran off, tossed his gun during the chase, and Officers Reynolds and Thompson eventually caught and arrested him. (RT 1948.)

Detective Roy Izumi with the San Bernardino Police department recovered the discarded gun, a .380 semiautomatic pistol, which was later identified as the weapon used to shoot both Officer Brock and Ms. Collins. (RT 1949, 1990-1992, 2084-2085, 2091-9095.)[20] Forensic Specialist

---

[19] San Bernardino Sheriff Deputy Robert Sears was flying as an observer in "40 King" and assisting in the hunt for suspects. (RT 1964-1965.)

[20] Ballistics expert William Matty of the San Bernardino Sheriff's Department identified the bullets taken from Ms. Collins as matching the .380 weapon. (RT 2084-2085, 2091-2095.) Detective David Dillon with

Randall Beasley of the San Bernardino County Sheriff's Department recovered prints from the magazine clip of this pistol which Mr. Rick Houle, a fingerprint examiner with the same department, identified as belonging to Mr. Funches. (RT 2001-2005, 2064-2067.) Gloria Hurt, a San Bernardino Police fingerprint technician also identified Mr. Funches' right thumb print as matching a print taken from the passenger-door handle at the crime scene. (RT 1807, 1810-1812.)[21]

Mr. Arthur Edwards was living next to the site where Officer Brock was shot and remembered seeing someone leave the Econo Lube area; but at the time of trial, he could remember little else. (RT 1886-1888.) On that night, however, Mr. Edwards told Officer Evans that he had seen a young white male adult, approximately six feet tall, running across Kendall Drive and then saw an African-American male adult with black clothing climb over the wrought iron fencing of the apartment complex. (RT 1891-1892.) He then heard three gunshots and saw the same African-American man reappear in the area of the Econo Lube. (RT 1892.)[22]

Later the same evening, about 10:00 p.m., Officer Manuel Castro of the California State University San Bernardino Police Department was in

---

the San Bernardino Police Department identified the location of the spent .380 shell casings taken from the crime scene. (RT 1974-1978.)

[21] Seven-year old Darin Greenwood recovered a second gun, a .357 magnum which had not been discharged, near his University Village apartment on Kendall near University, and gave it to Officer Michael Ingels of the San Bernardino Police Department on December 12, 1992. (RT 1894-1896, 1971-1973.)

[22] Officer Evans did not testify; Mr. Edwards' statement to Officer Evans was read into evidence pursuant to a stipulation between the parties. (RT 1891.)

the vicinity in response to the Acacia Park apartment homicide. He was searching for a second suspect described as an African-American male wearing a poncho-type gray colored jacket and dark colored pants. (RT 2024.) Officer Castro saw someone matching the description, standing at a phone booth at the Seven-Eleven store on Kendall. (RT 2025.) The suspect appeared nervous. Because an officer had already been shot, Officer Castro drew his gun and ordered the man to kneel down and keep his hands in his pockets while he conducted a search. (RT 2027-2028.) The suspect had no weapons and identified himself as Shawntik Wilcox with a birth date of January 19, 1967. (RT 2028.) Officer Castro arrested him and turned him over to Officer Bordger. (RT 2028.) The suspect was later identified as appellant, Demetrius Howard. (RT 2029.)

According to Mr. Craig Oguino, a criminalist with the San Bernardino sheriff's crime laboratory, fibers taken from appellant's poncho and pants were consistent with those found on the soles of Ms. Collins' shoes but could not be positively proved as belonging to appellant. (RT 2111-2112, 2120-2124, 2141-2142, 2155-2157.) The prosecution theorized that appellant was struggling with Ms. Collins on the driver side of the car when Mr. Funches shot her through the passenger-side window. (RT 1644.)

No fingerprints were found on a second gun, the .357 revolver recovered near the crime scene. (RT 2183.) Randy Collins, the victim's daughter, also could not identify the men who attacked her mother at the time of trial and did not remember what they were wearing that night. (RT 1787.) Detective Blackwell testified that in an interview he had with Randy four days after the homicide, she described the clothing of the assailants as she had on the night in question, one was wearing a white shirt

and the other man had a black coat. (RT 1805-1806.) She told him that the person on her side of the car broke the window with something he had in his hand while her mother had turned in the seat and was kicking at the person on the driver side. (RT 1806.) Initially she said she did not see a gun but heard it and then saw a gun by the stomach of the man on her mother's side of the car. (RT 1806.)

Penalty Phase

The prosecution introduced into evidence certified copies of appellant's two prior felony convictions, each for assault with a deadly weapon. (RT 2550.) Additionally, each victim of the prior felonies testified. Mr. James Pearsall testified that he was at a bachelor party for Mr. Norman Gannon in the early evening of September 29, 1989, and that several of the guys were standing around a truck having a few beers on the cul de sac. (RT 2536-2537, 2540.) A young, small African-American male, later identified as appellant, rode up on a bicycle and started yelling swear words at them. (RT 2537.) At first they ignored him and then Mr. Pearsall walked over to talk with him when another African-American man showed up. (RT 2538.) Mr. Pearsall only remembers turning to speak with this second man; he was knocked unconsciousness and spent a month and two weeks in the hospital. (RT 2538.) Appellant punched him in the jaw using brass knuckles and he fell to the ground, suffering permanent damage to his thigh, foot, hand, back, neck, and vision. (RT 2538-2540, 2550.) He can no longer taste or smell, nor is he able to work. (RT 2539-2540.)

Mr. Pearsall did not remember any argument concerning lewd comments being made to two African-American females. (RT 2539-2540.) However, the defense entered a stipulation that if Mr. Norman Gagnon testified he would state that on September 29, 1989, he was present with

Mr. Pearsall when an individual rode up on a bicycle and asked the two why they were making smart remarks to females. A heated argument ensued. (RT 2553.)

The second prior felony incident occurred on December 19, 1983. Ms. Laura Carroll was at work at the Orange Recreation Center in San Diego when a group of boys walked past her office. (RT 2542.) A few minutes later one of them came back to report that a little girl had been injured on the playground. (RT 2542.) She and her boss left to find the child but part way to the playground her boss returned to the office to answer the phone. (RT 2542.) She continued to try to locate the child with the person who reported the incident, later identified as appellant. (RT 2543.) When they did not find the child on the playground, they checked the restroom. (RT 2543.) As they walked inside, appellant grabbed her from behind and tried to force her to the ground at the back of the restroom. (RT 2543.) She punched him in the face to stun him and tried running out when he grabbed and threw her towards the back wall of the bathroom. (RT 2544.) As he held up a bloody knife, she felt something hot on her neck and realized she had been stabbed. (RT 2544.) She screamed for help and he told her to "Shut up, bitch." (RT 2545.) People heard her screams and came to her aid. (RT 2545.)

The wound to her neck was so deep it required a shunt; she also suffered from atrophy in her shoulders. (RT 2546-2547.) She underwent psychiatric care for acute post-traumatic stress syndrome and was unable to leave her house for months. (RT 2548-2549.) At the time of the trial, she continued to suffer emotionally from the attack and to have some difficulties in public places. (RT 2549.)

The parties stipulated that if Ms. Collins' daughter, Randy, were to

testify, she would say that she sometimes thinks about her mommy, misses her, and feels sad about what happened. (RT 2551.)

The defense did not call any witnesses at the penalty phase. The defense argued that appellant should not be put to death because he was not the shooter. (RT 2610.)

* * * * *

I.

THE TRIAL COURT IMPROPERLY FORCED APPELLANT TO WEAR A STUN BELT DURING THE TRIAL WITHOUT A SHOWING OF MANIFEST NEED, WITHOUT EXAMINING LESS RESTRICTIVE ALTERNATIVES, AND WITHOUT ASSESSING THE HARM TO APPELLANT, INFRINGING UPON APPELLANT'S ABILITY TO PARTICIPATE IN HIS OWN DEFENSE IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Proceedings Below

During pre-trial proceedings held on April 4, 1995, defense counsel raised a continuing objection to both the use of shackles and the use of a stun belt on appellant during trial. (CT 123; RT 504-505.) Defense counsel argued such restraints were unwarranted given that appellant had behaved properly during trial, never made any outbursts and in fact "never acted out in any manner whatsoever" during all of his court appearances. (RT 505.) Counsel also objected to the extreme shock the stun belt would administer, approximately 50,000 volts of electricity. (RT 505.)[23] Notwithstanding the

---

[23] Other than the 50,000-volt shock, the physical attributes of the stun belt are not described on the record. However, as described in *People v. Mar* (2002) 28 Cal.4th 1201, 1214-1215, " '[t]he type of stun belt which is used while a prisoner is in the courtroom consists of a four-inch-wide elastic band, which is worn underneath the prisoner's clothing. This band wraps around the prisoner's waist and is secured by a Velcro fastener. The belt is powered by two 9- volt batteries connected to prongs which are attached to the wearer over the left kidney region.... [citations omitted.] [¶] The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin

lack of any courtroom problems, the trial court denied the defense motion to have the devices removed, claiming it was a "prophylactic measure," in light of the "nature of defendant's past." (RT 505.) The trial court also found no harm in applying the restraints based on his observation that the stun belt could not be seen by the jurors. (RT 505.)[24] Appellant, admittedly nervous, was forced to testify wearing the stun belt. (RT 2185.)

The trial court's order to restrain appellant with the stun belt was made without good cause and without consideration of less prejudicial measures depriving appellant of his rights to due process, equal protection, a fair and impartial trial, to testify in his own defense, and freedom from cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and corresponding state constitutional rights under article I, §§ 7, 15 and 17.

B. A Trial Court Must Make a Finding of Manifest Need on the Record, Consider Less Drastic Alternatives, and Consider the Personal Risk of a Stun Belt to the Defendant

A defendant should attend his trial free of restraints except where the court makes a finding of "manifest need," based upon acts such as threats of

---

requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures. [citations omitted.]' "

[24] Because it is unclear from the record whether appellant was forced to wear both shackles and a stun belt during trial, appellant addresses only the stun belt issue on direct appeal and reserves the issue of shackling for appellant's habeas petition. It should be noted, however, that "[t]he trial court also erred in failing to make a full factual record of the type of restraints used, whether they were visible to the jury, and the number of armed officers in the courtroom." (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1826.)

escape or disruption of court proceedings. (*People v. Mar, supra*, 28 Cal.4th at p. 1215; *People v. Duran* (1976) 16 Cal.3d 282, 291; *People v. Harrington* (1871) 42 Cal. 165, 168; 5 Witkin, Cal. Crim. Law 3d (2004 supp.) Crim. Trial, § 15, p. 9; see also *Deck v. Missouri* (5/23/05 No. 04-5293) 2005 WL 1200394 [finding, *inter alia*, that the defendant's constitutional rights under the Fifth and Fourteenth Amendments were violated by the trial court's use of visible shackles without any showing of specific need.) And, "'*[t]he showing of nonconforming behavior* in support of the court's determination to impose physical restraints *must appear as a matter of record*. . .[citation omitted.]'" (*People v. Mar, supra*, 28 Cal.4th at p. 1217, emph. in original.) Moreover, the court should only authorize "the least obtrusive or restrictive restraint" to provide the necessary security. (*Id.* at p. 1226; see also Pen.Code § 688, requiring that any person charged with a public offense not be subjected "to any more restraint than is necessary for his detention . ..") Once the court has determined a stun belt is warranted, it must then consider the distinct features or risks of a stun belt to the defendant before compelling its use, including, *inter alia*, the potential adverse psychological consequences and health risks. (*Id.* at pp. 1225-1226.) As will be shown *infra*, the trial court abused its discretion by failing to meet any of the threshold requirements before forcing appellant to wear a stun belt restraint.

1. No Manifest Need

As is evident from the record, no need, manifest or otherwise, existed for the trial court's imposition of a stun belt restraint:

> MR. NASCIN: I would object to that [stun belt] for the same reason. He's never – in all of his court appearances through San Bernardino to here, he's never acted out in any manner whatsoever. He's never been disrespectful to the court or

anybody else. I would object on those grounds.
THE COURT: Well, it's a prophylactic measure, and given the nature of the case, I believe it would – and given the nature of Mr. Howard's past – and it is – it can't be seen which is a nice thing about it – it insures everyone that nothing unfortunate is going to happen. And it can't be seen by jurors. So it doesn't reflect poorly upon Mr. Howard in their eyes. ¶ But your objections are noted.

(RT 505.)

In earlier proceedings held on April 22, 1994, the trial court had even allowed appellant to appear in court without shackles:

MR. NACSIN: Excuse me, your Honor, before we go any further, I would request that my client, Mr. Howard be uncuffed.
THE COURT: Okay, any objection?
MR. NACSIN: There's never been any disturbance by Mr. Howard whatsoever in any court proceeding and we've been to court many times.
THE COURT: Any objection?
MR. HESS: No objection.
THE COURT: Mr. Howard may be uncuffed.

(RT 6.)

Nothing happened between the April 22, 1994, hearing and the April 4, 1995, hearing, to warrant the use of the stun belt. Appellant's courtroom behavior was indisputably and consistently above reproach. (RT 505.) Deputy District Attorney Hess even agreed that appellant's handcuffs should be removed at the April 22, 1994, hearing. Moreover, the prosecutor remained conspicuously silent at the subsequent hearing on whether appellant should wear a stun belt. (RT 504-505.) In contrast, the same prosecutor vigorously supported restraints for appellant's co-defendant, Mr. Funches, citing to incidents which occurred both in and out of the

courtroom. (RT 7-9.) The prosecutor surely would have objected to the removal of restraints at the first hearing and requested restraints at the second hearing if, like his co-defendant, appellant had posed any type of security risk.

This Court held in *Mar* that the principles enunciated in *Duran* require a showing of manifest need before the court may order a defendant restrained with conventional shackles or require that he wear a stun belt in court. (*People v. Mar, supra*, 28 Cal.4th at p. 1219, relying upon *People v. Duran, supra*, 16 Cal.3d 282, 293.) A manifest need arises only upon a showing of nonconforming conduct or threat of escape by the defendant. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1215; Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 7th ed. 2004) § 31.28, pp. 874-876.) There are numerous examples of nonconforming, disruptive or violent behavior to warrant restraints. (See e.g., *People v. Pride* (1992) 3 Cal.4th 195, 231 [defendant repeatedly threatened violence and showed hostile behavior towards deputies who transported him to and from the courtroom and the trial court was concerned over his "muscular" build and "imposing" size]; *People v. Price* (1991) 1 Cal.4th 324, 402 [defendant flicked ash onto officer's pants, hit the officer in the jaw, and engaged in other hostile acts towards officers]; *People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1424-1425 [defendant was shackled but only after punching his attorney in the face in courtroom]; *People v. Loomis* (1938) 27 Cal.App.2d 236, 239 [defendant shouted obscenities in court, kicked at counsel table, fought officers, and threw himself on the courtroom floor]; *People v. Hillery* (1967) 65 Cal.2d 795, 806 [defendant resisted and had to be taken bodily to court].) Evidence of an intention to escape also warrants restraints. (See e.g., *People v. Kimball* (1936) 5 Cal.2d 608, 611 [defendant expressed an

intent to escape, threatened to kill witnesses, and secreted a lead pipe into the courtroom]; *People v. Burwell* (1955) 44 Cal.2d 16, 33 [defendant wrote letters stating an intent to arm himself and escape from the courtroom with the help of friends]; see also, *People v. Burnett* (1967) 251 Cal.App.2d 651, 655; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-864.)

The Ninth Circuit's physical restraint doctrine is analogous to California's, requiring "compelling circumstances" as opposed to "manifest need," an adequate record, and consideration of less restrictive alternatives. (*Gonzalez v. Pliler* (9th Circ. 2003) 341 F.3d 897, 901-902; *Castillo v. Stainer* (9th Cir. 1992) 983 F.2d 145, 147-148.) Similarly, "compelling circumstances" that physical restraints are necessary may occur when there is unruly behavior (*Stewart v. Corbin* (9th Cir. 1988) 850 F.2d 492, 497 [defendant physically assaulted officers in the courtroom, threatened a judge and an attorney, tore off and took part of an exhibit, disobeyed the orders of several judges, and officers testified that he could not be controlled by a leg brace alone]), or a serious threat of escape. *(United States v. Collins* (9th Cir. 1997) 109 F.3d 1413, 1418[defendant, *inter alia*, discussed faking medical emergencies and escape plans with other inmates, spoke with inmates who had handcuff keys, planned to kill a custodial officer, and had scraped caulking from his window]; *Loux v. United States* (9th Cir. 1968) 389 F.2d 911, 919 [defendants had history of escape attempts and had begun preparations for another escape].)

Here, appellant's behavior was above reproach under any standard. (RT 504-505.) There was no evidence that appellant had attempted to escape, was planning an escape, or had even discussed an escape. (Cf., *People v. Kimball, supra,* 5 Cal.2d at p. 611; *People v. Burwell, supra*, 44 Cal.2d at p. 33; *People v. Burnett, supra,* 251 Cal.App.2d

at p. 655; *People v. Stabler, supra,* 202 Cal.App.2d at pp. 863-864; *United States v. Collins, supra,* 109 F.3d at p. 1418; *Loux v. United States, supra,* 389 F.2d at p. 919.) Neither had appellant engaged in any disruptive, unruly, nonconforming or violent conduct. (Cf., *People v. Price, supra,* 1 Cal.4th at p. 402; *People v. Loomis, supra,* 27 Cal.App.2d at p. 239; *People v. Hillery, supra,* 65 Cal.2d at p. 806; *People v. Jacobo, supra,* 230 Cal.App.3d at pp. 1424-1425; *Stewart v. Corbin, supra,* 850 F.2d at p. 497.) Appellant is also slight in build and stature so that he did not pose the type of security concerns found with the muscular and imposing defendant in *People v. Pride, supra,* 3 Cal.4th at p. 231.[25] Appellant had, by all accounts, exhibited model behavior. Moreover, appellant had already shown that he would conduct himself appropriately without restraints; he sat without incident through a court hearing on April 22, 1994, unrestrained. (RT 6.)

The trial judge's sole justification for the stun belt was that it was a "prophylactic measure given the nature of the case . . the nature of Mr. Howard's past . . ." (RT 505.) Contrary to the court's comments, the fact that appellant had been previously convicted of and was currently charged with a violent crime, does not, without more, justify the use of restraints. (*Deck v. Missouri, supra,* 2005 WL 12000394 *3, *9 [reversal where the trial court imposed shackles on defendant during his penalty re-trial, failing to justify it by "a risk of escape . . . or a threat to courtroom security" and instead erroneously relied upon the sole fact that the defendant "'has been convicted'"]; *People v. Mar, supra,* 28 Cal.4th at p. 1218, relying upon

---

[25] The second suspect (besides Funches) in the homicide was described by witnesses as between five feet four and six inches tall weighing approximately 140-150 pounds. (RT 1855, 2181.)

People v. Duran, supra, 16 Cal.3d at p. 293; *People v. Seaton* (2001) 26 Cal.4th 598, 651 ["[t]he circumstance that defendant was charged with a violent crime . . . does not establish a sufficient threat of violence or disruption to justify physical restraints during trial"]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1212 [improper to shackle defendant at penalty phase of capital trial based on mere assessment that defendant had "nothing to lose by attempting to escape"]; *United States v. Samuel* (4th Cir. 1970) 431 F.2d 610, 614-615 [status as a convicted felon, standing alone, insufficient to warrant shackling.]) In sum, "[t]he record is completely devoid of any action taken by the defendant in the courtroom that could be construed as a security problem" and the trial court abused its discretion in forcing appellant to wear the restraint. (*Gonzalez v. Pliler, supra,* 341 F.3d at p. 902 [reversal where defendant improperly restrained with stun belt for showing a "little attitude"]; *People v. Martinez* (2004 Ill.App.3d) 808 N.E.2d 1089, 1091-1092 [reversal for forcing appellant to wear a stun belt during murder trial based solely on trial court's custom to impose it on violent offenders.])

2. No Record

Duran requires "a due process determination of *record* that restraints are necessary." (*People v. Duran, supra*, 16 Cal.3d at p. 293, fn. 12, emph. added; accord *People v. Mar, supra*, 28 Cal.4th at p. 1217; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1116 [trial court abused its discretion by failing to make any record of necessity for restraints]; *People v. Cox* (1991) 53 Cal.3d 618, 651 [the trial court erred in failing to make a proper record before ordering defendant restrained]; *United States v.Durham* (11th Cir. 2002) 287 F.3d 1297, 1305-1306 [judgment vacated, *inter alia*, because court abused its discretion by failing to make findings sufficient to justify

the use of the stun belt]; *United States v. Theriault* (5th Cir. 1976) 531 F.2d 281, 285 [court required to put the reasons for it decision to use shackles on the record]; *Deck v. Missouri, supra,* 2005 WL 12000394 *1 ["that the trial court acted within its discretion – founders on the record, which does not clearly indicate that the judge weighted the particular circumstances of the case"].)

In *Durham*, the appellate court found that given the novel technology involved with a stun belt, the trial court "need[ed] to make factual findings about the operation of the stun belt, addressing issues such as the criteria for triggering the belt and the possibility for accidental discharge" and that "the court's rationale must be placed on the record." (*United States v. Durham, supra*, 287 F.3d at pp. 1306-1307.) The trial court's discretion in this matter is also not "absolute" and its reasons for imposition of such an extraordinary security measure "must be disclosed in order that a reviewing court may determine if there was an abuse of discretion." (*United States v. Samuel, supra*, 431 F.2d at p. 615; see also, *Cal. Criminal Law: Procedure and Practice* (Cont.Ed.Bar 7th ed. 2004) § 31.28, pp. 874-877.)

The appellant in *Riggins v. Nevada* (1992) 504 U.S. 127, 129, was similarly charged with robbery and murder. In that case, the trial court unconstitutionally forced Mellaril, an antipsychotic drug, upon the defendant during trial. (*Ibid.*) In analogizing the forced wearing of a stun belt to the forced administration of antipsychotic drugs, this Court noted that in *Riggins*, "due process principles required reversal . . . because the trial court had 'failed to make findings adequate to support forced administration of the drug. [Citation omitted.]'" (*People v. Mar, supra*, 28 Cal.4th at p. 1228.)

