# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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| **PEOPLE OF THE STATE OF CALIFORNIA,** Plaintiff and Respondent, | **S058025** San Bernardino Sup. Court No. No. VCR5976 |
| vs. | |
| **RICHARD DON FOSTER,** Defendant and Appellant. | |

## APPELLANT'S OPENING BRIEF

Automatic Appeal from the Superior Court of the State of California
San Bernardino County
Superior Court No. VCR5976

**HONORABLE STANLEY W. HODGE, JUDGE**

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| **PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff and Respondent, | ) | |
| vs. | ) | **S058025** |
| | ) | San Bernardino Sup. Ct. |
| **RICHARD DON FOSTER,**<br>Defendant and Appellant. | ) | No. VCR5976 |

## STATEMENT OF THE CASE

By information filed on December 5, 1991, Richard Don Foster, hereafter appellant, was charged with one count of murder in violation of Penal Code § 187, subdivision (a)[1] (count 1), one count of burglary (§ 459 (count 2), and one count of robbery (§ 211) (count 3). The information alleged as to all counts that appellant personally used a deadly and dangerous weapon within the meaning of § 12022, subdivision (b). The information alleged two special circumstances: (1) murder while engaged in the attempted commission of burglary (§ 190.2, subd. (a)(17)(vii)), and (2) murder while engaged in the attempted commission of robbery (§ 190.2, subd. (a)(17)(i)). The information also alleged two prior serious felony convictions (§ 667, subd (a)). (CT 142-145.) Appellant pleaded not guilty to all counts, and he denied all special allegations. (CT 141.)

On March 11, 1992, the People filed notice of intent to seek the death

[1]/ All further references are to the Penal Code unless otherwise indicated.

penalty (CT 179-180) and filed notice of the penalty trial evidence in aggravation. (CT 174-178). Appellant's trial counsel John Hardy moved for the appointment of assistant or second counsel on July 20, 1992. (CT 196-201.) Granting the motion, the court appointed Ray L. Craig as second or assistant counsel. (CT 202.)

On March 24, 1994, appellant objected to the use of DNA evidence on grounds that such evidence, including matching procedures and statistical analyses, were not generally accepted by the relevant scientific community. (1 Supp-A CT 3-11.) Following hearings on appellant's motion, the court ruled on July 6, 1994 that the prosecution's proffered DNA analyses and statistical evidence were generally accepted in the scientific community and that the DNA testing results and statistical analyses would be admissible. (CT 258-266.)

On November 29, 1994, the People moved, over appellant's objections (1 Supp-A CT 70-95), to admit evidence during the guilt trial of prior similar crimes that occurred in 1972 and 1982.[2] (CT 285; see also 1 Supp-A CT 96-99, 110-141.) The motion was granted by the court on April 21, 1994.

On November 29, 1995, the People moved to file an amended information

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[2] / Although apparently lodged and served on November 29, 1994, the People's motion was not filed until April 21, 1995. (See 1 Supp-A CT 110, 141.)

Appellant committed two rapes in Idaho in 1972 (one involving Johnnie Clark and a second involving Dinah Jackson). Appellant was convicted of two counts of rape in 1973. The prosecutor's guilt-trial motion pertained only to the 1972 Johnnie Clark rape. For consistency and accuracy in Appellant's Opening Brief in respect to various assignments of error, the year "1972" is used in reference to the occurrence of the 1972 crimes; the year "1973" is used in reference to appellant's 1973 Idaho conviction for those crimes.

and moved in limine to exclude evidence of third party motive or opportunity. (CT 298; 1 Supp-A CT 142-145.) On January 5, 1996, the court granted the People's motion to file the amended information. (CT 292.) As filed, the amended information alleged one count of murder in violation of § 187, subdivision (a) (count 1), one count of burglary (§ 459 (count 2), and one count of robbery (§ 211) (count 3). The information alleged both premeditated murder and felony-murder. The information alleged as to counts 1 and 3 that appellant personally used a deadly and dangerous weapon within the meaning of § 12022, subdivision (b). The information alleged two special circumstances: (1) murder while engaged in the commission or attempted commission of burglary (§ 190.2, subdivision (a)(17)(vii)), and (2) murder while engaged in the commission or attempted commission of robbery (§ 190.2, subdivision (a)(17)(i)). The information alleged two prior serious felony convictions within the meaning of § 667, subdivision (a)(1). (CT 294-297.) At his arraignment on the amended information, appellant pleaded not guilty to all counts, and he denied all special allegations. (CT 293.)