Here, the trial court similarly failed to make adequate findings for

imposing this highly intrusive method of restraint. Moreover, it is most likely that the court confused appellant with his former co-defendant, Mitchell Funches, who had numerous incidents of disruptive courtroom behavior, including, *inter alia*, throwing fecal matter at the judge in an earlier proceeding. (RT 6-9.) Mr. Funches had also requested that his shackles be removed on a number of occasions. (ACT A-1:69, 71-75; ACT E 569; ART A 35-48.) In denying Mr. Funches' request, the trial court similarly referred to his "past" problems. (RT 6.) Regardless of whether or not the trial court confused appellant with his co-defendant, it "made no supportable findings on even the most basic of the factual issues related to this restraint." (*United States v. Durham, supra*, 287 F.3d at p. 1308.) The court's imposition of the stun belt on appellant "'in the absence of a *record* showing of violence or a threat of violence or other nonconforming conduct . . . constitute[s] an abuse of discretion.'" (*People v. Mar, supra*, 28 Cal.4th at p. 1217, citing *People v. Duran, supra*, 16 Cal.3d at p. 291, emph. added; *People v. Cox, supra,* 53 Cal.3d at p. 651; *People v. Givan, supra,* 4 Cal.App.4th at p. 1116; *Riggins v. Nevada, supra,* 504 U.S. at p. 129.)

3. No Consideration of Less Restrictive Alternatives

Due process also requires "that restraints be imposed only 'as a last resort.'" (*Illinois v. Allen* (1969) 397 U.S. 337, 344; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 721.) The "judge must consider the benefits and burdens associated with imposing physical restraints in the particular case" and "[i]f the alternatives are less onerous yet no less beneficial, due process demands that the trial judge opt for one of the alternatives." (*Id.* at p. 728; see also, *Gonzalez v. Pliler, supra*, 341 F.3d at p. 900, citing *Duckett v.*

Godinez (9th Cir. 1995) 67 F.3d 734, 748 [before a court orders the use of physical restraints on a defendant at trial, it "'must be persuaded by compelling circumstances . . .[and] . . . must pursue less restrictive alternatives . . .'"]; *Rhoden v. Rowland* (9th Cir. 1999 172 F.3d 633, 636 ["due process requires the trial court to engage in an analysis of the security risks posed by the defendant and to consider less restrictive alternatives before permitting a defendant to be restrained"]; (*People v. Jackson, supra,* 14 Cal.App.4th at p. 1826 [abuse of discretion to leave shackling decision to security personnel and failure to consider less restrictive alternatives.]))

In *Mar*, this Court went one step further and required that:

> [a] trial court must take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and should give considerable weight to the defendant's perspective in determining whether traditional security measures - such as chains or leg braces - or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard.

(*People v. Mar, supra*, 28 Cal.4th at p. 1228.)

Here, "there was no evidence that the trial court considered [the stun belt] to be a last resort, rather than a first resort." (*People v. Jackson, supra,* 14 Cal.App.4th at p. 1826.) The trial court gave no "weight to the defendant's perspective" or the psychological consequences of the restraint on a testifying defendant and never considered the numerous less draconian alternatives to the stun belt. (*People v. Mar, supra*, 28 Cal.4th at p. 1228.) If any disruptive behavior had occurred in the courtroom, the trial court had the option of admonishing the defendant and threatening him with additional restraint, or using additional shackles, or bringing in additional security personnel (see e.g., *People v. Miller* (1990) 50 Cal.3d 954,

1003-1005 [trial court exercised its discretion properly by not utilizing physical restraints and reducing the number of bailiffs as the threat of disruption appeared to diminish]; *Holbrook v. Flynn* (1986) 475 U.S. 560, 565-566 [presence of armed guards in courtroom not "inherently prejudicial."]) The court considered none of these or any other options, nor the specific impact of the stun belt on appellant, thereby abusing its discretion.

The trial court lacked any need, manifest or otherwise, for forcing appellant to wear a stun belt. It further failed to state any factual basis for authorizing the stun belt, failed to consider less obtrusive or restrictive restraints, and failed to assess the risks and the potential for harm in using the stun belt on this particular defendant. Any one of these failures standing alone would signal an abuse of discretion; all of them combined leads to an inescapable conclusion of abuse. (*People v. Mar supra*, 28 Cal.4th at pp. 1215-1226; see also, *People v. Hill* (1998) 17 Cal.4th 800, 841-842 [court abused its discretion by deferring to Sheriff's Office on need for shackling without making independent determination]; *People v. Duran, supra*, 16 Cal.3d at p. 293, fn. 12.)

C. Appellant Was Seriously Prejudiced

1. The Psychological Impact

The harmful psychological impact from wearing a stun belt is well documented and acknowledged by many jurisdictions, including this Court:

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

(*People v. Mar, supra*, 28 Cal.4th at p. 1227, fn. 8 [citation omitted.])

Amnesty International explains that

> [t]o be effective, [the stun belt] relies on the wearer's fear of the severe pain and humiliation that could follow activation. Such fear is a leading component of the mental suffering of a victim of torture or cruel, inhuman or degrading treatment which is banned under international law.[26]

(U.S.A.: The Stun Belt - Cranking Up the Cruelty," (4/6/1999), Amnesty International webcite, [www.amnestyusa.org].) This same "mental suffering," the constant fear of a severe shock being administered at any time, is also banned by the prohibition against cruel and unusual punishment under the Eighth Amendment.

The stun belt has an undisputed harmful psychological impact on the wearer, notwithstanding its lack of visibility to jurors.[27] This Court has

---

[26] The international law includes, *inter alia*, the United Nations Minimum Rules for the Treatment of Prisoners and the International Covenant on Civil and Political Rights to which this country is a party. (See, U.S.A.: Use of Electro-Shock Stun Belts (6/12/96) and "U.S.A.: Cruelty in Control? The Stun Belt and Other Electro-Shock Equipment in Law Enforcement" (as of 11/9/04), [www.amnestyusa.org]; see also, Russev, "Restraining U.S. Violations of International Law: An Attempt to Curtail Stun Belt Use and Manufacture in the United States Under the United Nations Convention Against Torture" (2002) 19 Ga.St.U.L.Rev. 603.)

[27] The trial court found the belt was not visible to jurors while appellant was seated at counsel table (RT 505), but the record is silent as to whether it was visible when appellant took the stand to testify in his own behalf. Appellant had to walk in front of the jury to the witness stand and "if the stun belt protrude[d] from the defendant's back to a noticeable degree, it is – at least possible that it may be viewed by a jury. If seen the belt 'may be even more prejudicial than handcuffs or leg irons because it implies that unique force is necessary to control the defendant.'[Citation omitted.]" (*United States v. Durham, supra,* 287 F.3d at p. 1305.)

recognized that stun belts "may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury" noting that the Supreme Court of Indiana has banned the use of stun belts in courtrooms altogether because other forms of restraint "can do the job without inflicting the mental anguish . . ." (*People v. Mar, supra*, 28 Cal.4th at pp. 1226-1227.) Other courts have similarly found that "[w]earing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case." *(United States v. Durham, supra,* 287 F.3d at p.1306; see also *Illinois v. Allen, supra,* 397 U.S. at p. 344 [restraints may impede a defendant's ability to communicate with his counsel and participate in his defense.]) A defendant's ability to follow the events at trial would be seriously compromised. He would be "occupied by anxiety over the possible triggering of the belt" and " likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial." (*United States v. Durham, supra,* 287 F.3d at p. 1306.) The restraint also creates "a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles." (*Gonzalez v. Pliler, supra,* 341 F.3d at p. 900.) A primary advantage to a defendant's presence at trial is his ability to communicate with his counsel and "[s]tun belts may directly derogate this 'primary advantage.'" (*Gonzalez v. Plilier, supra*, 341 F.3d at p. 900, relying upon *Spain v. Rushen, supra*, 883 F.2d at p. 720.)

> The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely "hinders a defendant's participation in defense of the case," chill[ing] [that] defendant's inclination to make any movements during trial--including those movements necessary for effective communication with counsel.

(*Gonzalez v. Plilier, supra*, 341 F.3d at p. 900 [citation omitted].) Knowing that any second appellant could be hit with an electric shock powerful enough to cause, *inter alia*, self-urination or defecation, confusion, the cessation of breathing, severe burning, paralysis, or heart irregularities, is tantamount to psychological torture. (See, Dahlberg, "The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use is Permissible Under the United States and Texas Constitutions" (1988) 30 St. Mary's L.J., 239, 249-252.) The trial court's determination that the device was harmless because it could not be seen by jurors is therefore wholly unfounded. (RT 505; *People v. Mar, supra*, 28 Cal.4th at p. 1219; *Gonzalez v. Pliler, supra,* 341 F.3d at pp. 900-901 [reversal where state court improperly forced defendant to wear stun belt after observing that "the belt is not visible to anyone"]; *United States v. Zygadlo* (11th Cir. 1983) 720 F2d 1221,1223 [even leg shackles which are not visible to jury "may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow."])

Because the restraint would have affected appellant psychologically, it could have also impacted his testimony and demeanor, and more importantly the jury's perception of him, particularly while testifying. While it is "not unusual for a defendant, or any witness, to be nervous while

testifying," given "the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict . . . it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial." (*People v. Mar, supra*, 28 Cal.4th at p. 1224; see also, *People v. Harrington, supra,* 42 Cal. at p. 168 [a restraint upon a prisoner during trial "inevitably tends to confuse and embarrass his mental faculties," particularly where the defendant is testifying in his own behalf]; accord, *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 105.)[28]

The increased anxiety from wearing the belt impacts a defendant's demeanor on the stand and "this demeanor, in turn, impacts a jury's perception of the defendant, thus risking material impairment of and prejudicial affect on the defendant's 'privilege of becoming a competent witness and testifying in his own behalf.'" (*Gonzales v. Pliler, supra*, 341 F.3d at pp. 900-902 [citations omitted.])

In the present case, as in *Mar*, appellant testified on his own behalf. His defense rested "completely on the jury's evaluation of [his] credibility" and that evaluation "depended in large part upon [his] demeanor. . ." (*People v. Mar, supra*, 28 Cal.4th at p. 1224.) It is difficult to conceive how the forced wearing of the stun belt could not have adversely affected appellant's demeanor let alone his testimony; he had to testify while worrying about an intentional or accidental 50,000 volt charge piercing his

---

[28] Amnesty International states that the proponents of the stun belt "euphemistically refer to 'anxiety'" in place of "fear." (U.S.A.: Cruelty in Control? The Stun Belt and Other Electro-Shock Equipment in Law Enforcement,"*supra*, [www.amnestyusa.org]

body like the sword of Damocles.[29]

> At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall expression on the trier of fact, an expression that can have a powerful influence on the outcome of the trial."

(*Riggins v. Nevada, supra*, 504 U.S. at p. 142; see also, Dahlberg, *supra*, 30 St. Mary's L.R. at pp. 289-290 [an accused's fear of the stun belt's painful physical consequences would affect his outward physical demeanor].) "Alternatively, a juror may simply notice that the defendant is watching whomever is holding the monitor," or "form the belief that the defendant's nervous guise is a result of guilt, therefore destroying the impartiality of the jury." (*Id.* at p. 290.)

2. Appellant Was the Most Important Witness in his Defense

> The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are [sic] essential to due process of law in a fair adversary process.' [Citation omitted.] The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony . . .The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right

---

[29] The sword of Damocles is from Greek mythology. Damocles had a sharp sword hung over his head, tethered only by a single horsehair, putting him in danger every moment and causing him much angst. (Webster's New World Dict. (3d college ed. 1991) p. 349.)

> to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. [Citation omitted.] Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense,' [citation omitted], is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself.

(*Rock v. Arkansas* (1987) 483 U.S. 44, 51-52.)

Appellant had a fundamental right to testify on his own behalf (*Rock v. Arkansas, supra,* 483 U.S. at pp. 51-52) and the forced wearing of a stun belt seriously compromised that right. (*People v. Mar, supra*, 28 Cal.4th at p. 1224; *People v. Harrington, supra,* 42 Cal. at p. 168; *Gonzales v. Pliler, supra*, 341 F.3d at pp. 900-902; *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 105.) Appellant's entire defense was one of mistaken identity, that he was in the wrong place at the wrong time. Moreover, the entire case hinged on the jury's evaluation of the witness' credibility.[30] While the prosecution could place appellant in the general vicinity, there were no fingerprints linking appellant to either the murder weapon or the victim's car, unlike co-defendant Funches whose prints were found on both. (RT 1810-1812, 2064-2067, 2084-2085, 2091-2095.) Appellant also had a

---

[30] The only forensic evidence linking appellant to the crime was some cotton and polyester fibers from appellant's clothing which were "consistent" with fibers found on the victim's shoes. (RT 2124.) However, as pointed out by the defense on cross-examination of the prosecution fiber expert, Dr. Oguino, cotton and polyester are very common, and unlike fingerprints, cannot be positively proved as belonging to appellant. (RT 2155-2157.)

plausible explanation for being at that apartment complex which witnesses corroborated. Appellant testified he was in the Kendall Street area that night looking for his aunt and uncle's apartment. (RT 2206.) Stipulated testimony from appellant's uncle confirmed that in December of 1991, he was living on Kendall Drive, that he had offered appellant some cash to make a fresh start after appellant's release from prison, and that he had told appellant to come by on a Sunday evening. (RT 2295.) Roxanne Winn, appellant's girlfriend at the time, similarly testified that while she could not remember the exact date, she had driven appellant over to Kendall Drive to see his aunt and uncle. (RT 2201-2202.) The two had an argument, appellant exited the car on Kendall, and Ms. Winn drove off. (RT 2204-2205.) The prosecution's key witness was Cedric Torrence who testified he heard appellant and Funches discuss a "jack" or robbery earlier that same day and that appellant was carrying a gun. (RT 1662, 1668.) However, Torrence admitted that he had lied in an earlier conversation with Detective Blackwell about the day's events, including seeing appellant with a gun. (RT 1697.) Moreover, after appellant's trial, Torrence was overheard by two independent witnesses on a Sheriff's transit bus admitting that he lied about appellant's involvement in the crime. (See Arg. II.) Torrence also had a child with appellant's sister and the defense attempted to show that Torrence was using his testimony as leverage in a custody dispute. (RT 1705.) That the jury had significant difficulty figuring out whom to believe in this case is borne out by its request for a re-read of appellant's testimony. (CT 207, 209; RT 2469.) The same jury was apparently still troubled at the penalty phase and requested read back, *inter alia*, of Torrence's and Sgt. Blackwell's testimony. (RT 2628, 2693.) It also requested information on the effect of future changes in the death

penalty laws and the possibility of parole. (RT 2621, 2628, 2693.)

In *Mar*, as in the present case, it was "not explicitly apparent from the transcript of the proceedings what effect the stun belt had on the content of defendant's testimony or on his demeanor while testifying." (*People v. Mar, supra*, 28 Cal.4th at p. 1213.) Nonetheless, this Court observed that Mr. Mar was nervous while testifying when his counsel tried to keep the defendant from speaking too rapidly:

> [Counsel]: Stop just a minute. You get a little excited; don't you, Mr. Mar? [Defendant]: Yeah, I do.
> [Counsel]: Have you ever testified before?
> [Defendant]: No.
> [Counsel]: Are you a little nervous?
> [Defendant]: Very.

(*People v. Mar, supra*, 28 Cal.4th at p. 1213, quotation marks omitted.)

A similar exchange occurred in the present case, showing that appellant was nervous from the moment he took the stand to testify on his own behalf:

> Q. Mr. Howard, good morning.
> A. Good Morning.
> Q. Little nervous today?
> A. Yes.
> Q. In fact, you've been feeling ill over the last weekend, haven't you?
> A. Yes.
> Q. Have you ever testified before?
> A. No.

(RT 2185.)

Appellant was not only so nervous it may have made him sick, but he

had trouble following questions. (RT 2228, 2231, 2239, 2242.)[31] And, as with Mr. Mar, the prejudice to his case was not diminished because appellant "was able to testify at length to his version of events" or because "the stun belt was not activated" at any time during trial. (*People v. Mar, supra*, 28 Cal.4th at p. 1213; RT 2185-2255.) Nor would the impact have been limited to the guilt phase since appellant's nervous demeanor could have made him less sympathetic to a jury deciding between life and death.

The wearing of the stun belt thus created "the possibility that the substance of [appellant's] own testimony, his interaction with counsel, or his comprehension at trial were compromised . . .". (*Riggins v. Nevada, supra*, 504 U.S. at p. 135.) Appellant's "behavior, manner, facial expressions, and emotional responses, or their absence combine[d] to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial" and indeed could have signaled deceit and guilt to the jury. (*State v. Calderon* (Kan. 2000) 13 P.3d 871, 879.) A conscientious reviewing court cannot therefore determine

---

31

Q. And when you got to Florez street [sic] who went where that was in the car?
A. What do you mean who went where? (RT 2228)
Q. You've seen him since, haven't you?
A. I know who he is now because of this case.
Q. But you had, prior to seeing him after this case started, December 6, 1992?
A. Can you repeat that? Wait, repeat that." (RT 2231.)
Q. How long had you and her ben together up to this point?
A. What do you mean being together? (RT 2239.)
Q. And you went back into the complex. Did you knock on any doors on the complex?
A. What do you mean went back into the complex?
(RT 2242.)

beyond a reasonable doubt that the stun belt had no effect on the jury's impression of his guilt and reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24; *United States v. Durham, supra,* 287 F.3d at p. 1297 [finding the error of federal constitutional dimension]; *Gonzalez v. Pliler, supra,* 341 F.3d at p. 902; *People v. Martinez, supra,* 808 N.E.2d at pp. 1091-1092.) Even under the more stringent *Watson* standard, given the jury's notes for read-back of testimony and that the case hinged on credibility, there is more than a reasonable probability that the error affected the outcome of appellant's trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837; (*People v. Mar, supra*, 28 Cal.4th at p. 1225.)

* * * * *

II.
THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S NEW TRIAL MOTION WHEN NEWLY DISCOVERED EVIDENCE CORROBORATED APPELLANT'S INNOCENCE

A. Introduction

On November 15, 1995, appellant filed his motion for new trial in which he submitted affidavits from two impartial witnesses who established that the prosecution's key witness, Cedric Torrence, had lied under oath. (CT 369-371.) Appellant additionally submitted an affidavit from appellant's former co-defendant, Mitchell Funches, naming a person other than appellant as his accomplice. (CT 372.)

After the jury returned its guilty verdict against appellant on May 10, 1995, appellant found himself sitting directly behind the prosecution's key witness, Cedric Torrence, on a Sheriff's transit bus. (CT 364; RT 2761-2762.) Torrence had been coincidentally placed on the same bus following his arrest on an outstanding traffic warrant. (CT 364, 407.) David H. James and Michael Nunez, who were also in custody and on the same bus, were close enough to appellant and Torrence to overhear their conversation. (CT 369, 371.) Neither James nor Nunez knew Torrence or appellant. (CT 369-371.) All the men were shackled. (CT 364-371.)

In support of his new trial motion, appellant presented affidavits from both James and Nunez concerning the conversation they overheard between appellant and Torrence during their May 10th bus ride. (CT 369-371.) In these affidavits, James and Nunez stated that they overheard Torrence admit to appellant that he had lied about appellant's involvement in the crime, that he was sorry, and that he had been worried

about threats he had received from those who were actually involved. (CT 369-371.)

Other evidence in support of the new trial motion included an affidavit from Mitchell Funches confirming that appellant was not with him on the night of Ms. Collins' homicide and naming Kevin "Kino" Allen as his real accomplice. (CT 372.)

The trial court denied appellant's motion for new trial on December 7, 1995. (CT 456; RT 2778, 2781.) This erroneous denial by the trial court of appellant's meritorious new trial motion was an abuse of discretion which deprived him of his right to due process and a fundamentally fair trial (U.S. Const., Amends. 5, 14; Cal. Const., art. I, §§ 7, 15, 17; *Estelle v. Williams* (1976) 425 U.S. 501, 505; *Holbrook v. Flynn, supra,* 475 U.S. at pp. 565-566; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; his right to a reliable adjudication (U.S. Const. Amend. 8; *Beck v. Alabama* (1980) 447 U.S. 625, 638; and his right to present a defense (U.S. Const., Amend. 6; *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691.) A denial of a motion for new trial is a proper matter for appellate review and appellant's conviction should be reversed accordingly. (Pen.Code §§ 1237(a), 1466(2)(a).)

B. James, Nunez and Funches Provided New, Admissible, and Material Evidence of Appellant's Innocence Which Was Not Cumulative and Which Directly Contradicted the Prosecution's Strongest Evidence

A motion for new trial "is particularly important to a defendant who has been found guilty of a capital offense." (*People v. Edgmon* (1968) 267 Cal.App.2d 759, 766.) In addressing a motion for new trial claim, this Court has held that "[t]rial courts have a constitutional duty to insure that defendants be accorded due process of law, and this duty may not be limited by statute." (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.)

Penal Code section 1181, subdivision (8) provides the trial court with the statutory power to grant a new trial after independently weighing whether the evidence presented is: (1) newly discovered and material in nature; (2) not merely cumulative; (3) such that a different verdict would probably result and that the new evidence could not have been produced at the previous trial; and (4) admissible in a court of law. (See also 6 Witkin, Cal. Crim. Law 3d (2000 Suppl.) Crim Judgm, §§ 91, 98, pp. 20, 122; *People v. Beyea* (1974) 38 Cal.App.3d 176, 202.) The test on appeal for denial of a motion is whether the trial court abused its discretion. (*People v. Minnick* (1989) 214 CalApp3d 1478, 1482.)

Here, the facts show that the exculpatory evidence was newly discovered and could not with reasonable diligence have been produced at the trial. Appellant's serendipitous bus conversation with the key prosecution witness did not occur until after the guilt phase of the trial. Additionally, Funches' affidavit could not have been obtained prior to trial or October 27, 1995, because Funches' attorney would not allow his client either to be interviewed or to testify prior to entry of a plea. (CT 365.)

The affidavits in support of the new trial motion were also indisputably material. Funches' affidavit completely exonerated appellant of any involvement in the crime while affidavits from two impartial witnesses, James and Nunez, attested to Torrence's perjury. When, as here, the key prosecution witness admits he lied during the case-in-chief, such evidence is irrefutably material. (*People v. Love* (1959) 51 Cal.2d 751, 756 [new trial properly granted where witness who had previously testified about defendant's threats against deceased recanted]; see also *People v. Minnick, supra,* 214 Cal.App.3d at p. 1482 [new trial where child victim-witness recanted]; *United States v. Sutton* (9th Cir. 1972) 455 F.2d 974

[alleged perjury by main prosecuting witness was ground for motion for new trial]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1209 [perjury by key prosecution witness entitled petitioner to relief notwithstanding that the "false evidence [was] presented in good faith"]; *Commonwealth v. Krick* (Pa. 1949) 67 A.2d 746, 749 [motion for a new trial should have been granted where the prosecuting witness' recantation "destroy[ed] and obliterate[d] the testimony of the one witness upon whose testimony the defendant was convicted"].) The "materiality of this newly discovered evidence cannot be questioned," where three new witnesses come forward, two of whom are completely unrelated to the offense, and seriously impugn the credibility of the key prosecution witness, thereby undermining the prosecution's entire case. (*People v. Shepherd, et. al* (1936) 14 Cal.App.2d 513, 519 [reversible error to deny the motion for a new trial where new evidence was obtained from co-defendant who confessed to the crime, implicating two others]; *Sutton v. State* (Ark. 1938) 122 S.W.2d 617, 618 [noting that "where the material evidence upon which a verdict is grounded, and without which it would not have been justified, is given by a witness who subsequently repudiates this testimony, a new trial ought to be granted [citations omitted]"].)

Evidence of Torrence's perjury was not just material; he was the "'make-or-break witness for the state, [and] there is a reasonable probability that, without all the perjury, the result of the proceeding would have been different. [Citation omitted.]" (*Killian v. Poole, supra*, 282 F.3d at pp. 1209-1210.) Torrence was the only person directly linking appellant to the crime. He was the only witness to testify he heard appellant discuss a "jack" or robbery earlier that same day. (RT 1662, 1668.) Torrence was also the only person to testify he saw appellant with a gun. (RT 1657.)

None of the others playing football or hanging out in the garage with Torrence, appellant, and Funches heard appellant discuss anything about a robbery. Without Torrence's testimony, the prosecution's case fell apart. There was only some generic fiber evidence connecting appellant directly to the crime and a description of generic clothing worn by the second assailant - a white top or sweater and black pants. The fingerprint evidence recovered from the victim's car and the murder weapon were conclusively identified as belonging to Funches, not appellant. Randy Collins could not identify appellant as her mother's assailant. (RT 1787.) Officer Brock, the surviving shooting victim, identified Funches, not appellant, as his assailant. (RT 1920, 1928.) And, while other witnesses placed appellant in the general vicinity, he had a plausible reason, corroborated by witnesses, for being in the area and for lying to the police about his identity. (RT 2028, 2218, 2295, 2301-2305, 2262-2263.)

In determining whether the trial court abused its discretion on a motion for new trial, "each case must be judged from its own factual background." (*People v. Dyer* (1988) 45 Cal.3d 26, 50.) The facts in this case are uniquely persuasive in favor of appellant for a number of reasons. This is not a situation where a co-defendant is opportunistically recanting prior inculpatory testimony against his accomplice. Recantations of such witnesses are often given little credence. (See, e.g., *People v. Dyer* (1988) 45 Cal.3d 26, 50.) Here, Mitchell Funches never testified at appellant's trial and in fact, under his attorney's advice, refused to provide any evidence to appellant until his own plea negotiations were finalized. (CT 365.) Moreover, by naming his actual accomplice, Funches was

exposing himself to a "snitch jacket"[32] in prison, something undesirable at best and fatal at worst. (See, e.g., *People v. Carter, supra*, 30 Cal.4th at p. 1187, fn 3.) Typically, inmates would much rather remain silent (and alive) under such circumstances than be labeled with a "snitch jacket" by fellow inmates. (See, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 828.)[33] The fact that Mitchell Funches was willing to expose himself to a "snitch jacket" shows that his statement was reliable and worthy of favorable consideration.

Appellant had even more compelling evidence than Funches' affidavit in support of his new trial motion; he had affidavits from two other "persons with nothing to gain." *(People v. Williams* (1962) 57 Cal.2d 263, 275 [defendant entitled to new trial where defense produced four affidavits from unbiased persons refuting testimony of State witness that defendant had robbed him].) James and Nunez did not choose to be shackled next to Torrence on the bus and had nothing to gain nor any motive to falsely report what happened. Indeed, James wanted to avoid any involvement in what he perceived might be a "racial type situation." (CT 370.) Where unbiased witnesses are available to refute the State's key prosecution witness, the

---

[32] In other words, to acquire a reputation as an informant. *(People v. Carter* (2004) 30 Cal.4th 1166, 1187, fn 3.)

[33] Amazingly, the trial court acknowledged the impact of a "snitch jacket" on Torrence, but not on Funches. (RT 2764-2765.) The trial court apparently reasoned that Torrence was most likely afraid of being labeled a "snitch," and this accounted for his apology and admission to Howard on the bus that he had perjured himself on the stand. (RT 2764.) This makes no sense. Torrence had already "snitched," and was not offering to recant to authorities. Also, as defense counsel pointed out, Torrence was on his way to Barstow while appellant was being transported to Victorville, so he had no reason to fear appellant. (RT 2762.)

defendant should be given the opportunity to present the evidence to the trier of fact. (*People v. Williams, supra*, 57 Cal.2d at p. 275.)

Torrence's testimony was the lynchpin of the prosecution's case and all three affidavits presented by appellant had strong indicia of reliability and trustworthiness. In Funches' case, the reliability is evinced by his risking exposure to a "snitch jacket." With James and Nunez, they were undeniably independent reluctant witnesses with no ties whatsoever to the case.

Where, as here, "the newly discovered evidence contradicts the strongest evidence introduced against the defendant," the denial of appellant's motion warrants reversal. (*People v. Martinez* (1984) 36 Cal.3d 816, 823 [defendant entitled to new trial after newly discovered evidence corroborated appellant's innocent explanation for his palm print being on a burglarized tool]; *People v. Randle* (1982) 130 Cal.App.3d 286, 293-294 [defendant entitled to new trial where following conviction on sexual assault, defendant produced affidavits impugning credibility of victim]; *People v. Gilbert* (1944) 62 Cal.App.2d 933, 938 [new trial should have been granted where only circumstantial evidence of defendant's presence at crime scene]; *People v. Williams, supra*, 57 Cal.2d at p. 275.)

Nor was the evidence merely cumulative of Torrence's lack of credibility. On cross-examination Torrence admitted he initially lied to Detective Blackwell about appellant having a gun and other matters. (RT 1697-1700.) However, this new evidence did "more than merely impeach [Torrence] - it tend[ed] to destroy [his] testimony by raising grave doubts about [his] veracity and credibility. [His] credibility [was] central to the proof of the crime." (*People v. Rundle, supra*, 130 Cal.App.3d at p. 293.) And, even "assuming that the evidence may be cumulative . . . if it is

such that a different result upon a retrial is reasonably probable as the result of such new evidence . . . the new trial should be granted." (*People v. Shepherd, supra*, 14 Cal.App.2d at p. 518; accord, *People v. Williams, supra*, 57 Cal.2d at pp. 272-273.) As previously set forth, without Torrence's testimony, the prosecution's case fell apart. Torrence directly linked appellant to the crime and without his testimony, the prosecution had only some generic fiber evidence and circumstantial evidence placing appellant at the scene. And, because the evidence placing appellant in the general vicinity of the crime was capable of competing reasonable interpretations, the jury would have been required to adopt that interpretation pointing to defendant's innocence. (CALJIC No. 2.01.) In sum, "[t]he jury's verdict cannot be sustained without [Torrence's] testimony." *(Commonwealth v. Krick, supra,* 67 A.2d at p. 749.)

C. The Judge Improperly Relied on Irrelevant Evidence from the Witnesses' Rap Sheets in Denying the Motion

> [O]ne of the most prolific causes of miscarriages of justice is the reluctance of trial judges to exercise the discretion with which they are clothed to grant a new trial when the circumstances show that justice would be thereby served. . .

(*People v. Minnick, supra,* 214 Cal.App.3d at p. 1481, quoting *People v. Love, supra* 51 Cal.2d at pp. 757-758; accord, *People v. Randle, supra,* 130 Cal.App.3d at pp. 293-294.)

The trial court's role in deciding a motion for new trial under these circumstances is to make a threshold determination of credibility, not to decide whether the proffered testimony is true or false. (*People v. Minnick, supra*, 214 Cal.App.3d at p. 1482;
6 *Witkin*, Cal. Criminal Law (3d ed. 2000) Crim Judgm, § 97, p. 130.)

It is difficult to imagine any evidence more "credible" than two

strangers with no connection to any of the parties in this case overhearing and attesting to a conversation on a bus. Yet, the trial court decided that James and Nunez were not credible based on their probation reports and rap sheets which the prosecution attached to its opposition. (CT 409-419, 428-441; RT 2764.) The trial court also dismissed Mitchell Funches' affidavit based on earlier Penal Code section 1368 proceedings in which the trial court determined Funches had attempted to feign mental illness. (RT 69, 86, 444-445, 2764.)

The trial judge reasoned that:

> [a]ssuming that Mr. Funches were to testify, I would think that there would be serious problems in anybody believing what Mr. Funches had to say about this matter. There are similar problems with the declarants . . . given their criminal backgrounds.

(RT 2764)

The trial court inappropriately relied upon the rap sheets and probation reports of James and Nunez and earlier competency proceedings of Funches to wholly disregard appellant's new evidence. The trial court disregarded the affidavits from James and Nunez not for any reason specific to this case but on the general grounds of their criminal records. Whether they were serial killers or Mr. Rogers, they were unwitting bystanders who overheard a conversation, lacking "any motive to falsify the actual happening of events, and it is to be presumed that each was telling the truth. [Citation omitted.]" *(People v. Williams, supra*, 57 Cal.2d at p. 272.) Otherwise no witness with a criminal background could ever pass the threshold "credibility" test on a motion for new trial. Moreover, the truth or falsity of the statements should have been left to the jury to decide

following a new trial. (*People v. Minnick, supra*, 214 Cal.App.3d at p. 1482.)

No deference should be accorded the trial court's factual findings here in any event because "[t]he deference accorded factual findings derives from the fact that the [judge] had the opportunity to observe the demeanor of witnesses and their manner of testifying." *(In re Gonzalo Marquez* (1992) 1 Cal.4th 584, 603; see also Evid. Code, § 780(a).) The court never took the opportunity to observe the demeanor of James and Nunez nor their manner of testifying. And the trial court's observations of Mitchell Funches during trial were limited to pre-trial competency proceedings. In that situation Funches would have been far more self-motivated to fabricate a defense for himself than in a post-conviction hearing where his statements were not self-serving and his fear of acquiring a "snitch jacket" made them trustworthy.

Relief was granted under comparable circumstances in *People v. Hairgrove* (1971) 18 Cal.App.3d 606. In *Hairgrove*, the trial court denied a new trial motion where the defendant offered the sworn affidavit from another individual that he had committed the crime and that the defendant neither accompanied him nor knew anything about it. (*Id.* at p. 609.) In reversing, the appellate court concluded that the trial court should have "taken advantage of what purported to be critical new evidence," (*Ibid.*) and admonished the lower court as follow:

> Under these circumstances the trial court should have taken affirmative action to call [the affiant] as a witness and examine him under oath. Had the court done so [the affiant] testimony might have established (a) that there was substantial merit to [defendant's] motion, or (b) that [the affiant] had perjured himself to help out a friend. Either outcome would have contributed positively to the

> administration of justice. Even if [the affiant's] testimony had turned out to be inclusive, at least the court would have had all available information before it in ruling on the motion for a new trial.

(*Id.* at pp. 610-611.)

Here, the trial court had a duty to "consider the probative force of the [new] evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. (Citations omitted.)" *(People v. Robarge* (1953) 41 Cal.2d 628, 633.) The probative force of this new evidence should have compelled the trial court to at the very least hold an evidentiary hearing in order to assess the witnesses' credibility so as to have "all available information before it in ruling on the motion for a new trial." (*People v. Hairgrove, supra,* 18 Cal.App.3d at p. 609.) The trial court abused its discretion in improperly refusing to hold so much as a hearing notwithstanding that three witnesses could corroborate appellant's claim of innocence. *(Ibid.; People v. Minnick, supra,* 214 Cal.App.3d at p. 1481; *People v. Robarge, supra,* 41 Cal.2d at p. 633; *People v. Randle, supra,* 130 Cal.App.3d at pp. 293-294.)

D. <u>The Error Was Prejudicial</u>

> It is a fundamental cornerstone of due process that the Constitution "cannot tolerate a ... criminal conviction obtained by the knowing use of false evidence." (*Miller v. Pate* (1967) 386 U.S. 1, 7.) The prosecution offends due process when false evidence is used, whether it solicits the evidence or simply allows it "to go uncorrected when it appears." (*Napue v. Illinois* (1959) 360 U.S. 264, 269 (citations omitted).) Due process is equally offended by direct statements which are untrue and the eliciting of testimony which "taken as a whole" gives the jury a "false impression." *(Alcorta v. Texas* (1957) 355 U.S. 28, 31.) When false evidence is used, even unwittingly, a new trial is required "if there is a reasonable

> probability that [without the evidence] the result of the proceeding would have been different." (*United States v. Young* (9th Cir. 1994) 17 F.3d 1201, 1204.)

(*Whaley v. Thompson* (N.D. Oregon 1998) 22 F.Supp.2d 1146, 1162-1163.)

The "false impression" given by Torrence's perjured testimony to the jury is best viewed by looking at what happened at Funches' trial. *(Alcorta v. Texas, supra,* 355 U.S. at p. 31) Torrence did not testify at Funches' trial.[34] Notwithstanding Torrence's absence, the prosecution had a much stronger case against Funches than appellant. The evidence against Funches included an eyewitness (Officer Brock), a murder weapon, and fingerprints, all directly connecting him to the crime. (RT 1920, 1928, 2001-2005, 2064-2067, 1810-1812.) Yet, the jury hung on the special circumstance and Funches received life without the possibility of parole even though he shot two people. (RT 2773, 2777.) By contrast, in appellant's case, the prosecution had no fingerprints, no eyewitnesses, and no murder weapon to connect appellant to the crime. What the prosecution did have was a fragile, close case held together by some generic fiber evidence and most importantly, Torrence. Had appellant been given the opportunity to show that Torrence fabricated the entire story, a different result would have been more than a "reasonable probability," it would have been a virtual certainty. (*United States v. Young, supra,* 17 F.3d at p. 1204.) All this new evidence had to do was to raise a reasonable doubt in the jury's mind as to appellant's guilt. "If the jurors even found a reasonable

---

[34] Appellant has filed a separate motion requesting that this Court take judicial notice of the records in Mitchell Funches' Case Nos. FSB 278297 and FSB 03736, and additionally has arranged for the transfer of these records to this Court pursuant to the California Rules of Court.

possibility that [Torrence's] testimony was [untrue], it is unlikely that they would find defendant's guilt proved beyond a reaonable doubt." (*People v. Martinez, supra*, 36 Cal.3d at p. 823.)

Torrence's testimony was not only critical to appellant's guilt phase, it necessarily affected his death verdict as well. Torrence's testimony did more than merely connect appellant to the crime. He testified that "Demetrius said he couldn't get caught, you know, or he'd go out shooting . . ." (RT 1663.) Portraying appellant as someone willing to shoot his way out of any problem, when jurors would otherwise know him as someone who had never even fired a gun, could have only tainted and inflamed their image of him and moved them towards a death verdict. Moreover, during the course of penalty phase deliberations, the jury requested that Torrence's testimony be read back to them. (CT 305; RT 2627-2692.) This request for read back shows a jury focused on Torrence's testimony in deciding whether appellant should live or die. A jury, concerned enough about a witness's testimony and credibility to ask that the testimony be read again, could have easily tipped the scale in appellant's favor in light of this new evidence.

> Where witnesses under oath retract evidence given by them upon a trial their recantation and prior testimony are subject to a careful scrutiny, and if doubt be entertained as to the particular time the witnesses were truthful the doubt should, especially in a capital case, be resolved in favor of a defendant. The application for a new trial in this case is out of the ordinary. In view of the conflict of evidence, the danger of a greater evil should be avoided and the defendant should have the opportunity of meeting the question of his guilt before a jury qualified by observation and scrutiny to determine the truth or falsity of the charge against him.

(*People v. Shilitano* (NY 1916) 112 N.E. 733, 745 (dis. opn. of Hogan, J.)

Due process "cannot tolerate" a conviction based upon perjured testimony. (*Miller v. Pate, supra*, 386 U.S. at p. 7; *Napue v. Illinois, supra*, 360 U.S. at p. 269; *Alcorta v. Texas, supra*, 355 U.S. at p. 31; see also, *Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972, 980.) Appellant's motion for new trial should have been granted and his conviction must be reversed accordingly.

* * * * *

III.
THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT FAILED TO HOLD A COMPETENCY HEARING AND GRANT APPELLANT'S MOTION FOR A NEW TRIAL DESPITE SUBSTANTIAL EVIDENCE APPELLANT'S MEDICATION HAD RENDERED HIM INCOMPETENT

It is well established that when there is a genuine doubt regarding the competence of a criminal defendant, the trial judge must suspend criminal proceedings and hold a competency hearing. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *People v. Hale* (1988) 44 Cal.3d 531, 539-40; *Blazak v. Ricketts* (9th Cir. 1993) 1 F.3d 891, 893, fn. 1, cert. den. (1994) 511 U.S. 1097.) Here, the trial court was put on notice concerning the appellant's competence at the end of trial. The proper remedy would have been to suspend proceedings immediately, investigate appellant's claim, and grant a new trial. The trial court's failure to do so, despite a clear indication of incompetence, deprived appellant of his rights to substantive and procedural due process of law, a fair trial, trial by jury, confrontation and cross-examination, effective assistance of counsel, equal protection and reliable guilt and penalty verdicts as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The death verdict must be vacated accordingly. (*Drope v. Missouri* (1975) 420 U.S. 162, 172.)

A. Proceedings Below

On December 7, 1995, the trial court heard from appellant directly on a motion the court treated as an "additional" motion for a new trial. (CT 456; RT 2767-2772.) Appellant informed the court that he had been taking anti-psychotic medication prescribed by a psychiatrist during his

trial. (RT 2767-2768.) Appellant said he did not want to be on this medication and that his psychiatrist had been on vacation during his trial. (RT 2768.)[35] Appellant felt that taking this medication had adversely affected his ability to cooperate with his attorney and had prejudicially affected his demeanor before the jury, including, *inter alia*, his facial expressions, emotional responses, mannerisms, credibility, persuasiveness, and the degree to which he invoked sympathy. (RT 2768.) Appellant cited to federal constitutional law in support of his argument. (RT 2768-2769.) He also said that he had brought this situation to his attorney's attention but counsel never brought it to the court's attention. The trial court then questioned defense counsel who said "I don't have anything to say about this motion . . ." (RT 2769.) At that point, the court inquired "would anybody disagree that is a matter that should be looked into immediately before we proceed further?" (RT 2769.) The prosecutor objected. (RT 2769.) The prosecutor stated that in his observations of appellant, "during his own testimony, he would smile from time to time, respond properly . . . and seemed very coherent." (RT 2770.) Appellant responded that even though he might not be "drooping over" in his outward appearance, the medication still affected his coherence and mental acuteness. (RT 2771.) Following the prosecution's comments, however, the court did a 180-degree turn from its earlier position and instead of wanting to suspend proceedings to look into appellant's competency immediately, the court summarily rejected appellant's motion. It commented that it had "the same issue raised by Mr. Funches and his

---

[35] The court determined that appellant's treating psychiatrist was Dr. Tan who was employed by the Sheriff's Office out of West Valley Detention Center. (RT 2770.)

counsel" and that there were "just too many coincidences with what Mr. Howard has related this morning to what Mr. Funches and his counsel had to say." (RT 2771-2772.)[36] The court further noted that in its own "perceptions of Mr. Howard . . . he was coherent and responsive, and in no way appeared to be impaired by virtue of any medication or anything else." (RT 2772.) The court apparently felt that if the issue had been viable, appellant's trial attorney would have raised it himself. (RT 2772.) The court acknowledged that a hearing on appellant's competency might be necessary on a petition for writ of habeas corpus but felt that the present motion had been brought by appellant "in bad faith" and "as a way of creating another issue for appellate review." (RT 2772.)

B. The Verdict Must Be Vacated Because the Trial Court Failed to Suspend Proceedings and Order a Competency Hearing After Appellant Declared a Doubt about his Own Competency

It is a venerable principle of our criminal law that a criminal defendant may not be tried unless he is competent and that the state must give the defendant access to procedures for determining his competency. (*Pate v. Robinson, supra,* 383 U.S. at p. 386; *Drope v. Missouri. supra*, 420 U.S. at p. 172; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1087.) Trial of an incompetent defendant violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution (*Medina v. California* (1992) 505 U.S. 437, 449; *Cacoperdo v. Demonsthenes* (9th Cir.

---

[36] The court determined that Funches was feigning mental illness. (RT 444.) In contrast to the present facts, however, proceedings against Funches were suspended while his competency was evaluated and he was afforded a full evidentiary hearing on the matter. (RT 1(B) 3; 69, 105-446.)

1994) 37 F.3d 504, 510, cert. den. (1994) 514 U.S. 1026) and article I, section 15 of the California Constitution.

The rule that a criminal defendant who is incompetent should not be required to stand trial is "fundamental to an adversary system of justice" (*Drope v. Missouri, supra*, 420 U.S. at p. 172) and "has deep roots in our common-law heritage." (*Medina v. California, supra*, 505 U.S. at p. 446.) As Justice Kennedy emphasized in *Riggins v. Nevada*:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

(*Riggins v. Nevada, supra,* 504 U.S. at pp. 139-140 (conc. opn. of Kennedy, J.); see also *Cooper v. Oklahoma* (1996) 517 U.S. 348.)

The test for competence to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – whether he has a rational as well as factual understanding of the proceedings against him." (*Boag v. Raines* (9th Cir. 1985) 769 F.2d 1341, 1343, citing *Dusky v. United States* (1960) 362 U.S. 402, 402 (*per curiam*); *People v. Lawley* (2002) 27 Cal.4th 102, 131 [defendant is mentally incompetent if he or she is unable to understand the nature of the criminal proceedings or to "assist counsel in the conduct of a defense in a rational manner"].)

The court's duty to conduct a competency hearing arises when substantial evidence raising doubt as to mental competence is presented at any time before judgment. (*Drope v. Missouri, supra*, 420 U.S. at p. 181; *People v. Danielson* (1992) 3 Cal.4th 691, 726, (overruled on other grounds

in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1071); *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110.)