The People moved on December 20, 1995 to physically restrain appellant at trial. (1 Supp-A CT 146-195.) The People's motion was granted on January 26, 1995. The court also deferred ruling on the People's previously-filed motion to exclude evidence of third party motive or opportunity pending an Evidence Code § 402 hearing during trial. (CT 295.)

Trial by jury commenced February 5, 1996. (CT 309.) A jury was selected

and sworn on February 28, 1996. (CT 343.) Jury deliberations commenced April 4, 1996. (CT 374.) The jury returned verdicts on April 11, 1996, finding appellant guilty on count 1 of first degree murder (§ 187, subd. (a)), guilty on count 2 of second degree burglary (§ 459), and guilty on count 3 of second degree robbery (§ 211). The jury found that appellant personally used a deadly and dangerous weapon on counts 1 and 3 within the meaning of § 12022, subdivision (b) and found true the alleged two special circumstances within the meaning of § 190.2, subdivision (a)(17)(vii) (murder while engaged in the commission or attempted commission of burglary) and § 190.2, subdivision (a)(17)(i)) (murder while engaged in the commission or attempted commission of robbery). The jury also found that appellant sustained two prior serious felony convictions within the meaning of § 667, subdivision (a)(1). (CT 378-379, 466-475.)

Penalty trial commenced April 15, 1996. (CT 480.) On May 9, 1996, the jury returned a penalty verdict of death. (CT 507-507, 705.) Appellant moved on November 12, 1996 to modify the penalty of death pursuant to § 190.4, subdivision (e) (CT 709-712) and to strike the special circumstances (CT 713-717). Appellant also moved for a new trial on December 13, 1996. (CT 718-730.)

The trial court denied appellant's motions for a new trial, to strike the special circumstances, and for modification of the verdict on December 13, 1996. (CT 738, 741.) The trial court sentenced appellant to death on count 1. The court also sentenced appellant to 2 years in state prison on count 2 (§ 459) and to 3 years

on count 3 (§ 211). Counts 2 and 3 were ordered to be served concurrent to each other; execution of sentence was stayed pending execution of sentence on count 1. (CT 736-739.)[3]

On February 15, 2002, appellant moved to correct clerical errors in the abstract of judgment in respect to the number of § 667, subdivision (a) enhancements found true by the jury. (1 Supp-A CT 261; 2 Supp-A CT 80.) Appellant's motion was granted by the trial court on April 26, 2002. (2 Supp-A CT 369.) A corrected abstract of judgment was prepared and filed on May 9, 2002 to reflect two, rather than three, 5-year enhancements pursuant to § 667, subdivision (a). (See 2 Supp-A CT 370-371.)

On June 12, 2003, the court certified the record on appeal as complete and accurate. (1 Supp-D CT 7357.) This appeal from a judgment of death following a trial by jury is automatic. (§§ 1237 and 1239, subd. (b).)

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[3]/ The minutes of the sentencing proceedings on December 13, 1996 provide that appellant was sentenced to a total determinate term of "14 years as to counts 2 and 3." Counts 2 and 3 were ordered to run concurrently with each other, and sentences imposed on those counts were stayed pending execution of sentence on count 1. (See CT 741.) The abstract of judgment, dated December 20, 1996, specifies that appellant was sentenced on count 2 (§ 459) to a concurrent, middle term of 2 years and on count 3 (§ 211) to a concurrent, middle term of 3 years. In addition, the abstract of judgment provides that on count 3 the court imposed, but stayed, a 1-year term pursuant to § 12022, subd. (b). Finally, the abstract of judgment lists three 5-year terms imposed pursuant to § 667, subd. (a). (See CT 750, 752.)