1. A Trial Court Must Conduct A Competency Hearing Whenever There is a Bona Fide Doubt as to the Defendant's Competency to Proceed

"Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a [competency] hearing. . . ." (*Pate v. Robinson, supra*, 383 U.S. at p. 385.) A bona fide doubt should exist where there is substantial evidence of incompetence. (*Moran v. Godinez* (9th Cir. 1995) 57 F.3d 690, 695; see also *Drope v. Missouri, supra*, 420 U.S. at p. 180; *People v. Hale, supra*, 44 Cal.3d at p. 539.)[37] When a defendant shows that the evidence before the trial court raised such a doubt as to competency, the conviction must be set aside; if the prosecution then wishes to retry the defendant, a hearing must be held to determine present competency. (*Pate v. Robinson, supra,* 383 U.S. at p. 387; *Drope v. Missouri, supra*, 420 U.S. at p. 183.)

It bears emphasis that the initial question is *not* whether the defendant is definitely incompetent, but merely whether there is sufficient doubt in that regard:

> Under the rule of *Pate v. Robinson* (1966) 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815, a due process evidentiary hearing is constitutionally compelled at any time that there is

---

[37] Courts have used different terms to describe the level of "doubt" required before a trial court must hold a competency hearing. (*Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 516, fn. 1 [collecting cases using "sufficient doubt," "good faith doubt," "genuine doubt," "reasonable doubt," and "substantial question].) Regardless of the term used, the standard has remained the same for decades. (*Blazak v. Ricketts, supra,* 1 F.3d at p. 893.)

> "substantial evidence" that the defendant may be mentally incompetent to stand trial. "Substantial evidence" is a term of art. "Evidence" encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from *any source, there is a doubt that cannot be dispelled by resort to conflicting evidence.* The *function of the trial court in applying Pate's substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? It[s] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue.* It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.

(*Moore v. United States* (9th Cir. 1976) 464 F.2d 663, 666, cert. den. (1976) 429 U.S. 919, emph. added.)

The constitutionally mandated procedure governing competency questions in California is codified in Penal Code sections 1367 *et seq.* (See *People v. Pennington* (1967) 66 Cal.2d 508, 518 [noting that *Pate v. Robinson* transformed Penal Code section 1368 into a constitutional requirement].) Section 1367 provides that a trial may not occur if "the defendant is unable to understand the nature of the criminal proceedings *or* to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, §1367, subd. (a), emph. added.)

Section 1368 provides the mechanism for ensuring the protection of

the defendant by imposing two obligations on the trial court.[38] First, section 1368 requires the trial court to inquire about the defendant's mental competency when *any doubt* about such competency arises. In addition, section 1368 imposes a duty on a trial court to order a competency hearing if there is substantial evidence that the defendant is incompetent. (*People v. Guzman* (1988) 45 Cal.3d 915, 963 (overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn 13) ["a competency hearing is mandatory when 'substantial' evidence of the accused's incompetence has been introduced"].) Evidence is "substantial" if it raises a reasonable doubt about the defendant's competence to stand trial. (*People v. Danielson, supra*, 3 Cal.4th at p. 726; see also *People v. Weaver* (2001) 26 Cal.4th 876, 953.)

As set forth more fully below, appellant provided the lower court with substantial evidence and sufficient doubt regarding his competence. He informed the court that the anti-psychotic medication made him drowsy, affected his ability to cooperate with his attorney, affected his demeanor, his

---

[38] Section 1368 provides in relevant part that:

> (a) If ... a doubt arises in the mind of the trial judge as to the mental competence of the defendant, he or she shall state the doubt on the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.... At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings ... to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing," and even if "counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing.

facial expressions, his emotional responses, his mannerisms, his credibility, his persuasiveness, and the degree to which he invoked sympathy. (RT 2768.) Nor does it matter that the judge personally believed appellant to be competent. (RT 2772.) When the court becomes aware of substantial evidence which objectively generates a doubt, the trial court must declare a doubt and suspend proceedings *even* if the trial judge's personal observations lead the judge to a belief the defendant is competent. (*People v. Pennington, supra*, 66 Cal.2d at p. 518; *People v. Jones*, 53 Cal.3d at p. 1153.) Due process requirements are not satisfied if the court merely hears the evidence to guide it in determining if it should declare the existence of a doubt as to the defendant's competency; the trial court has no discretion on whether or not to order a competency hearing once there exists substantial evidence giving rise to a doubt regarding competency. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 69.) If a state fails to observe its statutorily prescribed procedures aimed at testing whether a defendant is competent to stand trial, then that defendant's right to procedural due process has been violated. *(Drope v. Missouri, supra*, 420 U.S. at p. 172; *Matheney v. Anderson* (7th Cir. 2001) 253 F.3d 1025, 1040.)

It is also of no import that appellant's counsel did not advance his cause in this matter. Competency cannot be waived by defendant or his counsel. (*In re Davis* (1973) 8 Cal.3d 798, 808, cert. den. (1973) 414 U.S. 870; see also *Pate v. Robinson, supra*, 383 U.S. at p. 384; *People v. Marks* (1988) 45 Cal.3d 1335, 1340, 1342 .) The trial court would have been obligated to conduct a hearing even if defense counsel had objected or asserted a belief that the defendant was competent. (*People v. Guzman, supra*, 45 Cal.3d at p. 963; Pen. Code §1368, subd. (b).) Here, defense counsel was merely silent. (RT 2769.)

2. There Was Substantial Evidence Before the Court That Appellant Was Incompetent to Suspend Proceedings

There are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Drope v. Missouri*, *supra*, 420 U.S. at p. 80.) The Supreme Court has recognized that in some cases many factors may be significant, while in others, just one factor may be enough to require that a competency hearing be held. (*Ibid.*)

In a recent appellate court decision, *People v. Harrison* (2005) 125 Cal.App.4th 725, 731, the court criticized the type of "Catch 22" situation an appellant can find himself in when seeking a competency determination:

> while, the California Supreme Court has repeatedly stated that a competency hearing is required whenever there is evidence that 'raises a reasonable doubt about the defendant's competence to stand trial' [citation omitted] in practice, the court has essentially required that the defendant establish his incompetence before a trial court will be required to hold a competency hearing. In our view, the holdings in these cases appear to have lost sight of the fact that, '[t]he function of the trial court in applying *Pate*'s substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency.' [Citation omitted.]

A defendant on trial for his life should not be put in the untenable position of having to prove his incompetence before being granted a competency hearing. Here, appellant specified for the court numerous functions affected by the medication, from facial expressions to cooperating with counsel, thereby providing forceful and sufficient indications that he

lacked the requisite competence during the trial. Moreover, once the trial court had evidence from "any source," that evidence raised "a doubt which cannot be dispelled by resort to conflicting evidence." (*Moore v. United States, supra,* 464 F.2d at p. 666.) In other words, the trial court should not have attempted to resolve the issue of competence on its own but rather should have assumed the evidence presented by appellant to be true in which case it raised a reasonable doubt as to appellant's competency. (Ibid.; *Pate v. Robinson, supra*, 383 U.S. at p. 385.) Once that doubt was raised, proceedings should have been suspended and the issue of competency investigated further – as was done with co-defendant Funches. Instead, the trial court erroneously and unilaterally decided the ultimate issue of competence. The lower court decided this ultimate issue without even inquiring as to why appellant's medication had been prescribed in the first place (other than it was generally an anti-psychotic drug according to appellant), the name of the medication, the dosage, the side effects, whether appellant was forced to take it as he indicated, or whether Dr. Tan had considered less intrusive medications which would have served a similar purpose. In *People v. O'Dell* (2005) 126 Cal.App.4th 562, 571, a court's order to involuntary medicate a defendant was vacated where "the hospital never specified the actual anti-psychotic medication it was proposing to administer to defendant." The appellate court recognized that " '[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.' [Citation omitted.]" (*Id.* at p. 572.) In sum, further inquiry into appellant's competence was constitutionally mandated. (See *Drope v. Missouri, supra*, 420 U.S. at p. 179.)

Failure to make further inquiry into petitioner's competence to stand trial denied him a fair trial. (*Drope v. Missouri, supra*, 420 U.S. at pp. 174-

175.) There was ample evidence in this case giving rise to a genuine, reasonable and bona fide doubt regarding appellant's competence to stand trial. The trial court was thus obligated to take the next step, even if his personal observations led him to believe appellant competent (*People v. Pennington, supra*, 66 Cal.2d at p. 518; *People v. Jones* (1991) 53 Cal.3d 1115, 1153), by holding a competency hearing.

> Under Section 1368 of the Penal Code *the trial court has no power to proceed with the trial once a doubt arises as to the sanity of the defendant.* In trying defendant without first determining at a hearing his competency to stand trial, *the court both denied to defendant a substantial right* [citations omitted] *and pronounced judgment on him without jurisdiction to do so. In such cases the error is per se prejudicial.* Nor, as the United States Supreme Court specifically held in *Pate v. Robinson, supra*, 383 U.S. 375, 387, may the error be cured by a retrospective determination of defendant's mental competency during his trial.

(*People v. Pennington, supra*, 66 Cal.2d at p. 521, emph. added; accord, *People v. Marks, supra*, 45 Cal.3d at p. 1344; *People v. Hale, supra*, 44 Cal.3d at p. 541; *People v. Stankewitz* (1982) 32 Cal.3d 80, 94.) The court's failure to hold a hearing in this case, in the face of substantial evidence of appellant's incompetence, resulted in appellant being tried while incompetent; the error was structural and requires reversal of appellant's judgment of death. (*Rohan v. Woodford* (2003) 334 F.3d 803, 818, citing *Satterwhite v. Texas* (1988) 486 U.S. 249, 256-257.)

* * * * *

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND A RELIABLE JUDGMENT OF DEATH WERE VIOLATED BY THE ERRONEOUS AND PREJUDICIAL ADMISSION OF A GUN, NOT THE MURDER WEAPON, WHICH LOOKED LIKE A GUN APPELLANT HAD PREVIOUSLY HANDLED

A. The Trial Court Erroneously Admitted a Ruger .357 Handgun When There Were No Fingerprints Linking Appellant to the Gun and the State's Informant Could Only Describe the Gun as "Average" and "Black"

1. Background

Six days after the homicide, a seven year old child found a loaded black .357 revolver near apartment number three in the apartment complex at 1616 Kendall Street. (RT 1580, 1894-1896, 1972.)[39] The boy's mother turned the gun over to police. (RT 1580.)

It is undisputed that this gun was not the murder weapon. The prosecutor sought to have it admitted on the theory appellant had used the weapon during the attempted robbery. (RT 1577-1580.) The sole evidence linking appellant to this weapon was that appellant had been seen in the vicinity of apartment number three where the gun was found and that the State's key witness and informant, Cedric Torrence, had seen him earlier in the day with a gun. (RT 1580.)

During in limine proceedings, defense counsel made, *inter alia*, relevancy, foundational, and Evidence Code section 352 objections to the

---

[39] Laurie Manzella, who testified she saw appellant in her apartment hallway that night, lived in apartment number two of this complex. (RT 1848.)

gun's admission, arguing the lack of any evidence tying appellant to the gun. (RT 1574, 1577, 1592, 1595, 1601.)

Even the trial judge openly pressed the prosecutor about the lack of any evidence linking appellant to the gun, asking:

> THE COURT: Is there anything else to tie that gun to Mr. Howard other than the black .357 at that location and Mr. Howard was seen at that location? Anything else, fingerprints, admissions? MR. HESS: No fingerprints. That's it.

(RT 1580.)

The prosecutor admitted that Torrence had not identified this gun at the grand jury proceedings but believed he would be able to identify it at trial. (RT 1580-1581.) On April 25, 1995, the lower court held an Evidence Code section 402 hearing regarding the gun's admissibility and erroneously granted its admission. (RT 1613.) As discussed *infra*, the trial court abused its discretion in permitting admission of a gun which was not the murder weapon, and therefore irrelevant. Even assuming arguendo there was any relevance, the probative value was outweighed by its prejudicial effect and thus it should have been excluded under Evidence Code section 352.

2. The Trial Court Erroneously Admitted the Gun Based Upon Cedric Torrence's Generic and Inconsistent Identification and the Prosecution's Improper Prompting

At the 402 hearing, Torrence testified that on the day of the homicide, he saw appellant with a .357 black handgun. (RT 1603.) He could only describe the gun as "average." (RT 1603.) Moreover, his gesture to estimate the gun's length was between twelve and sixteen inches.

(RT 1603.)[40] Mr. Torrence was shown only the one gun, Exhibit 3, a .357 black handgun. (RT 1604.) When asked whether he could identify it as appellant's weapon, Torrence responded: "All I know is it was a black .357. I really didn't–". (RT 1603-1604.) The prosecutor quickly interrupted, prompting Torrence for an identification, asking him alternately if it was the actual gun or if the gun looked like the one he saw that night. Torrence responded, "yes," to these questions. (RT 1604.)

On cross-examination, Torrence could not say whether Exhibit 3 was in fact a foot long and instead said that it was "average." (RT 1604.) He admitted hesitancy in identifying the gun. (RT 1604.) When asked if he could really identify the gun, he responded, "It's a black gun." (RT 1605.) When asked a third time if he was sure it was the gun, he changed course and asserted, "That's the gun." (RT 1605.) As defense counsel aptly noted, after giving halting and equivocal responses, "**Now** you [Torrence] are sure." (RT 1605, emph. added.)

Additionally, Mr. Torrence twice testified that he saw appellant with the gun in the garage. (RT 1603, 1605.) It was only during cross-examination, when defense counsel began to question Torrence about the other people who were in the garage at the time who had not seen the gun, that Torrence once again changed direction:

> Q. BY MR. NACSIN: Who was present when this happened?
> A. Just – well, I was the only one present when I seen the gun.
> Q. Where was everybody else?
> A. They was – they was – they wasn't around.
> Q. Who was in the garage at the time you saw the gun?
> A. I seen the gun before I was in the garage.

---

[40] Defense counsel estimated Torrence's gesture as between twelve and sixteen inches; the trial judge estimated it at about a foot. (RT 1603.)

Q. Didn't you just tell us you saw the gun in the garage?
A. I seen it in the garage; before the garage.

(RT 1606-1607.)

Seeing the direction defense counsel was taking, Torrence once again changed his testimony. He now remembered that he had actually seen appellant with the gun before going to the garage, when appellant left the gun under Torrence's bed at his house. (RT 1607-1608.) He claimed appellant retrieved the gun from his house after playing football and before going to the garage. (RT 1611.)[41]

Torrence also changed his testimony over how many times he saw appellant exhibit a weapon. At first Torrence testified that, while in the garage, appellant took out the gun from his back pant's waist about three times, over a period of time, but before the others arrived at the garage. (RT 1611-1612.) Later during cross-examination, Torrence said appellant pulled his gun out in the garage only once, not three times. (RT 1612.)

Cedric Torrence's story changed so many times that it rendered his testimony wholly untrustworthy. The prosecution simply could not carry its burden of linking the gun to appellant. As defense counsel noted, it was "only after he was pushed [by the prosecutor] did he say, 'Yes, that's the gun . . .". (RT 1613.)

The transcript shows a nervous prosecutor who stopped Torrence from giving answers the prosecutor did not want and who spoon fed

---

[41] Several witnesses (Roxanne Winn, Danny Rivera, George Rivera, Patricia Washington, and Segonia Washington) who had been with appellant earlier that day, either in the garage or elsewhere, testified that appellant did not have a weapon.
(RT 2081, 2263, 2277, 2280, 2297-2298, 2302.)

Torrence cues to get the answers he did want. Initially, when asked to identify Exhibit 3, Torrence could not do so. Instead, he said "I really didn't –" but was abruptly cut off by the prosecutor. (RT 1604.) By cutting off Torrence and re-asking the question, the prosecutor was telling Torrence that his initial response, a denial, was unacceptable. The next time Torrence followed the prosecutor's cue and identified the weapon. Asked enough times, Torrence eventually gave the answer the prosecution wanted.

If there was any doubt about Torrence's inability to identify the gun it was completely dispelled on cross-examination when he: (1) admitted he was having trouble with the identification (RT 1604) and (2) twice refused to answer whether Exh. 3 was the gun, saying only that the gun was "average" and that "[i]t's a black gun." (RT 1605.) Torrence's testimony was nothing more than a one-gun-fits-all identification.

Torrence further discredited himself when he was painted into a corner on cross-examination regarding where he observed appellant with the gun. Torrence first claimed to have seen appellant with the gun in the garage but once defense counsel reminded him that others were present in the garage who also would have seen the gun, he changed his story. (RT 1607-1611.)

The trial court was charged with exercising its discretion under Evidence Code section 402, to "determine the question of admissibility of [this gun]. . ." (Evid. Code, § 402(a), (b).) In determining the admissibility of evidence, the trial court has broad discretion. (*People v. Mattison* (1971) 4 Cal.3d 177, 187.) On appeal, a trial court's decision to admit evidence, after a hearing pursuant to Evidence Code section 402, is reviewed for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167;

People v. Clair (1992) 2 Cal.4th 629, 676.)

In the instant case, the trial court abused its discretion when it admitted the gun on the basis of Torrence's vague testimony that it was "black," "average" and between "twelve and sixteen inches." (RT 1605.) While there are situations where a "similar" weapon might be admissible solely for the purpose of illustration (*People v. Poggi* (1933) 136 Cal.App. 1, 2; *People v. Aguirre* (1958) 158 Cal.App.2d 304, 306), or where a similar weapon was retrieved from defendant's home (*People v. Gardner* (1954) 128 Cal.App.2d. 1, 6), that is not the case here. Indeed, it is blatantly obvious from the transcript that Torrence would have identified **any** .357 gun presented to him and the trial court's decision to admit Exhibit 3 makes a mockery out of a 402 hearing.

Worse, because the 402 hearing served as a dress rehearsal, Torrence was able to testify at trial without any of the jitters, hesitancy, or confusion he showed during the 402 hearing; making an absolute positive identification of Exh. 3. (RT 1657, 1664, 1675-1676.)

3. A Gun Found Six Days after the Homicide on the Grounds of a Nearby Apartment Complex Where Appellant Had Been Was Insufficient Evidence to Establish Appellant's Ownership of the Gun

The prosecution's attempt to establish a foundation for the gun's admission was also based in part on where the gun was found, in a nearby apartment complex not far from where appellant had been seen. (RT 1580.) Several people besides appellant had occasion to be on the same grounds of the apartment complex. To suggest that appellant's presence, not at the site where the gun was found, but in the same general vicinity, is sufficient to establish his ownership of the weapon, would equally apply to any of the residents or guests of that apartment complex. In other words, had any of

the other residents or guests of that complex been unfortunate enough to have been suspect in this case, the prosecutor could have likewise bootstrapped ownership of this weapon to them.

Moreover, one would have to believe that a fully loaded .357 handgun left on the ground, even if tossed in the bushes, would not be found for a full six days in a common area where at least one child and probably others played. (RT 1580, 1895.)

The prosecutor admitted he lacked any fingerprint evidence whatsoever to connect appellant to this gun. (RT 1580.) As previously set forth, the prosecutor could certainly not meet his burden of establishing a foundation for the gun's admission with Torrence's generic testimony. The rationale used to connect appellant to a weapon because he had been seen in the same general vicinity is similarly generic in that it could apply uniformly to any number of people at the complex. Additionally, the gun was not even found on the day of the homicide but several days later. By overlooking these gapping flaws in the prosecutor's attempt to lay a foundational basis for the admission of Exhibit 3, the trial court permitted inadmissible and highly prejudicial evidence to be used against appellant.

4. The Gun Was Both Irrelevant and Prejudicial in Violation of Evidence Code Section 352

The Supreme Court has long held that "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn.6.) Here, the gun at issue should not have been admitted because it lacked any relevant or competent purpose since there was no credible evidence tying it to appellant. Also, it was not the murder

weapon. And, even assuming arguendo it was relevant, it was more prejudicial than probative.

5. The Trial Court Failed to Weigh the Prejudice Under Section 352

When a motion invokes section 352, the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value. (*People v. Green* (1980) 27 Cal.3d 1, 25, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 836, 834, fn. 3.)

> [T]he reason for the rule is to furnish the appellate courts with the record necessary for meaningful review of any ensuing claim of abuse of discretion; an additional reason is to ensure that the ruling on the motion 'be the product of a mature and careful reflection on the part of the judge,' [citations omitted]

(*People v. Montiel* (1985) 39 Cal.3d 910, 924.)

In the instant case, defense counsel made a section 352 objection to the admission of the gun, but the trial court never addressed this objection nor stated its reasoning under section 352 for admitting the gun. (RT 1577, 1601-1613.)

Under the rule enunciated in *Green*, it was error for the trial court to fail to make a finding on the record that the probative value of the evidence outweighed the risk of prejudice. (*People v. Green, supra*, 27 Cal.3d at p. 25; *People v. Frank* (1985) 38 Cal.3d 711, 732.) Moreover, the record does not support an inference that the trial court even considered a weighing process. (*People v. Montiel, supra,* 39 Cal.3d at p. 924.) The trial judge limited its finding to the foundational objection only:

> THE COURT: The issue is one of foundation for admissibility of the evidence with regard to the finding of the firearm and it's [sic] admissibility, and in my view the evidence is sufficient so it will be admitted.

(RT 1613.)

For this and the other reasons set forth above, the trial court abused its discretion in finding the .357 gun was admissible evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) The improper admission of evidence also made it impossible for appellant to get a fair trial in violation of his constitutional rights to due process. (*McKinney v. Rees, supra,* 993 F2d at p. 1379.) The state evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of those rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) This expectation is protected against arbitrary deprivation under the Fourteenth Amendment. (*Ibid*; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804.) Because the improper admission of evidence rendered his trial fundamentally unfair, it thereby deprived appellant of his federal constitutional rights to due process and to a reliable penalty determination. (U.S. Const., 5th, 8th and 14th Amends; Ca.Const. art. I, §28(d); *People v. Cudjo* (1993) 6 Cal.4th 585, 638 (Kennard, J., dissenting; *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process violation].)

The improper admission of evidence in this capital case also violated the Eighth Amendment. The death penalty's qualitatively different character from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637, *Kyles v. Whitley* (1995) 514 U.S. 419, 422.)

Additionally, a due process analysis is virtually the same as an Evidence Code section 352 analysis. It has been noted, "[a] careful weighing of prejudice against probative value under [Evidence Code

section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334.) Moreover,

> [a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.

(*People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn 6, quoting from *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

This Court has also recognized section 352 as providing a realistic safeguard from due process violations. (*People v. Falsetta* (1999) 21 Cal.4th 903, 919-920; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) Under the present facts, the analysis required by section 352 and by due process is virtually the same. (See e.g. *People v. Cole, supra*, 33 Cal.4th at p. 1195, fn 6; *People v. Yeoman, supra*, 31 Cal.4th at p. 117.)

B. The Error Was Not Harmless Because Appellant's Sole Argument at Penalty Was that He Was Not the Shooter

Because the error violated appellant's right to a fair trial as well as his Eighth Amendment rights, it is subject to the *Chapman* standard of prejudice, requiring the State to prove the error harmless beyond a reasonable doubt. (*Chapman v. California*, supra, 386 U.S. at p. 24.)

It is undisputed that even if appellant carried a gun, he never shot anyone. Mitchell Funches shot both Sherry Collins and Officer Brock. The prosecutor intentionally blurred the lines between Funches, the actual shooter, and appellant. Notably, he paraded a weapon allegedly belonging

to appellant in front of the jury. (RT 1675.) He had the court staff "display[ing] Exhibit No. 3 by holding it from the tip of the barrel and the base of the handgrip of the revolver" for Mr. Torrence to identify. (RT 1675.) No such theatrics were used when Torrence identified Funches' weapon, the actual murder weapon, Exh. No. 48. In fact, Torrence identified the murder weapon from only a photograph. (Exh. 4; RT 1672.)[42]

The prosecutor continued to blur any distinction between Funches and appellant during argument:

> MR. HESS: Did he [appellant] pull the trigger? You better believe he pulled the trigger. Almost as if he was standing on the other side when he came up and made direct physical contact with Sherry Collins . . .

(RT 2608-2609)

There was absolutely no evidence presented at trial that appellant ever pulled any trigger on any weapon. Even though appellant never shot anyone, the prosecutor had appellant pulling the trigger, calling him a shooter. Regardless of appellant's culpability under the felony-murder theory, he was nonetheless entitled to a fair trial under the facts of *his* case. Unlike Funches, appellant did not shoot two people, murdering one and seriously injuring another; he was not arrested while fleeing the scene of the crime; and his fingerprints were not linked to the crime scene or the murder weapon. By placing an inadmissible gun in appellant's hand and calling him a shooter, the prosecutor made appellant indistinguishable from Funches to the jury. Moreover, it eroded appellant's defense that he did not commit the robbery because the gun placed him there.

---

[42] The prosecutor also brought a successful motion to leave Funches' name on the Indictment when read to the jury. (CT 122-125.)

The gun's admission was most prejudicial to appellant in the penalty phase, however, where the *sole* mitigating factor offered by his trial counsel was that he was not the actual shooter. (RT 2610.) Defense counsel argued repeatedly and exclusively that appellant's life should be spared because it was a "robbery that went awry by a person that didn't even pull the trigger." (RT 2613.) Defense counsel did not present any other evidence in mitigation; his entire argument was based on the fact that "Demetrius did not kill [Ms. Collins.]" (RT 2612.)

The importance of the admission of "appellant's" gun to the prosecution's case was not only apparent from the prosecution's closing arguments but during voir dire as well. Prospective jurors sought to understand how a person who did not have a gun could be equally culpable as a person with a gun, if the two engaged in a robbery and somebody got killed. (RT 1545.) Defense counsel summarized voir dire discussions as follows:

> You know, I went back over the questionnaires in the jury voir dire, and we discussed this idea of about [sic] what is a death penalty case? Is it a robbery going awry? . . . And most people said, no, that's not necessarily a death penalty case, because something bad happens.

(RT 2611-2612.)

Even if jurors found culpability through the felony murder doctrine, they were not inclined to impose a death judgment on the non-shooting defendant. That is, until the prosecution capitalized on Exhibit 3 to create a picture of appellant as a violent and threatening individual, someone both familiar with and inclined to use firearms. The prosecutor could thus assuage juror concerns about imposing a death sentence on someone who had not killed anyone. As the prosecutor argued: "You go to do a robbery,

you take a gun or guns. What's logically going to occur there if something goes wrong? A murder." (RT 2410-2411.)

The prosecution used the gun to try appellant as if he were Funches, create a violent image for the jury, and make it easier for jurors to impose a death judgment on a non-shooter under a felony-murder theory. Thus, the prosecution cannot carry its burden establishing that this error was harmless beyond a reasonable doubt, and the judgment must be reversed. Even under the more stringent *Watson* standard, there is more than a reasonable probability that the error affected the outcome of appellant's trial given the violent image this inadmissible gun presented to the jury. (*People v. Watson, supra,* 46 Cal.2d 818, 836-837.

* * * * *

V.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IN THE PENALTY PHASE TO DISREGARD THE GUILT PHASE INSTRUCTIONS WHILE OMITTING CRITICAL GUIDELINES FOR HOW THE JURY SHOULD EVALUATE THE EVIDENCE

A. Introduction

The trial court gave a very limited number of jury instructions in the penalty phase of the trial. (CT 333-345; RT 2595-2600, 2616.) The instructions given included CALJIC No. 8.84.1, which states in pertinent part:

> You must accept and follow the law that I shall state to you. *Disregard all other instructions given to you in other phases of this trial.*

(CT 335; RT 2595, emp. added.)

Critical instructions, such as defining reasonable doubt, determining the credibility of witnesses and the sufficiency of circumstantial evidence, were not given in the penalty phase. Because the trial court expressly directed the jurors to disregard the instructions given previously, the jurors in the penalty phase had no legal guidance in making key determinations.

The omission of critical instructions in the penalty phase resulted in an unfair, arbitrary and unreliable determination of the appropriate punishment in violation of appellant's federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the presumption of innocence, a fair jury trial, a reliable penalty determination and due process of law. This omission also violated appellant's rights under article I, sections 7, 15 and 17 of the California Constitution.

As more fully established below, this instructional error requires reversal.

B. The Trial Court's Error in Penalty Phase Instruction

It is well-settled that jurors in criminal cases "are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 193 ["It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (opn. of Stewart, Powell, and Stevens, JJ).]) Moroever, "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

This Court has also recognized the necessity of complete instructions on the applicable law. A trial court must instruct *sua sponte* on those general principles of law which are " . . . closely and openly connected with the facts before the court, and which are necessary for a jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) A trial court has a *sua sponte* duty to instruct on the "general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [credibility of witnesses]; *People v. Yrigouyen* (1955) 45 Cal.2d 46, 49 [circumstantial evidence]; *People v. Reeder* (1976) 65 Cal.App.3d 235, 241 [expert testimony].)

Typically, in the penalty phase the trial court fulfills its duty either by (a) instructing which guilt phase instructions apply at the penalty phase or

(b) by reinstructing the jury on all applicable principles of law. (See, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1256-1257.) Here, the trial court did neither. The trial court's direction to the jury to disregard all guilt phase instructions without the benefit of new instructions on fundamental issues such as the burden of proof necessary for the prior crimes evidence or how to evaluate the credibility of witnesses put the jury adrift without the proverbial rudder. Moreover, it improperly made the jurors their own "experts in legal principles." (*Carter v. Kentucky, supra*, 450 U.S. at p. 302.)

In *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26, this Court stated that "[t]o avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." As indicated in the Use Note, CALJIC No. 8.84.1 was adopted in response to the *Babbitt* decision and utilizes a different procedure "less likely to result in confusion to the jury." That is, this instruction directs the jurors to disregard all instructions given in other phases of the trial, but it is contemplated that CALJIC No. 8.84.1 will be "followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." (CALJIC No. 8.84.1, Use Note.)

Here, the trial court took a different approach and one which was guaranteed to result in juror confusion and violate due process. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70-72 [due process implicated if jurors misunderstood instructions].) The trial court neither specified which guilt instructions applied in the penalty phase nor did it reinstruct the jury on the legal principles regarding the evaluation of the evidence that applied in the penalty phase. Rather, the trial court simply directed the jurors to

disregard any and all of the previously given guilt phase instructions. (CT 335; RT 2595.)

It is "a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given." (*People v. Harris* (1994) 9 Cal.4th 407, 425, citation omitted.) It must therefore be presumed that the jury followed the trial court's directive that the guilt phase instructions did not apply in the penalty phase. (*People v. Harris, supra,* 9 Cal.4th at p. 425; *Richardson v. Marsh* (1987) 481 U.S. 200, 211; *People v. Bonin* (1988) 46 Cal.3d 659, 699 (overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn 1).)[43] This left the penalty phase jury without proper guidance on the applicable legal principles for evaluating the evidence and presents, contrary to due process, a "reasonable likelihood" that the jurors evaluated the penalty evidence in whatever fashion and for whatever purpose the individual jurors desired. (*Boyde v. California* (1990) 494 U.S. 370, 380 [due process violated if reasonable likelihood that jury applied instructions erroneously].)

In *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1217-1224, defendant's conviction for possession of a sharp instrument while in prison was reversed because the trial court, having previously given CALJIC No. 2.90 at the outset of trial, failed to repeat it in its final charge to the jury. In *Elguera*, the trial court gave the entire CALJIC No. 2.90 instruction to all prospective jurors at the outset of trial and asked each one

---

[43] This issue is distinguishable from past cases claiming error for failure to reinstruct because those cases did not involve an affirmative directive from the trial court instructing the jury to disregard the instructions given in the guilt phase. (See *People v. Brown* (1988) 46 Cal.3d 432, 460; *People v. Sanders* (1995) 11 Cal.4th 475, 561; *People v. Wharton* (1991) 53 Cal.3d 522, 600; *People v. Williams* (1988) 45 Cal.3d 1268, 1321.)

if he or she understood the requirement of proof beyond a reasonable doubt. (*People v. Elguera, supra*, 8 Cal.App.4th at pp. 913-914.) The trial court then made repeated references to the prosecution's burden of proof throughout trial, reminding the jury right before argument of the prosecution's burden of proof, and the final oral and written charge to the jury informed it that inferences from circumstantial evidence had to be proven beyond a reasonable doubt. (*Ibid.*) Notwithstanding these other potentially curative admonitions, the appellate court considered the reasonable doubt instruction too essential to defendant's right to a fair trial to be omitted, noting, *inter alia*, that:

> because the court made no reference to the presumption of innocence and the general reasonable doubt standard with its charge to the jury after presentation of the evidence, any intellectual awareness the jurors had that the reasonable doubt standard applied may not have been accompanied by the sense of centrality and importance the instruction should carry. "[T]he reasonable doubt instruction more than any other is central in preventing the conviction of the innocent." (*People v. Brigham* (1979) 25 Cal.3d 283, 290, 157 Cal.Rptr. 905, 599 P.2d 100.) "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368.) If any phrase should be ringing in the jurors' ears as they leave the courtroom to begin deliberations, it is "proof beyond a reasonable doubt." In the circumstances of this case, the impact of the instruction may have been prejudicially blunted by the passage of time from jury selection to deliberations. Instruction at the conclusion of trial, rather than before, tends to ensure emphasis and prevent confusion. (See *People v. Valenzuela* (1977) 76 Cal.App.3d 218, 221, 142 Cal.Rptr. 655 [although court has discretion to instruct at any time during trial, instructions should be repeated in final charge if lapse of time or intervening courtroom events threaten to leave jury confused].)

(*Id.* at p. 1214.)

In the present case, the trial court's error was more egregious than in *Elguera* because the court did not just fail to reinstruct the jury on the burden of proof; it told the jury to disregard it. (See also *People v. Crawford* (1997) 58 Cal.App.4th 815, 821 [conviction reversible under any standard for failure to instruct on reasonable doubt and assign the burden of proof to the prosecution].) The trial court's failure to reinstruct on the burden of proof was particularly egregious because it "diluted" both the presumption of innocence and the prosecution's burden of proof.[44] (*People v. Elguera, supra*, 8 Cal.App.4th at p. 1214.) The prosecution presented "other crimes" evidence as aggravation which consisted of appellant's two prior felony assault with a deadly weapon convictions. (RT 2550.) Additionally, each of the victims of the prior crimes testified at the penalty phase, warranting instructions on both CALJIC No. 8.86 (conviction of other crimes) and No. 8.87 (other criminal activity.) (CT 338-339; RT 2598-2599.) Both CALJIC 8.86 and 8.87 require proof "beyond a reasonable doubt" of either the fact of the prior conviction or that appellant engaged in the alleged criminal activity. Appellant was therefore entitled to a presumption of innocence on these charges. The presumption of innocence is a basic component of a fair trial. (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) But appellant's penalty jury never heard this critical instruction.

The penalty phase jury was thus in the unenviable position of having been instructed that the other crimes evidence must be proved beyond a

---

[44] This duty of the judge specifically includes instructing on the burden of proof. (Evid. Code, § 502.)

reasonable doubt, but it was offered no definition of that term. (CT 338; RT 2598.) Worse, jurors were expressly told not to consider the previous definition of reasonable doubt given during the guilt phase. (CT 335; RT 2595.) Appellant's jury thus had to decide his penalty without the benefit of CALJIC No. 2.90, which both specifies that the prosecution bears the burden of proof and defines the concept of reasonable doubt. The "jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) A verdict based on a defective definition of reasonable doubt cannot stand. (*Id.* at p. 281.) Certainly, a verdict from a jury without any definition at all also cannot stand.

Moreover, as evidenced by its notes to the trial judge during the penalty phase and its eight days of deliberations, the jury was clearly struggling over the penalty. (CT 300, 304, 330; RT 2621-2622.)[45] Most noteworthy was the jury's request for a re-read of testimony from Laura Carrol, the victim of one of the alleged assaults. (RT 2733.) Any confusion the jury was having with the Carrol prior crime evidence would have certainly been exacerbated by the complete absence of a definition in the penalty phase of reasonable doubt.

In addition to the omissions on the burden of proof, the jury also did not receive any instructions to guide their credibility determination or to weigh the sufficiency of the circumstantial evidence presented on these allegations. A trial court is required to "inform the jury in all cases that the

---

[45] The jury sent notes to the judge asking, whether appellant could get parole if he were given a death sentence and the death penalty overturned, and whether if the law changed, if appellant could be released from prison. (RT 2621-2622)

jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." (Pen. Code, § 1127.) CALJIC No. 2.20, which specifies that jurors are the exclusive judges of the credibility of witnesses and provides the standards for assessing credibility, was also not given to appellant's jury in the penalty phase. Nor was the jury instructed that the testimony of one witness may be sufficient for proof of a fact, although such an instruction should be given *sua sponte* in every criminal case. (*People v. Rincon-Pineda, supra*, 14 Cal.3d at p. 884; *People v. Pringle* (1986) 177 Cal.App.3d 785, 788-790.) Additionally, CALJIC No. 2.01 or a similar instruction on the sufficiency of circumstantial evidence must be given *sua sponte* where the prosecution's case rests substantially on circumstantial evidence. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 175.) Yet this instruction was also not given in the penalty phase of this case.

The error was compounded by the trial court's refusal to give several defense proposed instructions. (ACT 319, ACT Suppl. (C) 371-372, 374, 377; see Args. VIII and IX.) These proposed instructions included, *inter alia*, a lingering doubt instruction which would have at the very least permitted jurors to "demand a greater degree of certainty for the imposition of the death penalty" and potentially helped to mitigate this error. (ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl.(C) 374; RT 2573.)

The trial court also failed to give a number of instructions that should have guided jurors as to their general duties. Jurors were not directed that the instructions should be considered as a whole. (CALJIC No. 1.01.) This omission created the danger that jurors might view certain instructions in isolation and without regard to other applicable instructions. Jurors were not instructed on the prohibition against

independent investigation and the duty to not discuss the case with anyone else except other jurors during deliberations. (CALJIC No. 1.03.) This omission created the danger that jurors might have felt free to consult with outside sources. Jurors were also not instructed on the use of notes (CALJIC No. 1.05.) Although this instruction is not required to be given *sua sponte*, it is the "better practice" to give this instruction. (*People v. Whitt* (1984) 36 Cal.3d 724, 746-748.) Jurors were not instructed to refrain from taking a cue from the judge. (CALJIC No. 17.30.) And, as previously set forth, the trial court also refused to give several instructions requested by the defense including on felony murder not requiring imposition of the death penalty any more than any other special circumstance, on the jury's ability to give appellant a life sentence without finding any mitigation, on comparing the aggravating evidence, and on the absence of moral justification or extreme duress being an inappropriate factor in aggravation. (CT 319; ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl. (C) 371- 374, 377; RT 2568-2569, 2582- 2585, 2589.)

Appellant had a federal constitutional right to a properly instructed jury in the penalty phase. Federal due process principles also prohibit depriving appellant of crucial protections afforded under California law such as full and complete jury instructions. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) The trial court's directive to disregard all instructions from the earlier phases of the trial without reinstructing the jury on essential legal principles necessary for a fair and reliable penalty determination constituted error.

C. Reversal is Required for the Multiple Instructional Errors

Aggravation evidence presented pursuant to Penal Code section 190.3, subdivisions (b) and (c), pertaining to other crimes evidence and prior convictions respectively, must be established beyond a reasonable doubt by the prosecution and the jury must be so instructed. (*People v. Davenport, supra*, 41 Cal.3d at p. 280; *People v. Robertson* (1982) 33 Cal.3d 21, 53.) The trial court's failure to define reasonable doubt in the penalty phase was structural error as a verdict by a jury deprived of a proper definition of reasonable doubt cannot stand. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282.) Because appellant's jury made critical findings as to alleged aggravating factors without proper guidance on the burden of proof and presumption of innocence, the findings were invalid rendering the death sentence unreliable.

As recognized by this Court, errors relating to the reasonable doubt instruction as to other crimes evidence in a capital case are "especially serious because that type of evidence 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (*People v. Davenport, supra*, 41 Cal.3d at pp. 280-281, quoting *People v. Robertson, supra*, 33 Cal.3d at p. 54, quoting *People v. Polk* (1975) 63 Cal.2d 443, 450.)

But even if the reversible per se standard does not apply, the instructional errors in appellant's penalty phase were so numerous and prejudicial, that reversal is still required. (See Args., VIII, IX, XI,.XII, XV.)

Findings critical to the penalty determination were made without providing jurors "any meaningful guidance." (*People v. Dominguez* (2005) 124 Cal.App.4th 1270, 1278-1284 [murder conviction reversed where trial

court failed to provide complete instructions on felony murder].) There is a reasonable likelihood that at least some of the jurors accepted alleged aggravation evidence and may have rejected mitigation evidence because of the lack of complete and adequate instructions. Under these circumstances, appellant was deprived of his federal constitutional right to a jury fully instructed on the applicable legal principles and prejudice from that error is likely. Even assuming that the failure to define reasonable doubt is not structural error, the omission of numerous crucial instructions from the penalty phase cannot be considered harmless error. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Confidence in the reliability of the outcome is sufficiently undermined that reversal is required.

* * * * *

VI.
THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY INSTRUCTING THE JURY ON FELONY MURDER WHEN THE GRAND JURY INDICTMENT CHARGED APPELLANT ONLY WITH MALICE MURDER

A. Introduction

Appellant was charged only with second degree malice murder by his Grand Jury Indictment. (CT 1-4.) The relevant part of the Indictment reads as follows:

> On or about December 6, 1992, . . . the crime of murder, in violation of Penal Code § 187(a), a Felony, was committed by Mitchell Lee Funches and Demetrius Charles Howard, who did willfully, unlawfully, and with malice aforethought kill Sherry A. Collins, a human being.

(CT 1.)

At the close of trial, however, the jury was instructed only on first degree felony murder pursuant to Penal Code section 189 and CALJIC No. 8.21:

> The unlawful killing of a human being whether intentional, unintentional, or accidental which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime."

(CT 259; RT 1636.)

Because appellant's indictment did not charge him with first degree murder and did not allege the facts necessary to establish first degree murder, his first degree murder conviction must be reversed.[46]

---

[46] Appellant is not contending that the indictment was defective. On the (continued...)

B. The Trial Court Lacked Jurisdiction to Try Appellant for Felony Murder

Second degree murder is the unlawful killing of a human being with malice aforethought, "but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder." (*People v. Hansen* (1994) 9 Cal.4th 300, 307; Pen. Code §187.)[47] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[48]

Because the indictment charged only second degree malice-murder

---

[46](...continued)
contrary, as set forth above, Count One was an entirely correct charge of second degree malice-murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crime of first degree felony-murder in violation of Penal Code section 189.

[47] Subdivision (a) of Penal Code section 187, provides: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[48] At the time the murder at issue allegedly occurred, Penal Code section 189 provided in pertinent part:

> "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information. [Citations omitted.]" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; see also *People v. Granice* (1875) 50 Cal. 447, 448 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

C. This Court Should Reconsider its Case Law Regarding the Relationship Between Malice Murder and Felony-Murder

Appellant recognizes that this Court has heard and rejected various arguments pertaining to the relationship between malice murder and felony-murder (see, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250) but submits that this line of cases does not address what appear to be irreconcilable contradictions in the law of first-degree murder in California. These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165,

> "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[49] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes* (2002) 27 Cal.4th 287, 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and

---

[49] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "[s]econd degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter, supra,* 15 Cal.4th at p. 394, quoting *People v. Pride, supra,* 3 Cal.4th at p. 249; accord *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder, murder during the commission of a felony, or murder while lying in wait, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes . . ." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra,* 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser

offense included within first degree murder].)[50]

The greatest difference is between second degree malice-murder and first degree felony murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

D. Reversal is Warranted

Regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of

---

[50] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added.)[51]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding the malice which was an essential element of the crime alleged in the indictment. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96 (overruled on other grounds

---

[51] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation omitted.]"

in *People v. Flood* (1998) 18 Cal.4th 470, 483.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Accordingly, appellant's conviction for first degree murder and death sentence must be reversed.

* * * * *

VII.
THE TRIAL COURT VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AND COMMITTED PREJUDICIAL ERROR BY INSTRUCTING, OVER APPELLANT'S OBJECTIONS, ON CALJIC NOS. 2.03, 2.71 AND 2.72 ON CONSCIOUSNESS OF GUILT AND ADMISSIONS

A. Introduction

During in-limine proceedings at the guilt phase, the trial court delivered three instructions relating to appellant's statements to police: CALJIC Nos. 2.03, 2.71 and 2.72. (CT 230-233; RT 2373-2374.)[52] These instructions, which were given over defense objection, erroneously and unfairly permitted the jury to draw improper and adverse inferences against appellant, which, when considered with the other instructional errors, deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Accordingly, reversal of the conviction is required.

B. The Trial court Prejudicially Erred by Giving CALJIC No. 2.03

1. The Consciousness-Of-Guilt Instruction Improperly Duplicated the Circumstantial Evidence Instructions

The trial court, over defense objection, gave the following consciousness of guilt instruction:

---

[52]The trial court also gave CALJIC 2.71.7 on pre-offense statements, presumably related to testimony that appellant was overheard discussing a "jacking" or robbery prior to the homicide. (CT 232; RT 2373-2374.)