## STATEMENT OF FACTS

### I. Guilt Phase

#### A. Prosecution Evidence

1. Murder and Crime Scene

On Monday, August 26, 1991, Gayle Johnson[4] was stabbed to death in the minister's office of the High Desert Church of Religious Science in Victorville (Apple Valley), San Bernardino County. Then 44-years-old, appellant, (who was on parole as of December 1990 for robbery and assault with intent to commit rape committed in 1982 about a mile from the scene of the murder and who was then living a few miles from the crime scene), was identified as a possible suspect within days after the crime. He was contacted by the police about the murder and interviewed on September 10. Appellant was arrested for the murder on September 11, 1991. When arrested, appellant was wearing a T-shirt and Rustler jeans (waist 33, length 30). (RT 2346-2347.)

On August 24, 1991, two days before the murder, appellant visited the High Desert Church. At that time, appellant had dirty, scraggly hair and smelled as though he had not bathed for a while. (RT 1984-1998.) Appellant spoke with Irma

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[4]/ Gayle Johnson is also referred to as "Gail Johnson" in various transcripts, police reports, documents, pleadings, and so forth, in this case. For consistency and uniformity, all references to the victim or to "Gail" Johnson have been changed in Appellant's Opening Brief to "Gayle Johnson."

Plate, the newly-appointed church minister, in the Garden Room.[5] He did not go into other areas of the church. Appellant identified himself as Martin Jennings. He told Plate that his mother was in the hospital and asked the minister to pray for her. Appellant filled out a prayer (or so-called "treatment") request for his mother, identifying himself as "Martin Jennings" and providing a Washington mailing address and telephone numbers.[6] (RT 1976-1980.)

Loren West repaired the church air conditioning on the morning of August 26, 1991. He went to church at 11:20 a.m. and spoke with Gayle Johnson in the church office. (RT 2001-2014.) Everything was normal when West left the church. (RT 2014-2015.) William D. Rosenthal, who worked for an Apple Valley stationery store, discovered Gayle Johnson's body at approximately 1:00 p.m. in the church office on delivering a stationery order to the church. (RT 2025-2033.) In addition to seeing a body lying on the floor next to the minister's desk, Rosenthal observed some puddles and white, milky splotches in the church foyer and by the drinking fountain. He saw broken shards of glass outside the church

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[5]/ At trial, Rev. Plate identified appellant's attorney, Ray Craig, as the disheveled man whom she met on August 24, 1991. (8 RT 1983-1984.)

[6]/ The prayer or treatment request submitted in the name of "Martin Jennings," was introduced into evidence during trial as People's Exhibit 268A. (RT 1981-1983, 3568-3571.) A copy of the treatment request is reproduced at 4 CT 889. Martin Jennings is the son of appellant's mother and stepfather Art Jennings with whom appellant lived in 1991 in Victorville. In a separate, unrelated case also from San Bernardino County, and not involving appellant, Martin Jennings was convicted of first degree murder (for the torture-murder of his son) and sentenced to death. Jennings' appeal is pending before the Court (Case No. S081148).

next to the front window. (RT 2035-2038.)

Gayle Johnson's blue Honda was found at 10 p.m. on August 26, 1991 in the parking lot of Lucky Market in Apple Valley. (RT 2987-2990.) The car had been parked at the north end of the parking lot which was about one mile (as the crow flies) from the High Desert Church and a few miles from where appellant was then living. (RT 2990-2992.) No fingerprints were found anywhere on the exterior or interior of the car; the dash area appeared to have been wiped with some sort of contaminant.[7] Bloodstains were observed on the passenger seat, floor mat, and other interior areas of the car. (RT 2961-2964.) Four portions of bloodstained fabric from the passenger seat and from the driver's inside door panel, seat belt, and seat cover were cut out and preserved for testing. (RT 2955-2963.)

2. Cause of Death

Dr. Frank Sheridan, Chief Medical Examiner for San Bernardino County, performed an autopsy on body of Gayle Johnson on August 29, 1991. (RT 2728-2729.) Johnson had a number of defensive wounds on both hands, arms, and body. (RT 2729-2760.) Johnson had face injuries and bruising on the right nose and jaw line consistent with having been punched in face a couple of times while

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[7]/ During rebuttal the People offered additional testimony that some latent fingerprints were found on and lifted from the exterior of the car, but these fingerprints apparently were not of good quality for identification or comparison purposes. (See RT 3507-3512.)

trying to ward off blows from a knife. (RT 2760-2765.) In Dr. Sheridan's opinion, all wounds could have occurred within a minute or two if the victim had been warding off knife blows. (RT 2753-2760.)