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(CALJIC No. 2.03; CT 230; RT 2317-2318, 2343-2346, 2373.)

The trial court reasoned that the sole fact that appellant gave a false name, Shawntik Wilcox, to police when he was arrested was a sufficient basis for this instruction. (RT 2028, 2343-2346.)[53] The court further decided, over appellant's objection, that the false name also amounted to an admission and was a proper basis for giving CALJIC Nos. 2.71 and 2.72. (See *infra*.)

The instruction under CALJIC No. 2.03 was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080 (overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 822, fn. 1).) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (CT 227-229;

---

[53]Appellant also admitted that while in jail awaiting trial, he called his mother and asked her to ask Cedric Torrence to provide an alibi for him. (RT 2219-2220.) The alibi evidence was not discussed during the in-limine proceedings on this jury instruction although the prosecution argued that the fabricated alibi attempt was "consciousness of guilt" in closing argument. (RT 2396.)

RT 1631, 2370-2373.) These instructions informed the jury that it may draw inferences from the circumstantial evidence. In other words, the jury was informed that it could infer facts tending to show appellant's guilt from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt.

Additionally, the jury was instructed on CALJIC Nos. 2.23 and 2.24 regarding the believability or credibility of witnesses. (CT 243; RT 1633-1634.) These instructions once again made CALJIC 2.03 unnecessary since "[t]here is little probative value in giving a 'fabrication instruction' when the jury is properly instructed on assessment of witness credibility." (*State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [instruction regarding fabrication by defendant was an improper comment on the evidence].)

This unnecessary consciousness-of-guilt instruction focused the jury's attention on evidence favorable to the prosecution amounting to a type of " judicial imprimatur of [the] prosecution's position," and lessening the prosecution's burden of proof. (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1571 [judge improperly questioned defendant about his alibi impugning his integrity].) This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal

protection].)

2. The Consciousness-Of-Guilt Instruction Was Unfairly Partisan and Argumentative

The consciousness-of-guilt instruction in the instant case was not just unnecessary, it was also impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such an instruction unfairly highlights "isolated facts and thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that"'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid,* citation omitted.)

Judged by this standard, CALJIC No. 2.03, the consciousness-of-guilt instruction given in this case, is impermissibly argumentative. Structurally, it is almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th 408, which read as follows:

> "*If you find* that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, *you may* conclude that they were not in a

criminal sense wilful, deliberate, or premeditated."

(*Id.* at p. 437, fn. 5, emp. added.) The instruction here also tells the jury, "[i]f you find" certain facts (false statement), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold CALJIC No. 2.03 to be impermissibly argumentative as well.

Appellant is well aware that this Court has repeatedly rejected constitutional challenges to CALJIC No. 2.03 (see, e.g., *People v. Nicolas* (2004) 34 Cal.4th 614, 665; *People v. Crandell* (1988) 46 Cal.3d 833, 869 (overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 361.), but respectfully asks this Court to reconsider those rulings given their rationale.[54] For instance, in *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should

---

[54] This Court has also held that the trial court's inclusion of non-theft offenses like rape or murder in CALJIC No. 2.15 (inference of guilt from possession of recently-stolen property) is erroneous. (*People v. Prieto* (2003) 30 Cal.4th 226, 248-249.) The analytical basis for this holding--i.e., that a defendant's conscious possession of recently stolen property "'simply does not lead naturally and logically to the conclusion the defendant committed' a rape or murder" (*id.* at p. 249, citation omitted)--is logically indistinguishable from appellant's instant argument regarding the impermissible inferences allowed by CALJIC Nos. 2.03, 2.71, and 2.72.

be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and the defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet, supra,* 405 U.S. at p. 77). Moreover, the prosecution-slanted instruction given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

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

The rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. (*People v. Kelly, supra,* 1 Cal.4th at p. 532.)

Notwithstanding this mild admonition that there must be at least one other piece of evidence relied upon to establish guilt, the instruction permits the trial court to: (1) single out evidence favorable to the prosecution, (2) invite the jury to consider that evidence as showing consciousness of guilt, and (3) advise the jury that the weight and significance of the evidence are matters for the jury's determination. The admonition is thus no more than a thin sugar coating on an instruction that is otherwise bitterly detrimental to the defense, as the consciousness of guilt instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt.

Indeed, more recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefited [sic] the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) If the benefit belongs to appellant, then *a fortiori* appellant should have been allowed to waive the giving of this instruction.

Accordingly, this Court needs to revisit its holdings in cases such as *Kelly* and *Arias*, where as here, CALJIC No. 2.03 interfered with appellant's rights to an impartial and properly-instructed jury, and to a fair and reliable capital trial.

3. The Consciousness-Of-Guilt Instruction Embodies an Improper Permissive Inference About Appellant's Guilt

The consciousness-of-guilt instruction should not be given generally because it contains a permissive inference that allows the jury to infer one fact, appellant's consciousness of guilt, from the fact that he initially gave a false statement to the police. The Ninth Circuit has held that a permissive

inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on an isolated fact such as the false statement, jurors may well overlook exculpatory evidence and convict a defendant without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren, supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.* at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

Permissive inference jury instructions are constitutional as long as there is a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal, supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred. [Citations omitted.]" (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen, supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that

the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.[Citation omitted]'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 157, 162-163.)

Here, the consciousness-of-guilt instruction permitted the irrational inference that appellant was guilty of first degree felony murder from appellant giving a false name. The fact that an accused gives a false name or fabricates an alibi, however, does not make it more likely than not that he committed all the crimes which may be alleged. Particularly where, as in the present facts, appellant had a plausible explanation for the falsehoods: his fear that as an African-American parolee in the vicinity of a crime scene he would become law enforcement's primary suspect. (RT 2028, 2218; see, e.g., 1 Witkin, Cal. Evid. 4th (2000 Suppl.) Hearsay, § 110, pp. 813-814; *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839 [reversal where defendant gave police a false account of her movements the night of her mother's murder and denied knowledge of her brother's .22 rifle. Court found that defendant's falsehood's may have formed unfavorable inferences against her "[b]ut inference of what? The refutation of these falsehoods did not directly implicate defendant in the slaying"].)

This Court has nonetheless approved expansive inferences such as the one in *People v. Rodriguez* (1994) 8 Cal.4th 1060, when it held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140, emph. in original; accord, *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [holding that it is rational to infer "that false statements regarding a crime show a consciousness of guilt of all the offenses committed during a single

attack"]; *People v. Kimble* (1988) 34 Cal.App.4th 1832, 1842.) However, such sweeping inferences, although permitted by the consciousness of guilt instruction, do not provide a "rational connection" to the proven fact and are thus constitutionally infirm under *Ulster*. (*Ulster County Court v. Allen, supra,* 442 U.S. at p. 164.) Moreover, although the instruction did admonish the jury that the consciousness of guilt evidence was not alone sufficient to prove guilt (CT 230), as set forth *supra*, this purportedly protective aspect of the instruction is illusory.

Because the consciousness-of-guilt instruction permitted the jury to draw unreasonable inferences of guilt against appellant, use of the instruction undermined the reasonable doubt requirement and denied him a fair trial and due process of law. (U.S. Const., 6th and 14th Amend.; Cal. Const., art. I, §§ 7, 15, 16.) By reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal. Const. art. I, § 17.)

C. The Trial Court Prejudicially Erred in Giving CALJIC Nos. 2.71 and 2.72

CALJIC No. 2.71 reads:

> An admission is a statement made by the defendant other than at his trial which does not by itself acknowledge his guilt of the crime for which defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.[55] ¶You are the exclusive judges as to whether the defendant made an admission and, if so, whether such

[55]The written CALJIC 2.71 given to the jury had "evidence" but the trial court erroneously stated "testimony" in reading this instruction. (CT 231; RT 2373.)

> statement is true in whole or in part. If you should find that the defendant did not make the statement you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true. ¶Evidence of an oral admission of the defendant should be viewed with caution.

(CT 231; RT 2373.)

Because the trial court instructed the jury on admissions, it also instructed on the *corpus delicti* rule, CALJIC No. 2.72, prohibiting conviction of an offense solely on the basis of an admission:

> No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial. ¶The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. Such identity or degree of the crime may be established by an admission."

(CT 233; RT 2374.)

In giving these instructions, the trial judge improperly reasoned that evidence of appellant giving a false name necessitated "instructions about admissions and corpus delicti." (RT 2344.) Appellant objected, arguing, *inter alia*, that "[s]tating a false name isn't an admission; it's a credibility. [sic.] You lie, it goes to your credibility." (RT 2345.)

As appellant aptly pointed out at trial, appellant's providing a false name went to his credibility and was sufficiently covered by those instructions related to credibility (CALJIC Nos. 2.23 and 2.24) as well as those related to circumstantial evidence (CALJIC Nos. 2.00, 2.01 and 2.02).

CALJIC Nos. 2.71 and 2.72 also suffer from the same constitutional

and prejudicial defects as with CALJIC No. 2.03, *supra.*[56] As with CALJIC No. 2.03, CALJIC No. 2.71 is also unconstitutionally argumentative and one-sided in favor of the prosecution and, as such, also violated appellant's due process rights. The instruction "invite[d] the jury to draw inferences favorable to" the prosecution: that appellant acknowledged guilt of felony murder "from specified items of evidence." (*People v. Mincey, supra*, 2 Cal.4th at p. 437.) In this case, the evidence was appellant's alias and alibi, and the jury "improperly implie[d] certain conclusions" – that appellant was guilty of first degree murder – from it. (*People v. Wright, supra*, 45 Cal.3d at p. 1137). Moreover, the one-sided nature of the argumentative instructions, taken together--i.e., that the jury could infer guilt if the defendant *denies* involvement (CALJIC No. 2.03), and at the same time, infer guilt if the defendant *admits* involvement (CALJIC Nos. 2.71 and 2.72)--was unfair in the extreme. (See *Wardius v. Oregon, supra,* 412 U.S. at pp. 475-476; *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, 540-542.)

Nor did CALJIC No. 2.72 alleviate the harm from CALJIC No. 2.71; on the contrary, it exacerbated it and was prejudicially unfair in itself. CALJIC 2.72 expressly told the jury that identity "may be established by an admission." Appellant's entire defense was one of mistaken identity. The instruction, taken as whole, effectively told the jury that as little as

---

[56] If, as this Court has asserted, "the effect of [CALJIC No. 2.71] is beneficial to [the] defendant" (*People v. Frye* (1998) 18 Cal.4th 894, 959), then as with CALJIC 2.03, the defendant should be able to waive the giving of the instruction at his discretion, at least where there are legitimate strategic or evidentiary reasons for doing so. (See, e.g., *People v. Echevarria* (1992) 11 Cal.App.4th 444, 453 [trial court's acquiescence to the defense strategy of not instructing the jury pursuant to CALJIC 2.71.7 on appellant's pre-offense statement upheld].)

appellant's providing a false name could in fact tend to prove his guilt of first degree felony murder "when considered with the rest of the evidence."

D. Reversal is Required

Giving the consciousness-of-guilt instructions was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's attempted robbery and murder conviction and the special circumstance finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, supra, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. The jury was given not one, but three unconstitutional instructions, which magnified the argumentative nature of the instructions and their impermissible inferences. The instructions under CALJIC Nos. 2.03, 2.71 and 2.72 were based on thin evidence – appellant's use of an alias and attempt to solicit an alibi. The error affected the only contested issue in the case, appellant's involvement in the felony murder. As stated elsewhere in this brief, the evidence against appellant was either weak or closely balanced. (See Args. I, II, IV.) With the exception of some questionable fiber evidence, appellant's entire case hinged on credibility, his versus that of the prosecution's key witness, Cedric Torrence. There were no fingerprints linking appellant to either the murder weapon or the victim's car, unlike co-defendant Funches whose prints were found on both. (RT 1810-1812, 2064-2067, 2084-2085, 2091-2095.) Appellant also had a plausible explanation for being at that apartment complex which witnesses corroborated. (RT 2201-2206, 2295.) Moreover, prosecution witness

Torrence admitted that he had lied in an earlier conversation with Detective Blackwell about the day's events, including seeing appellant with a gun. (RT 1697.) Torrence also had a motive to implicate appellant given his reputed custody problems with appellant's sister. (RT 1705-1706.) That the jury had significant difficulty figuring out whom to believe in this case is borne out by its request for a re-read of appellant's testimony. (CT 207, 209; RT 2469.) If the jurors believed appellant's explanation of events and why he was near the crime scene on the night in question, they could not have convicted him. Yet the combined effect of the instructional errors was to tell the jury that appellant's own conduct showed he was aware of his guilt for the very charges he disputed. Added to the mix was the fact that appellant's credibility was already seriously compromised by the forced wearing of a stun belt during his testimony. (See Arg I.) These instructions were therefore not harmless beyond a reasonable doubt, particularly when considered in combination with the other errors in this case.

* * * * *

VIII.
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN THE PENALTY PHASE BY REFUSING TO INSTRUCT THE JURY ON LINGERING DOUBT

A. Proceedings Below

On May 22, 1995, during in-limine discussions regarding jury instructions, appellant requested that the penalty jury be given the following instruction on lingering doubt:

> Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty. The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered.

(ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl.(C) 374; RT 2571-2572.) The trial court denied appellant's request, relying upon *People v. Rodriguez* (1994) 8 Cal.4th 1060 and *People v. DeSantis* (1992) 2 Cal.4th 1198. The judge determined that while lingering doubt was the proper subject of argument by defense counsel, the court was not required to give an instruction on it. (RT 2583.)

The trial court's refusal to instruct on lingering doubt violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments of the federal Constitution and Cal. Const., art. I, §§ 7, 15 and 17 to present a defense, to a fair trial, to a reliable penalty determination and to due process and equal protection. Lingering doubt was key mitigation for appellant and lack of clear instruction authorizing the jury to consider it prejudiced him, requiring reversal.

B. The Trial Court Erred in Refusing to Instruct on Lingering Doubt

1. The Proposed Instruction was Properly Formulated

This Court has recognized that a capital defendant has the right to have the penalty phase jurors consider any residual or lingering doubt as to his guilt. (*People v. DeSantis, supra,* 2 Cal.4th at p. 1238.) Nonetheless, because this Court has also ruled that a lingering doubt instruction is not necessarily required, the trial court did not feel compelled to give it. (*Id.* at pp. 1239-1240; *People v. Cox* (1991) 53 Cal.3d 618, 677-678; RT 2583.) The trial court erred. When, as here, the proposed instruction is "properly formulated" and does not invite readjudication of matters resolved at the guilt phase, the trial court may be required to give it in appropriate situations. (*People v. Cox, supra*, 53 Cal.3d at p. 678, fn. 20; see also *People v. Terry* (1964) 61 Cal.2d 137, 145-146 (overruled on other grounds in *People v. Laino* (2004) 32 Cal.4th 878, 891.) The proposed instruction in *Cox* "[a]s worded, . . . invaded the jury's responsibility to determine whether a particular 'circumstance of the crime' was aggravating, mitigating, or irrelevant and 'arbitrarily stressed certain items of evidence.' (*People v. Cox, supra*, 53 Cal.3d at p. 678, fn.21, citation omitted.) The instruction in the present case made none of the objectionable mistakes found in *Cox* but rather properly requested that the jury "demand a greater degree of certainty for the imposition of the death penalty" in consideration of any residual or lingering doubt. (ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl.(C) 374.) Indeed, the remaining language of the proposed instruction, that "[t]he adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by

you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered," has been approved by this Court as a "straightforward instruction" which "allow[s] the jury to consider any remaining uncertainty as to defendant's guilt." (*People v. Morris* (1991) 53 Cal.3d 152, 219 (overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn.1.); see also *People v. Snow* (2003) 30 Cal.4th 33, 125.)[57]

2. The Proposed Instruction Was Supported by Substantial Evidence

This Court recognized in *Cox* that a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20; *People v. Thompson* (1988) 45 Cal.3d 86, 134-135 [acknowledging the propriety of an appropriately phrased instruction to consider lingering doubt regarding defendant's intent to kill].) Here, the proposed instruction was undeniably "properly formulated"; it was also "warranted by the evidence." *(People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20.)

Appellant asserted his innocence throughout the guilt phase. In support of his defense, appellant offered evidence refuting the testimony of the prosecution's key witness, Cedric Torrence, that appellant had been seen with a gun earlier the day of the homicide and overheard discussing a robbery with Mitchell Funchess. Several witnesses who were present with Torrence refuted his testimony. (RT 2078, 2263, 2279-2280.) Roxanne Winn (appellant's former girlfriend), George Rivera, and George's brother,

---

[57] Some of this language can be traced originally to *People v. Friend* (1957) 47 Cal.2d 749, 767-768, and is also quoted in *People v. Terry, supra*, 61 Cal.2d at pp. 146-147.

Danny Rivera, never saw appellant with a gun that day.
(RT 2072, 2078, 2263, 2274.) George also never heard appellant discuss anything about "jacking" someone; George barely knew appellant and had no reason to lie. (RT 2274, 2279-2280, 2283-2285.) Appellant himself denied any involvement in the homicide and gave a different account from the prosecution's as to why he was in the vicinity of the crime scene that night. (RT 2185-2200.) Appellant's uncle, Willy Kelly, and Ms. Winn also corroborated appellant's account as to why he was in the vicinity of the apartment complex where Ms. Collins was killed.
(RT 2295, 2301-2305, 2262-2263.)

Through his own testimony and that of other witnesses, appellant sought to show that he did not commit the crime against Ms. Collins. This evidence, if believed, did not lessen the seriousness of appellant's crime; it showed that he was not guilty at all. This Court's rationale for not requiring specific instruction on lingering doubt is based on the notion that the concept of lingering doubt is "subsumed by the . . . factor (k), which informed the jury to 'consider' and 'take into account' 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse . . .'" (*People v. Brown* (2003) 31 Cal.4th 518, 567 [citations omitted].) However, without the benefit of a specific instruction, the jurors would most likely consider lingering doubt a "legal excuse" and not realize that they could consider it as mitigation, encompassed within the factor (k) portion of CALJIC No. 8.85.

Nor did defense counsel attempt to enlighten the jury about any residual or lingering doubt during closing argument. Once the trial court rejected his proposed instruction on lingering doubt, counsel apparently

abandoned the idea of pursuing the issue any further. (RT 2609-2615.)[58]

"The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [citations omitted].)

A trial court also has a duty to instruct on defenses if the defendant is relying on such a defense. (*People v. Barton* (1995) 12 Cal.4th 186, 195; *People v. Wright* (1988) 45 Cal.3d 1126, 1137.) Moreover, "[i]t is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531, citations omitted.) Appellant proposed a straightforward instruction supported by substantial evidence through the testimony of Messrs. Kelly, Danny and George Rivera, Ms. Winn, and appellant himself. The trial court was therefore required to charge the jury on lingering doubt just as it would "on any [other] points of law pertinent to the issue, if requested . . ." (Pen. Code § 1093(f); see also Pen.Code § 1127.) Without the proposed instruction, the jury had no basis for applying lingering doubt in the penalty determination, depriving appellant of a fair opportunity to present his defense. The trial court's refusal to give appellant's requested instruction

---

[58] His argument would have been insufficient to cure the failure to instruct in any event. As the Supreme Court explained in *Boyde v. California* (1990) 494 U.S. 370, 384: "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter [the Supreme Court has] often recognized, are viewed as definitive and binding statements of the law."

on lingering doubt as an authorized type of mitigation was thus error.

3. Federal Constitutional Error

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63, citations omitted.) In *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099, the Ninth Circuit found that under clearly established Supreme Court law, "the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. . .This is so because the right to present a defense 'would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense. [Citations omitted.]'" The Supreme Court "presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.)

This case law demonstrates that adequate instructions to the jury are necessary. California recognizes a right to present a lingering doubt defense. The failure to instruct the jury on this defense constituted error. The error rose to the level of federal constitutional error by denying appellant of his due process rights: (1) to instructions on the theory of the case (*United States v. Sotelo-Murillo* (9th Cir. 1989) 887 F.2d 176, 180 [a criminal defendant's right to an instruction on his theory of the case "implicates fundamental constitutional guarantee"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201 [criminal defendant's right to have the jury instructed on his theory of the case is "basic to a fair trial"]); (2) to a fair opportunity to defend against the state's

accusations (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]); and (3) to fundamental fairness in the process by which the jury determined his penalty (*Albright v. Oliver* (1994) 510 U.S. 266, 283 (conc. opn. of Kennedy, J.) [due process "ensure[s] fundamental fairness in the determination of guilt at trial"]; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 ["the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"].) Because state law recognizes a right to present a lingering doubt defense, appellant also had a state-created liberty right in adequate instruction on that defense. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

C. The Error is Prejudicial and Reversal is Required

This error requires reversal. "The right to have a jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that the failure to instruct where there is evidence to support the instruction can never be considered harmless error." (*United States v. Escobar de Bright, supra,* 742 F.2d at p. 1201, quoting *Chapman v. California, supra,* 386 U.S. at p. 23.) The trial court's failure to instruct on lingering doubt, which constituted appellant's theory of the case, is reversible per se.

Reversal is also required under the harmless error analysis for federal constitutional error. Under *Chapman*, "[t]he question to be asked is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction." (*Id.* at p. 23, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) Reversal is required unless the reviewing court concludes "beyond a reasonable doubt" that the error "did

not contribute to the [jury's] verdict." (*Chapman v. California, supra,* 386 U.S. at p. 24.) The essential inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279, emph. in original.)

The failure to instruct on the critical defense of lingering doubt cannot be considered harmless.[59] Appellant's jury struggled over penalty. The jury's notes to the judge and lengthy deliberations demonstrate the closeness of the penalty determination in this case. Most notably, the jury asked for a re-read of testimony from Laura Carroll, the victim of one of the two prior crimes offered as evidence in aggravation. (ACT Suppl (D) 501-502; RT 2733.)[60] The jury deliberated from May 23 to May 31, 1995, over penalty, returning a verdict at 4:37 p.m. on the eighth day. (CT 300, 330.) There was more than a reasonable probability that the jury would have returned a verdict of life rather than death if the court had explicitly and authoritatively instructed the jury that any lingering doubt it may have as to guilt was a legitimate basis upon which to conclude that death was not the appropriate verdict. This possibility was reasonable

---

[59] This requires reversal even if the error is not considered a federal constitutional violation. (*People v. Brown* (1988) 46 Cal.3d 432, 448 [applying "reasonable possibility" test to state law error in the penalty phase].) Given the significance of the omitted instruction, reversal is required even under the "reasonable probabili[ty]" test. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

[60] The jury was also concerned over whether appellant could get paroled or be released from prison in the event of changes in the law or an overturned sentence. (RT 2621-2622.)

because of the likelihood that the evidence could have left at least one juror with nagging doubt:

> '[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating fact' ... [T]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum L. Rev. 1538, 1563 (1998) (footnote omitted); accord William S. Geimer & Jonathan Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 AM. J. CRIM. L. 1, 28 (1988) ("The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied.").

Williams v. Woodford (9th Cir. 2004) 384 F3d 567, 624. (See also, *Lockhart v. McGee* (1986) 476 U.S. 162, 181, [the defense of "'residual doubt has been recognized as an extremely effective argument for defendants in capital cases. [Citation omitted.]'".)

Under these circumstances, it is likely that adequate consideration of the lingering doubt defense would have made a difference. Without any instruction, the jury had no proper guidance on whether or how to apply the evidence raising a lingering doubt. It cannot be shown that such an error was harmless. Reversal is required.

* * * * *

IX.
THE TRIAL COURT ERRED BY INSTRUCTING THE JURY WITH CALJIC NO. 8.85 WHILE REJECTING INSTRUCTIONS PROPOSED BY THE DEFENSE THAT MORE CLEARLY DEFINED MITIGATION AND ITS PROPER APPLICATION

A. Introduction

The trial court instructed the jury with CALJIC No. 8.85 on the factors for consideration in the penalty phase. (CT 336-337; RT 2596-2598.) This instruction is constitutionally flawed.[61] While relying on the flawed instruction, the trial court rejected instructions proposed by the defense that more clearly defined mitigating circumstances, and provided a more balanced and reliable approach to the proper consideration of these circumstances.

The trial court's refusal to give the defense-proposed instructions while instructing the jury with a flawed instruction deprived appellant of the rights recognized in the below-cited cases, as well as his rights to a fair and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and art. I sections 7, 15, 16, and 17 of the California Constitution. This instructional error resulted in prejudice which requires reversal.

---

[61] This Court has previously rejected the basic arguments raised in this argument (see, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 191, 192), but has not adequately addressed the underlying reasoning presented by appellant. The Court should therefore reconsider its previous rulings in light of the arguments presented here.

B. The Failure to Specify Which Circumstances Are Aggravating or Mitigating and the Failure to Prohibit Improper Consideration of Inapplicable Factors Resulted in an Unreliable Death Sentence

During in-limine discussions held on May 22, 1995, defense counsel specifically requested, over the prosecution's objection, that the trial court strike inapplicable factors from CALJIC No. 8.85. (RT 2562-2563.) Counsel argued, *inter alia*, that

> in every case there must be evidence to support an instruction. And if there is no evidence, then we are giving instructions on things that weren't even in evidence. And it violates the 8th Amendment because then it's going to allow the jury to determine factors that aren't even in evidence.

(RT 2561.)

The trial court itself then identified one such example of a mitigating circumstance unsupported by the evidence "[f]or example, whether or not the victim was a participant in the defendant's homicidal conduct or consented to defendant's homicidal act? " (RT 2561.) Counsel, quoting from *McCheskey v. Kemp* (1987) 481 U.S. 279, and relying upon the 8th and 14th Amendments, also argued, that "'[i]t would be improper and . . . prejudicial to allow [the jury] to speculate as to the aggravating circumstances wholly without support in the evidence.'" (RT 2563.) Nonetheless, the trial court denied counsel's request and erroneously instructed the jury on the full panoply of factors pursuant to CALJIC No. 8.85. (CT 336-337; RT 2596-2598.)

Thus, the jury was read factors which were unsupported by the evidence, such as factors (e) (whether the victim was a participant), (f)

(whether the defendant believed he had moral justification), and (g) (whether defendant acted under extreme duress or domination). The trial court's failure to delete these inapplicable mitigating factors rendered CALJIC No. 8.85 constitutionally deficient. The instruction itself tells the jury that it should "consider, take into account and be guided by the following factors, if applicable. . ." (CT 336; RT 2596.) However, the trial court did not delete the inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Here, the only evidence offered in mitigation was that appellant was not the shooter. (RT 2610.) The jury was thus invited to spend time pondering a laundry list of inapplicable mitigating factors for which there was no evidence at all and which inevitably denigrated the mitigation evidence which was presented.

Moreover, as counsel argued at trial, in no other area of criminal law is the jury instructed on matters unsupported by the evidence. (RT 2561.) Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process. The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime.

1. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable And Evenhanded Application Of The Death Penalty

In addition to not striking irrelevant factors, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – in this case factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating

circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens, supra,* 462 U.S. at p. 879.)

It is likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." *(Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different

numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) In addition, the error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama, supra*, 447 U.S. at p. 637.) Failing to provide appellant's jury with guidance on this point was reversible error.

Nor does it matter that the parties may have attempted to cure instructional deficits during argument because

> arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation omitted] and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

(*Boyde v. California* (1990) 494 U.S. 370, 384, relying upon *Carter v. Kentucky, supra* 450 U.S. at pp. 302-304, and fn. 20; *Quercia v. United States* (1933) 289 U.S. 466, 470; *Starr v. United States* (1894) 153 U.S. 614, 626.) Arguments of counsel are simply "not a substitute for instructions by the court." (*Parker v. Atchison T. & S.F. Ry. Co.* (1968) 263 Cal.App.2d 675, 680; see also, *People v. James* (2000) 81 Cal.App.4th

1343, 1364-1365, fn. 10 [closing argument cannot cure error in instruction but may exacerbate it].) It is well settled that it is the court, not counsel, which must explain to the jury the rules of law that apply to the case. (*People v. Baldwin* (1954) 42 Cal.2d 858, 871.) Here, the jury was instructed accordingly that "[s]tatements made by attorneys are not evidence" (CALJIC No. 1.02; CT 225; RT 2369), and that "[i]f anything concerning the law said by the attorneys . . . conflicts with my instructions on the law, you must follow my instructions. (CALJIC No. 1.00; CT 215; RT 2363-2365.)

2. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded The Jurors' Consideration Of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); RT 2597), and "substantial" (see factor (g); *Ibid.*), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Tennard v. Dretke* (2004) 124 S.Ct 2562, 2570; *Mills v. Maryland* (1988) 486 U.S. 367, 373; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Moreover, to add to any potential jury confusion over which factors were mitigating or aggravating, the prosecution used the adjective "extreme" in conjunction with "aggravating factors," referring to "*extreme* aggravating factors" in argument. (RT 2607, emph. added.)

C. The Trial Court Improperly Rejected Appellant's Proposed Instructions Which Would Have Guided the Jury's Deliberations in Accordance with the Law

"An accused is entitled on request to nonargumentative instructions that 'pinpoint' the theory of the defense." (*People v. Webster* (1991) 54

Cal.3d 411, 443, relying upon *People v. Daniels* (1991) 52 Cal.3d 815, 870; *United States v. Fejes* (9th Cir. 2000) 232 F.3d 696, 702.) Accordingly, "in considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of ... CALJIC ...." (Cal. Stds. Jud. Admin., § 5.) It is equally well-established that the right to request specially-tailored instructions applies at the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

Here, the trial court gave five of appellant's proposed instructions[62] but refused six critical ones, one on lingering doubt and five which dealt with mitigation. (CT 319; RT 2568-2569, 2573, 2582-2583, 2585, 2589; ACT Suppl. (B) 314; ACT Suppl.(C) 371-374, 377; (Settled Stmt #25).) Appellant has addressed the lower court's improper refusal of his lingering doubt instruction in a separate argument. (See Arg. VIII.) With the exception of one of the mitigation instructions discussed *infra*, the trial court did not find any of the other instructions argumentative or incorrect statements of law. In fact, the court either gave no explanation for its denial of the requested instructions or simply stated it was unpersuaded that it had a duty to give the instructions. (RT 2582-2583.)

This insubstantial basis for the denial of appellant's instructions is untenable. As set forth *supra*, leaving inapplicable factors in CALJIC No. 8.85 could only serve to confuse the jury and such unsupported theories should have been screened out. (See, e.g., *People v. Guiton, supra,* 4 Cal.4th at p. 1131.) In apparent recognition of the confusion that

---

[62] The five instructions addressed deterrence, absence of mitigation, sympathy and the lack of obligation to return a death verdict. (CT 340, 342-343; RT 2599-2600.)

inapplicable factors like (f) and (g) might cause the jury, defense counsel proposed the following two instructions:

> *Edelbacher* - Moral Justification[63]
> The absence of evidence showing moral justification, extreme duress, extreme emotional disturbance, or childhood deprivation cannot be factors in aggravation.

(ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl. (C) 371; RT 2568-2569, 2582.)

> The factors mentioned are to be considered only if relevant, and a mitigating factor such as duress or moral justification is irrelevant and should be disregarded when there is no evidence of it [sic] existence.

(ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl. (C) 372; RT 2568-2569, 2582.)

The trial court refused to give these two instructions without explanation. (RT 2582.) The jury would have benefitted from these instructions because they explained that the irrelevant factors included in CALJIC No. 8.85 should be disregarded. The trial court could articulate no reason, nor is there any, for failing to give the jury the two proposed *Edelbacher* instructions. (RT 2582.)

In addition to the *Edelbacher* instructions, appellant's other proposed instructions, rejected by the trial court, also dealt with mitigation. Specifically, the defense proposed an instruction on felony murder to be included at the end of CALJIC No 8.81.17, which would have properly

---

[63]The proposed instructions were not numbered. Two of the instructions referenced *People v. Edelbacher, supra,* 47 Cal.3d at p. 1035 (holding that judge must make clear that each juror is to make a personal conclusion from evidence on penalty.)

guided the jurors that the "circumstances of the crime is an aggravating factor as to *all* defendants who reach the penalty phase" and that defendants with a felony-murder special circumstance are thus "subject to no greater chance of receiving the death penalty than any other defendant" against whom that finding has been made. (ACT Suppl. (B) 314; ACT Suppl. (C) 373; RT 2582-2583; emph. added.)[64] This instruction was particularly critical to appellant because he had not killed anyone and was solely eligible for the death penalty under a felony-murder theory. The rejected instruction would have clarified for the jury that the felony murder conviction, standing alone, did not justify the death penalty.

The trial court also refused to give the following two defense instructions:

> You, the jury can impose a sentence of life imprisonment without parole even if you find no mitigating evidence whatsoever.

(CT 319; RT 2589.)

> You, the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

---

[64]The proposed instruction stated: "The finding of a felony-murder special circumstance makes the death penalty no more mandatory than the finding of any other special circumstance. Under our penalty scheme, the jury must weigh the factors in aggravation and mitigation to determine penalty. The circumstances of the crime is an aggravating factor as to all defendants who reach the penalty phase. Thus defendants with a felony-murder special circumstance are subject to no greater chance of receiving the death penalty than any other defendant against whom a special circumstance finding has been made." (ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl. (C) 373; RT 2582-2583.)

(ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl. (C) 377; RT 2585.)

As to the latter instruction, the court erroneously concluded that it "invites the jury to compare this case with other capital cases" and that it was an incorrect statement of the law. (RT 2585-2586.) In fact, the instruction made no mention whatsoever of other capital cases. Appellant's proposed instruction was taken directly from *People v. Duncan* (1991) 53 Cal.3d 955, 979, recognizing that under our law "[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (See also, *People v. Stansbury* (1993) 4 Cal.4th 1017, 1065.) Contrary to the trial court's finding, the instruction is a correct statement of the law. (RT 2585-2586.)

Even though the court acknowledged the language in *Duncan*, it nonetheless denied the instruction because, in comparing it with two federal district court cases under Arizona law, it found no authority to support the requirement that the instruction be given *sua sponte*. (RT 2585.) Appellant does not dispute the lack of a *sua sponte* requirement under our state law. (See e.g., *People v. Snow* (2003) 30 Cal.4th 43, 124.) However, as set forth above, this was not a proper basis to deny the defense request when the proposed instruction itself was a correct statement of the law, non-argumentative, and would have helped to guide the jury on appellant's theory of defense. (*People v. Webster, supra,* 54 Cal.3d at p. 443; *United States v. Fejes, supra,* 232 F.3d at p. 702.)

The Eighth and Fourteenth Amendments require a jury to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.) The jury's consideration of mitigating evidence must be ensured through proper instructions. Appellant's proposed instructions

dealt with mitigation and appellant "had a right to 'clear instructions which not only do not preclude consideration of mitigating factors . ... but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . .' " (*People v. Gordon* (1990) 50 Cal.3d 1223, 1277, citation omitted (overruled on another point in *People v. Edwards* (1992) 54 Cal.3d 787, 830.) Appellant's proposed instructions would have provided this much-needed guidance to the jury during the penalty phase. These instructions were vital to the jury's understanding of what mitigating evidence could be considered in determining the appropriate penalty and the trial court never found otherwise. The trial court's refusal to give appellant's proposed instructions infringes upon a right afforded by state law. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; Calif. Const., art. 1, §§ 7, 15 .) The refusal also violated appellant's right to a reliable penalty determination under the Eighth Amendment and appellant's liberty interest under the Due Process Clauses of the Fifth and Fourteenth Amendments in having a sentence imposed by a jury accurately informed concerning the scope of their sentencing function under state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; see also *Godfrey v. Georgia* (1980) 446 U.S. at p. 428, quoting *Gregg v. Georgia, supra,* 428 U.S. at p. 198 [a state wishing to authorize capital punishment "must channel the sentencer's discretion by 'clear and objective standards'"]); *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301; *Fetterly v. Paskett* (9th Cir. 1994) 15 F.3d 1472, 1497-1481 (conc. opn. of Trott, J.).)[65]

---

[65] Appellant acknowledges *Boyde v. California, supra,* 494 U.S. at pp. 381-382 and *People v. Kaurish* (1990) 52 Cal.3d 648, 705, holding that no

(continued...)

This Court has previously rejected such instructional challenges by asserting that the standard instructions on aggravation and mitigation are properly understood by the jurors. (See, e.g., (*People v. Benson* (1990) 52 Cal.3d 754, 802.) However, this unsubstantiated assumption has been severely undermined by recent empirical research showing how these circumstances are commonly misunderstood by jurors. (See Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 422-424 [juror simulation study of California instructions on college-educated students finding "widespread inability to comprehend the central terms of capital penalty phase decision making"]; Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law & Human Behavior 575, 582-583, 589-591 [study finding that juror comprehension of revised California instructions remained poor and that attorney closing arguments did little to improve comprehension]; Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L.Rev. 1 [study finding that South Carolina jurors remain confused about penalty phase law]; (see also, Haney, Sontag, and Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instruction, and the Jurisprudence of Death* (1994) 50 Journal of Social Issues 149, 169 [study finding capital jurors believed, despite ostensible instruction to the contrary,

---

[65](...continued)
additional instruction identifying other mitigating factors is necessary if some version of a factor (k) instruction is given. However, given the cumulative facts and errors in this case, appellant's proposed instructions were not only warranted but critical to his defense.

that the absence of mitigation evidence supported a death sentence].) The proposed instructions would have more adequately defined the concepts of aggravation and mitigation and allowed for proper consideration of all relevant mitigation.

Finally, the defense proposed instructions would have cured other deficiencies in CALJIC No. 8.85 – the failure to specify that jurors need not agree unanimously on factors offered in mitigation and that no burden of proof applies to consideration of mitigation by individual jurors. (CT 336-337.) In *Mills v. Maryland, supra,* 486 U.S. at p. 373, and *McKoy v. North Carolina* (1990) 494 U.S. 433, the United States Supreme Court held that under the Eighth Amendment a capital sentencing jury cannot be limited in its consideration of mitigating evidence by either explicit rule or implicit belief that it must unanimously agree on the existence of a mitigating circumstance before it can be considered in the penalty determination.

Nothing in CALJIC No. 8.85 made it clear in appellant's case that the jurors did not need to be unanimous on consideration of mitigation. Instead, the jurors were instructed pursuant to CALJIC No. 8.88 that "[i]n order to make a determination as to the penalty, all twelve jurors must agree any [sic]." (CT 345; RT 2616.)[66] The failure to specify that the unanimity requirement does not apply to consideration of mitigation created a reasonable likelihood that at least some of the jurors improperly rejected mitigating evidence because other jurors did not agree on a particular factor.

Mitigating circumstances are not rendered irrelevant simply because

---

[66]The reporter's transcript reads "all 12 jurors must agree any." (RT 2616.) The clerk's transcript reads "all twelve jurors must agree." (CT 345.)

all twelve jurors do not agree to their existence. Indeed, had the jury explicitly been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (See *McKoy v. North Carolina, supra,* 494 U.S. at 442-443; *Mills v. Maryland, supra*, 486 U.S. at 374.) Yet, because the jury in appellant's case was not instructed that it need not unanimously agree on each factor in mitigation, it is reasonably likely the jury disregarded the relevant mitigating circumstances which were not unanimously found.

The failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection, and a reliable capital sentencing determination, in violation of the Eighth and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 15, 16 and 17 of the California Constitution. Failing to instruct the jury on un unanimity with regard to mitigation impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth and Fourteenth Amendments. The failure to so instruct in this case also created the likelihood that different juries will utilize different standards, and such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Since the reasonable likelihood that the jury failed to consider all of appellant's mitigating evidence could have led to the erroneous imposition of the death sentence, the failure to give appellant's proposed instruction violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair and impartial jury, a fair trial, and a reliable determination of penalty.

Because the jurors were also instructed that consideration of the alleged aggravating factors relating to prior felony convictions and other

criminal activity must be proved beyond a reasonable doubt (CT 338-339), there is also a reasonable likelihood that some jurors improperly applied a similar burden to consideration of mitigation evidence. The absence of any instruction clearly informing the jurors that no such burden of proof applied to consideration of the mitigating evidence violated the Eighth and Fourteenth Amendments because of the likelihood that the instructional error precluded the jurors from considering all mitigation. (*Lockett v. Ohio, supra,* 438 U.S. at pp. 603-605.)

D. The Instructional Errors Require Reversal

Under the circumstances of this case, the use of CALJIC No. 8.85, while rejecting proposed instructions that would have clarified that certain factors can only be mitigating and that neither unanimity nor a burden of proof applied to consideration of mitigation, constituted federal constitutional error. There is a reasonable likelihood that the jury applied the flawed instructions in such a way as to improperly consider the aggravating and mitigating evidence presented in this case. (*Boyde v. California, supra,* 494 U.S. at p. 380.)

The trial court's refusal to give the jury the proposed defense instructions cannot be deemed harmless under any appropriate standard of review, and especially here where the jury was clearly struggling and in need of guidance during the penalty phase. It requested read back testimony from three witnesses, Cedric Torrence, Sergeant Blackwell, and Laura Carroll. (RT 2628, 2693, 2733.) It also sent a note during deliberations to the trial court asking about changes in the death penalty

law. (RT 2621.)[67]

The cumulative impact of all of these instructional errors including, *inter alia*, the failure to re-state applicable guilt phase instructions and the failure to give the defense proposed instructions on factors in mitigation unfairly tipped the scales in favor of a death verdict. Appellant's death verdict must be reversed.

* * * * *

[67]Specifically, the jury wanted to know if appellant were given death and the death penalty overturned, would he have an opportunity for parole or would his sentence automatically revert to LWOP? (RT 2621.) The jury also wanted to know if the law changed in the future whether there would ever be an opportunity for appellant to be released from prison. (RT 2621.)

X.
THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING AN IRRELEVANT AND INFLAMMATORY PHOTOGRAPH OF THE VICTIM'S BODY

The trial court abused its discretion under Evidence Code section 352, depriving appellant of due process of law, a fair trial, and a reliable guilt and penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and parallel provisions of the state Constitution by admitting an irrelevant and inflammatory photograph of the victim's body.

A. Proceedings Below

Defense counsel objected to the admission of Exhibit 59, a ten-by-twelve-inch close-up autopsy photograph of Ms. Collins' face. (CT 186; RT 1593.) The photograph showed two head wounds, a copper bullet jacket partially protruding from Ms. Collins' scalp amidst hair matted with blood, and some glass wounds on the skin of her face. (RT 1585-1586, 1592-1595). The prosecution contended that the photograph would assist the pathologist in his testimony to show that the bullet "split" after passing through the glass window, causing two entrance wounds, and that the copper bullet jacket was a match to the bullet recovered from Officer Brock as well as to Mitchell Funches' gun. (RT 1586, 1593-1594.) While the defense counsel agreed that the photograph was not especially gruesome and that he had "seen worse," he objected because the photograph was likely to raise the passions of the jurors. (RT 1594.) Counsel argued that the prosecution expert could introduce the same evidence through skull diagrams and that the probative value of the photograph was outweighed by the risk of undue prejudice

within the meaning of Evidence Code section 352. (RT 1593.) The trial court denied the defense motion to exclude this photograph finding that although it was "unpleasant," it was "not extremely inflammatory or gruesome" and there appeared to be no danger of undue prejudice. (RT 1594.) The court further explained that the photograph was "probative as to several issues in the case, including the identity of the perpetrators." (*Ibid.*)[68]

B. The Admission of The Prejudicial Photograph Violated Appellant's State and Federal Constitutional Rights

Under Evidence Code section 352, a court has discretion to exclude evidence when its probative value is outweighed by the probability it will create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. In several cases courts have found an abuse of discretion in allowing photographs of the bodies of murder victims. Thus, "[w]hen allegedly gruesome photographs are presented, the trial court must decide whether their probative value outweighs their probable prejudicial effect." (*People v. Love* (1960) 53 Cal.2d 843, 852 (overruled on other grounds in *People v. Balderas* (1986) 41 Cal.3d 144, 182); *Beagles v. Florida* (Fla. 1973) 273 So.2d 796, 798 [reversing murder conviction where there was no issue in dispute necessitating admission of gruesome photographs showing shotgun wound to victim's head]; *State v. Cloud* (Utah 1986) 722 P.2d 750,

---

[68] Defense counsel did not object to admission of the photograph during trial. (RT 2056.) Such an objection would have been futile in any event given the court's earlier ruling and would have also served to bring unwanted attention to the picture. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 817.)

752-755 [reversing murder conviction because of erroneous admission of graphic photographs].) Such evidence can have such a powerful effect that "[u]nnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment." (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997; *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269 [recognizing admission of gruesome photographs may deprive defendant of fair trial and require reversal of judgment].) Thus, "photographs should be excluded where their principal effect would be to inflame the jurors against the defendant because of the horror of the crime..." (*People v. Chavez* (1958) 50 Cal.2d 778, 792.)