Dr. Sheridan observed lotion on Johnson's face and pants, possibly a liquid soap. Johnson definitely had not been strangled; no alcohol or drugs were found in her body. (RT 2798-2800.)

Dr. Sheridan testified that there were one neck and at least six other stab wounds to Johnson's torso. There was no evidence of any sexual activity or any evidence of injury or bruising around the genitalia. (RT 2821-2822.) Dr. Sheridan was unable to determine the order of the stab wounds. In Dr. Sheridan's opinion, Johnson was probably lying on her back when the chest wounds were inflicted. (RT 2765-2766, 2789-2798.) All wounds occurred in quick succession at about the same time. In Dr. Sheridan's opinion, there were probably a minimum of seven separate thrusts; all chest wounds caused major internal hemorrhaging; all went through Johnson's lungs; two went through the aorta; the back wall of her chest wall (rib cage) was impacted twice. In Dr. Sheridan's opinion, Johnson would not have been able to stand after one of the stab wounds. A wound just below the left breast caused major internal injuries; there was lung tissue sticking out of the wound as though the lung had been torn by the tip of a knife and pulled back through the wound. (RT 2774-2782, 2785-2786, 2805-2810.)

Dr. Sheridan also testified about cuts observed and photographed on

appellant's hand after his arrest. In Dr. Sheridan's opinion, the cuts on appellant's hand were consistent with a knife injury, as if the hand was holding a knife during stabbing and had slipped; the cuts could have occurred two weeks before the photos were taken. An injury to appellant's fifth finger could have occurred at the same time as the other wounds. Appellant's hand injuries were consistent with healing wounds caused by a sharp object such as a knife. (RT 2800-2805, 2810-2812.)

3. Blood and DNA Evidence

San Bernardino County Sheriff Criminalist David Stockwell collected numerous blood samples and other evidence at the church. (RT 2092-2108.) The contents of the victim's purse had been dumped on the office floor, and the telephone was pulled from the wall. (RT 2179-2185.) There was an unusual blood stain on the bottom of the victim's purse, signifying that blood dropped onto the purse before it was turned over. (RT 2149-2159.) Stockwell observed white-colored hand lotion in various places in the church office, many covering blood stains. (RT 2173-2175.) The blood stains apparently had dried somewhat before lotion was added, because some stains did not show any mixture with the white fluid. Stockwell observed lotion or white fluid in the men's bathroom and a trail of lotion to or from the bathroom. A nearly-empty hand lotion jar and can of Gillette Right Guard men's deodorant was collected from the counter in the men's bathroom. (RT 2202-2215, 2362-2364.)

Stockwell's own laboratory analyzed the victim's blood (obtained during her autopsy) and appellant's blood (obtained after his arrest) using the ABO genetic marker system -- a separate and distinct process from DNA analysis performed by another laboratory. Various blood samples from the scene and obtained from the victim's car, as well as the victim's and appellant's reference samples, were tested in Stockwell's laboratory for up to 11 genetic markers.[8] (RT 2221-2225.) A blood drop on the bottom of Johnson's purse revealed 5 genetic markers under the ABO genetic marker system consistent with appellant's blood. (RT 2228.) A blood smear on fabric taken from the victim's car was also consistent with a mixture of appellant's blood and the victim's blood. (RT 2314-2316.) Of 8 bloodstains tested, analyzed, and compared with appellant's genetic marker profile using the ABO genetic marker system, one or more genetic markers in some of the samples, up to all 11 in other samples, were consistent with appellant's genetic marker profile. (RT 2248, 2270-2287.) In Stockwell's opinion, there were over 2 million possible combinations when comparing and matching all 11 ABO genetic markers. (RT 2290-2298.) There was a one in 2 million probability of matching 11 genetic markers in some of the blood stains from the church and from appellant. (RT 2290-2298; see also 2404-2406 (statistical methodology and use of product rule).)

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[8]/ Because of the need to preserve the bloodstains for future or independent analysis, Stockwell did not run the full 11 genetic marker tests on all samples. (RT 2335.)