"Autopsy photographs have been described as 'particularly horrible,' and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant." (*People v. Marsh, supra*, 175 Cal.App.3d at p. 998, quoting *People v. Burns* (1952) 109 Cal.App.2d 524, 541.) In *Marsh, supra*, the prosecutor argued that the autopsy photographs were relevant to show the amount of force used to inflict the fatal blows. (*Id.* at p. 997.) The Court of Appeal held that although cause of death was the central issue in the case, the coroner's testimony was adequate to make the prosecution's point, and therefore, the photographs were more prejudicial than probative and their introduction into evidence was error.

In the present case, contrary to the trial court's finding, the photograph was not relevant to the "the identity of the perpetrators." (RT 1594.) It was undisputed that Mitchell Funches shot Ms. Collins. (RT 2064-2067.) As in *Beagles, supra*, it was also undisputed "how [Ms. Collins'] death occurred, her identity and that a bullet went into her brain

and did not come out." (*Beagles v. Florida, supra,* 273 So.2d at p. 798.) Dr. Frank Sheridan, the forensic pathologist, testified that Ms. Collins died instantaneously from a bullet wound to the left side of her head. (RT 2042, 2046, 2049, 2053.) The bullet came from Mitchell Funches' gun. (RT 2064-2067.) Defense counsel did not cross-examine Dr. Sheridan. (RT 2057.) He did not need to because, *inter alia*, the fact that the bullet "split" in passing through the passenger window, causing two wounds instead of one, was of no import to the prosecution's case against appellant nor to appellant's defense. (RT 2050.) Moreover, as counsel contended during in-limine discussions, Dr. Sheridan could have just as easily used a diagram as a visual aid to depict the wounds without resort to a bloody head shot of the victim. (RT 2053.) " [T]he jury was not enlightened one additional whit by viewing . . . [a] gory autopsy photograph[s]." (*People v. Marsh, supra*, 175 Cal.App.3d at p. 997.) As in *Marsh*, here, "where the uncontradicted medical testimony identified the precise location and nature of the injuries [an autopsy photograph has] little, if any, additional probative value." (*Ibid*; see also *People v. Smith* (1973) 33 Cal.App.3d 51, 69 [erroneous admission of gruesome photographs which had "a sharp emotional effect, exciting a mixture of horror, pity and revulsion" where ample testimony regarding the precise location and nature of the wounds "needed no clarification or amplification. [Citation omitted].")

In contrast, it is not error to admit this type of evidence when the photographs are particularly probative, such as when they are admitted in the penalty phase to show the deliberate and brutal nature of the crime. (*People v. Staten* (2000) 24 Cal.4th 434, 462-464 [18 stab wounds reflect

very intentional nature of killing].) Similarly, in *People v. Scheid* (1997) 16 Cal.4th 1, the shocking nature of the photograph itself was relevant because by portraying the scene it helped explain the mental state of the two witnesses who found the victims. That mental state, when the first witness made statements to the police, had been the subject of some litigation. (*Id.* at p. 16.) No such issues were in dispute at appellant's trial.

Admission of irrelevant and lurid photographs may also render a trial fundamentally unfair. (See, e.g., *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548.) When a trial court's ruling admitting prejudicial evidence renders a trial fundamentally unfair, regardless of whether the ruling complies with or violates state evidentiary law, the ruling runs afoul of the Due Process Clause. (*Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 919.) Moreover, as stated elsewhere in this brief, a due process analysis is virtually the same as an Evidence Code section 352 analysis because "[a] careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings, supra,* 81 Cal.App.4th at p. 1314; *People v. Hoover, supra,* 77 Cal.App.4th at p. 1029; *People v. Brown, supra,* 77 Cal.App.4th at p. 1334.) There is simply no useful purpose in "declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved . . ." (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn 6, quoting from *People v. Yeoman, supra,* 31 Cal.4th at p. 117; see Arg. IV.)

This Court has also recognized section 352 as providing a realistic safeguard from due process violations. (*People v. Falsetta, supra,* 21

Cal.4th at pp. 919-920; *People v. Fitch, supra,* 55 Cal.App.4th at p. 183.) Under the present facts, the analysis required by section 352 and by due process is virtually the same. (See e.g. *People v. Cole, supra*, 33 Cal.4th at p. 1195, fn 6; *People v. Yeoman, supra*, 31 Cal.4th at p. 117.)

The wrongful admission of this type of evidence also violates the Eighth Amendment prohibition on cruel and unusual punishments, extended to the states through the Fourteenth Amendment, which encompasses the right to a fair and reliable guilt and penalty determination. (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Lockett v. Ohio, supra,* 438 U.S. at p. 605.)

As these cases make clear, the trial court erred in admitting the photograph objected to by the defense. The most important lesson from the foregoing cases is that when the depiction of a victim's injuries is unnecessary for the resolution of disputed issues, introduction of a gruesome photograph of the victim is error. The instant case presents precisely such a situation. In this case it is clear that the photographs had little or no probative value relating to any disputed issue in this case. The fact of the murder, the manner in which it was committed, the identity of the shooter and victim, and other facts that this photograph might have had bearing on were not in dispute. There was also nothing particularly informative about this picture, apart from its generic use of showing how the murder was committed. The wounds portrayed in the picture were described to the jury and thus negated the need to actually show the picture. A diagram or chart would have served the same function but even that would have been irrelevant. The photograph only added to the emotional aspect of the case and was, at best, cumulative.

C. Prejudice

When a trial court's error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California, supra*, 386 U.S. 18, 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt. Because the photograph in this case did not tend to prove anything that was of consequence to any disputed fact in the case, the evidence was not relevant. (Evid. Code § 210.) Having failed the test of relevance, this leaves only the gruesome nature of the photographs which clearly was prejudicial.

An important consideration in determining prejudice is the weakness of the case against appellant. While it has been held that any error in admitting gruesome photographs was harmless due to the strength of the prosecution's case (*People v. Hines* (1997) 15 Cal.4th 997, 1046), the same rationale may not be employed here. This was a close case in which the prosecution had little evidence against appellant: a few strands of generic fiber evidence consistent with appellant's clothing, his being in the vicinity of the crime, and the testimony of the prosecution's key witness, Torrence, who later admitted that he lied. (See Arg. II.) What is most notable is what the prosecution did not have. The prosecution had no fingerprints, no eyewitnesses, and no murder weapon to connect appellant to the crime. (See Args. II and IV.) Moreover, the jury clearly struggled during deliberations. It asked for the testimony of Michael Manzella, Laurie Manzella, and appellant to be read back during guilt phase deliberations (RT 2451, 2469), and for read back of testimony from Cedric Torrence (RT 2628), Sgt. Blackwell (RT 2693), and Laura Carroll (RT 2733) during

penalty deliberations. In a weak case like this one, the nature of this picture, a blown-up bloody head shot of a dead woman, had an undue detrimental influence on the jury. Because the injuries had already been described to the jury, any information the pictures might have contained had already been conveyed to the jury, thereby lessening any probative value in relation to prejudice. Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even assuming that it was mere state law evidentiary error rather than federal constitutional error. (*See People v. Poggi* (1988) 45 Cal.3d 306, 323.)

When deciding the impact of photographs on jurors, a reviewing court is usually left to speculate as to how the jurors may have been affected by viewing the photographs. Studies have recognized that graphic photographs have the power to arouse jurors' emotions: "Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs." (Rubenstein, *A Picture Is Worth a Thousand Words–The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197, 208; see, Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Behav. 485, 491-492 [documenting jurors' emotional reactions to viewing graphic photographs of murder victim]; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective* (1994) 43 Drake L.Rev. 97, 104 [recounting juror's posttraumatic-stress symptoms experienced after viewing graphic photos of murder victim].)

Studies also show that graphic photographs influence the verdicts that juries return. (Miller & Mauet, *The Psychology of Jury Persuasion*

(1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Douglas et al., *supra*, 21 Law & Hum. Behav. at p. 492-494 [accord].) If a jury is more likely to render a guilty verdict when shown an autopsy photograph than it would be if not shown the photograph, there is reason to believe that a penalty phase jury would be more likely to return a death verdict when shown the photograph than it would be if not shown the photograph.

Logic supports this conclusion because jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts."].) Thus, a jury's death-sentencing discretion at the penalty phase is much more likely to be affected by evidentiary items such as inflammatory photographs. Viewing a graphic photograph of a victims' corpse creates a strong emotional reaction in a juror and creates a likelihood that the reaction will be so strong that it will override consideration of the other evidence presented on the ultimate question of whether the defendant should live or die.

The belief that the introduction of gruesome photographs causes jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. (Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision*

Making (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

As reflected by the studies cited above, it is likely that the jurors were affected by the photograph in making their guilt and death-sentencing decisions, and may have closed their minds to the defense evidence because of it.

In summary, the trial court's decision to allow for introduction of an irrelevant, inflammatory, gruesome photograph depicting the body of the victim was an abuse of discretion, depriving appellant of an impartial jury, a fair trial, due process of law, and a reliable penalty determination in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provision of the state constitution. Appellant's conviction and death sentence must be reversed.

* * * * *

XI.
THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. As set forth elsewhere in this brief, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. (See Arg. XV.) As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Arg. XIII.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

\

\

\

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Cal. Penal Code § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[69]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist,

---

[69] There are two exceptions to this lack of a burden of proof. The special circumstances (Cal. Penal Code § 190.2) and the aggravating factor of violent criminal activity (Cal. Penal Code § 190.3(b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3(b), elsewhere in this argument and in this brief. (See also, Args. XII, XIII.)

[or] that they outweigh mitigating factors ...." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent, supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) ___ U.S. ___ [124 S. Ct. 2531].

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The high court held that a state may not impose

a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)[70] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to

---

[70] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id.*)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[71] Only

---

[71] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding

---

[71](...continued)
2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[72] As set forth in California's "principal sentencing instruction" (*People v. Farnam, supra,* 28 Cal.4th at p. 177), which was read to appellant's jury, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CT 344-345; RT 2614-2616; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating

---

[72] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[73]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Penal Code 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment

---

[73] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown*, *supra*, 40 Cal.3d at p. 541.)

contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2551, (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that

the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered.[74] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v.*

---

[74] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

Snow, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 263 (italics added).)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan, supra,* 53 Cal.3d at pp. 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual

finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[75]

---

[75] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman*, *supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to

(continued...)

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . .

---

[75](...continued)
the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

> extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi v. New Jersey*, *supra,* 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

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

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to

any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when

life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re*

Winship, *supra*, 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338, 342 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [same]; *People v. Thomas* (1977) 19 Cal.3d 630, 632 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

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

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*,

supra, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I*]n *a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as

nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California, supra*, 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See e.g., *People v. Griffin, supra,* 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the

> jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is

constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"];

Mills v. Maryland, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[76]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury

---

[76] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Cal. Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the

death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v.*

Bacigalupo (1992) 1 Cal.4th 103, 462-464 (cert. granted on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802); see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[77]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin*

---

[77] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[78]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina, supra,* 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California,* 524 U.S. at p. 732; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury. (Cf., *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 [holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not violated by a Louisiana rule which allowed for conviction based

---

[78] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto, supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

on a plurality vote of nine out of twelve jurors].)

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler (1978) 22 Cal.3d 258*, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[79] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See e.g., Pen. Code, § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v.*

---

[79] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k). In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).

Michigan (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration

> significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely

the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof (see Arg. XI) was the trial court's rejection of the defense's requested instructions. (See Arg. IX.) This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California, supra,* 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

A defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer considers it. However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard.

Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and

the equal protection and due process clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. XIV; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. VIII & XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. XIV;

Cal. Const., art. I, § 7.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

* * * * *

XII.
THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

In the penalty phase, the trial court instructed the jury with the 1989 revision of CALJIC No. 8.88[80] on the weighing process. This instruction

---

[80] The trial court instructed the jury: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant. ¶After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. ¶An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. ¶ The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. You shall now retire and select one of your number to act as foreperson, who

(continued...)

was vague and imprecise, failed to describe the weighing process accurately that jurors must apply in a capital case, was improperly weighted toward death and deprived appellant of the individualized, moral judgment required under the federal Constitution. This instruction, which formed the centerpiece of the trial court's description of the sentencing process, violated appellant's rights to a fair jury trial, reliable penalty determination and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding sections of the California Constitution.[81] (See e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.) Reversal of the death sentence is required.

B. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial

---

[80](...continued)
will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree. ¶Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom." (CT 344-345; RT 2614-2616.)

[81] As previously set forth (Arg. XII), appellant recognizes that this Court has rejected arguments challenging CALJIC No. 8.88 in cases such as *People v. Preito, supra,* 30 Cal.4th at p. 264 and *People v. Catlin* (2001) 26 Cal.4th 81, 174. However, for the reasons stated below, those decisions should be reconsidered.

in comparison with the mitigating circumstances that it warrants death instead of life without parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*See Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we

> are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[82]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing

---

[82] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra,* 503 U.S. at p. 235.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII and XIV), the death judgment must be reversed.

C. The Instructions Failed To Convey the Central Duty of Jurors in the Penalty Phase

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances];

accord, *People v. Champion* (1995) 9 Cal.4th 879, 948 (disapproved on other grounds in People v. Combs 2004 34 Cal.4th 821, 860); *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is

warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (CT 344-345; RT 2615-2616.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." (*Ibid.*)

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment

without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

D. 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

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[83] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*See Boyde v. California, supra,* 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not

---

[83] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See e.g., *People v. Moore, supra,* 43 Cal.2d at pp. 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions

required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States, supra,* 157 U.S. at p. 310.)[84]

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

---

[84] There are due process underpinnings to these holdings. In *Wardius v. Oregon, supra,* 412 U.S. at p. 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra,* 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (*See* U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has

been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

E. The Instructions Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (*See People v. Hayes, supra,* 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

The instructions given in this case resulted in this capital jury not being properly guided on this crucial point. The death judgment must therefore be reversed.

F. Conclusion

As set forth above, the trial court's main sentencing instruction,

CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

* * * * *

XIII.
THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original) (quoting *Proffitt v. Florida*, *supra*, 428 U.S. at p. 251 [opinion of Stewart, Powell, and Stevens, JJ.]).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the

proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (*See Gregg v. Georgia, supra,* 428 U.S. at p. 198; *Proffitt v. Florida, supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (*See People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these

> factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California, supra,* 512 U.S. at p. 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris*, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[85]

---

[85] *See* Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Coop. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. *See State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v.*

(continued...)

The present case exemplifies why intercase review should be mandatory in a capital case. Here, appellant neither shot nor physically injured anyone. Mitchell Funches, who was tried separately for the same crime, shot and killed Ms. Collins as well as seriously injuring Officer Brock. (RT 1644, 1920, 1928.) Funches, who undisputedly shot two people, is serving a life sentence; appellant is to be executed without having even pulled a trigger. (RT 2773, 2777.)[86] Recognizing the inherent unfairness in this situation, defense counsel specifically requested a jury instruction on comparative liability.[87] In rejecting the defense instruction, the trial court found that "[t]he problem with this instruction is that it invites the jury to compare this case with other capital cases. And under California law, that's not appropriate." (RT 2585.)

Appellant does not dispute the trial court's understanding of California law on this point. However, the capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the United

---

[85](...continued)
State (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre, supra,* 572 P.2d at p. 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 (comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

[86] Appellant has filed a separate motion requesting this Court take judicial notice of Mitchell Funches' clerk's transcript after his case was severed from appellant.

[87] Defense counsel proposed the following instruction:

> You, the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(ACT Suppl. (B) 314 (Settled Stmt #25), ACT Suppl. (C) 377; RT 2585.)

States Supreme Court in *Pulley* had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments following this one. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review, and the trial court should have instructed the jury accordingly under the facts of the present case. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

* * * * *

XIV.
CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century civilized European nations as models. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty. In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, *The Death Penalty, Abolitionist and Retentionist Countries* (as of March 2005), Amnesty International webcite, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty International, April 2005.) The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving standard of decency moving to abolish capital punishment worldwide. (See

Ring v. Arizona (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2004, ninety-seven per cent of all known executions took place in China, Iran, Viet Nam and the United States. (*Ibid.*) While most nations have abolished the death penalty in law or practice, this nation continues to join a handful of nations with the highest numbers of executions. The United States has executed more than 940 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty international, *About the Death Penalty,* Amnesty International webcite, *supra.*) As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment . . . Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past.

(April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[88]

---

[88]Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit:

> The cases of Derrick Jamison and the other 118 individuals released from death row since 1973 demonstrate that no judicial system is infallible. However sophisticated the system, the death penalty will always carry with it the risk of lethal error . . .

(*Ibid*; in February 2005, Derrick Jamison became the 119th wrongfully

(continued...)

The continued use of capital punishment in California and the United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at pp. 389-390 [dis. opn. of Brennan, J.].)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International, imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, *International Law*, Amnesty International website, *supra*.)

Additional support for this position is also evident by the adoption

---

[88](...continued)
convicted person to be released from death row on the grounds of innocence.)

of international and regional treaties providing for the abolition of the death penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 439-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[89]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing

---

[89] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Once again, however, defendant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent* (1987) 43 Cal.3d 739, 778-781; see also 43 Cal.3d at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray, supra,* 477 U.S. at p. 534 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus

review].) The death sentence here should be vacated.

* * * * *

XV.
CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

California's death penalty scheme fails to require that the jury make a written statement of findings and reasons for its death verdict. Although this Court has held that the absence of such a requirement does not render the death penalty scheme unconstitutional (*People v. Fauber* (1992) 2 Cal.4th 792, 859), that holding should be reconsidered as the failure has deprived appellant of his Fifth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and meaningful appellate review of his death sentence.

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449, citing *In re Podesto* (1976) 15 Cal.3d 921, 937-938.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentencing choice. (*Ibid*; Penal Code § 1170, subd. (c).) Because the Eighth and Fourteenth Amendments afford capital defendants more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that the sentencing entity in a capital case is constitutionally required to identify for the record the aggravating and

mitigating circumstances found and rejected.

As discussed previously in this brief, the decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Ring v. Arizona, supra*, 536 U.S. 584, and *Blakely v. Washington, supra*, 124 S.Ct. at p. 2543, require that a jury decide unanimously and beyond a reasonable doubt any factual issue allowing an increase in the maximum sentence. Without written findings by the jury, it is impossible to know which, if any, of the aggravating factors in this case were found by all of the jurors. This was particularly necessary here where the jurors queried the court over the choice of penalties. (RT 2621.)

Moreover, the Court itself has stated that written findings are "essential to meaningful [appellate] review." (*People v. Martin, supra*, 42 Cal.3d at pp. 449-450.) Explicit findings in the penalty phase of a capital case are especially critical because of the magnitude of the penalty involved (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 305) and the need to address error on appellate review. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15.) California capital juries have wide discretion, and are provided virtually no guidance, on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra,* 512 U.S. at pp. 978-979.) Without some written explanation of the basis for the jury's penalty decision, this Court cannot adequately assess prejudice where, as in appellant's case, aggravating factors have been improperly considered.

Accordingly, the failure to require written findings regarding the sentencing choice deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection of the law, and meaningful appellate review of his death sentence. This constitutional

deficiency in California's death penalty law requires reversal of appellant' s death sentence and remand for a new penalty trial.

*****

XVI.
THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT, REQUIRING REVERSAL

Numerous errors, many of federal constitutional dimension, occurred at appellant's trial. Appellant has shown how each of those errors individually prejudiced his case. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors undermines any confidence in the integrity of the proceedings and may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1206-1208; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

Forcing appellant to wear a stun belt during trial, particularly during his guilt-phase testimony, doomed any chances for him to receive a fair trial at the outset. Compounding the problem was the trial court's improper admission of a gun. The gun, even though it was not the murder weapon, acted to blur the line between Funches, the actual shooter, and appellant, bringing appellant that much closer to a death verdict. In addition, there were numerous instructional errors which left the jury without legal guidance to make key determinations. Finally, the trial court improperly denied appellant's two motions for new trial despite the compelling evidence that: (1) the prosecution's key witness perjured himself and (2) appellant had been on psychiatric medication which may have impaired his ability to assist in his own defense. These and the other multiple errors undermined the reliability of the both the guilt and penalty verdicts.

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Williams, supra,* 22Cal.App.3d at pp. 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 366; *People v. Pierce* (1979) 24 Cal.3d 199, 208.)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on

the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

In the instant case, it certainly cannot be said that the errors had "no effect" on any juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Given the severity of the errors in this case, their cumulative effect was to deny appellant due process, a fair trial by jury, and fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Killian v. Poole, supra,* 282 F.3d at p. 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood, supra,* 64 F.3d at pp. 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace, supra,* 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].) Appellant's conviction and death sentence must be therefore be reversed.

* * * * *

CONCLUSION

For all the foregoing reasons, appellant's conviction must be reversed and the judgment of death must be set aside.

DATED: 7/15/05

Respectfully submitted,

MICHAEL J. HERSEK
STATE PUBLIC DEFENDER

Kate Johnston
Deputy State Public Defender

Attorneys for Appellant

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

I am the Deputy State Public Defender assigned to represent appellant, Demetrius Charles Howard, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 59,639 words in length.

Dated: 7/15/05

Kate Johnston

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Demetrius C. Howard**
Case Number: **Supreme Ct. SO50583**
Case No.: Superior Ct. FSB03736

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 801 K Street, Suite 1100, Sacramento, California 95814.

On **July 15, 2005**, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in envelopes addressed to the persons named below at the addresses shown, and by sealing and depositing said envelopes in a United States Postal Service mailbox at Sacramento, California, with postage thereon fully prepaid.

Mr. Demetrius C. Howard
P.O. Box C-92812
San Quentin State Prison
San Quentin, CA 94974

Ms. Adrianne S. Denault
Deputy Attorney General
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

William Hess
Deputy District Attorney
San Bernardino District Attorney's Office
316 North Mountain View
San Bernardino, CA 92415-0004

Chuck Nacsin
Attorney at Law
572 North Arrowhead Ave., Ste. 200
San Bernardino, CA 92401

Mr. Robert Chandler & Mr. Julian Fox
Attorneys at Law
(Habeas Counsel)
3800 Orange St., #270
Riverside, CA 92501

Appellate Clerk
Superior Court of San Bernardino
351 North Arrowhead Ave.
San Bernardino, CA 92415

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 15, 2005, at Sacramento, California.

Saundra Alvarez

Saundra Alvarez