Stockwell prepared a bloodstain that he cut from the bottom of the victim's purse, (sample A-11b-1), which he sent to Cellmark Diagnostics in Maryland on November 21, 1991 for DNA analysis.[9] He also sent stains and reference samples obtained from the victim and from appellant to Cellmark. (RT 2348-2355.)

Dr. Robin Cotton, Laboratory Director, Cellmark Diagnostics, Germantown, Maryland, testified about DNA analysis performed by her lab, lab record-keeping procedures, lab quality control, error rates, and test results. (RT 2478-2531. 2536, 2577-2595, 2695-2700.) Cotton's lab received a blood stain from the bottom of the victim's purse (sample A-11b-1) and blood samples from Gayle Johnson and appellant on November 26, 1991. (RT 2593-2602.) Five DNA probes of the blood stain were prepared and compared to DNA probes prepared from appellant's blood and the victim's blood. (RT 2603-2605.) On all probes, the DNA banding patterns of the stain from the bottom of the victim's purse were, using both visual match and computer imaging systems, virtually indistinct from DNA probes prepared from appellant's blood samples. (RT 2603-2624, 2701-2704.)

Using the product or multiplication rule, binning, and the modified ceiling

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[9]/ Because the bloodstain was found on the underside of the purse (RT 2332-2333), it was less likely that it would have been contaminated by lotion or powder as were other stains also found inside the church. In Stockwell's opinion, bloodstains that had been mixed with a foreign liquid produced inconclusive test results. (RT 2324-2325.) The stain was also large enough to provide a sufficient sample for DNA analysis. (RT 2348.)

frequency calculation for the 10 bands common to appellant and the bloodstain from the purse (sample A-11b-1), Dr. Cotton estimated that there was a one 1 in 24 million possibility that any other person would have bands common to the bloodstain from the purse. (RT 2652-2654.) Additional searches of Cellmark's own database and a population database containing 464 known banding patterns failed to reveal anyone else in those population databases with banding patterns similar to appellant's and the bloodstain from the purse (sample A-11b-1). (RT 2646-2647.)

4. Other Evidence

Detective Thomas Bradford interviewed appellant on September 10, 1991. Appellant lived with his stepfather, Arthur Jennings, 7 or 8 miles out of Victorville, off a power line road. Bradford noticed unusual cuts on appellant's hands and left arm; he located a knife in a red pickup truck on the property. Bradford seized clothing belonging to or worn by appellant, including Rustler blue jeans (waist 33, length 30). (RT 2887-2897.) There was no blood on any of appellant's clothing or footwear. (RT 2944-2950.) During his interview with Bradford, appellant acknowledged that he had been at the church on August 24 and stated that the police might possibly find his fingerprints on the drinking fountain and on the office telephone that he used with the minister's permission during his church visit.

In January 1992, Dave and Curtis Edwards while out in the desert located a

mine shaft 2.2 miles from appellant's residence. In the shaft, they found (and turned over to police) the victim's wallet. (RT 2923-2930.) Detective Bradford went to mine shaft with the Edwards and additionally found a check cashing card in the victim's name, a flower coin purse containing a check in the name of Cynthia Johnson (the victim's daughter), bloodstained tissue paper, one or two plastic trashcan liners,[10] and a pair of bloodstained Rustler blue jeans (waist 33, length 30). (RT 2910-2914, 2948-2949.)

Criminalist David Stockwell examined the clothing and bloodstained tissue recovered from the mine shaft. Blood stains on the tissue were consistent with 3 of appellant's genetic blood markers. (RT 2287-2290.) Examination of a stain from the right knee and leg area of Rustler jeans found in the mine shaft revealed blood consistent with the victim's blood; a genetic marker found in one stain on the pants was consistent with both appellant's blood and the victim's blood. (RT 2343-2346.) Stains on a T-shirt also found in the mine shaft were very diluted, and no attempt was made to determine the genetic markers of these stains. (RT 2376-2378.)

Gilbert Johnson, the victim's husband, testified, over appellant's objections, that they had been married for 33 years and 38 days; they had 3 children. Gilbert

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[10]/ Bradford testified that when he inspected the men's and women's bathrooms in the church after Gayle Johnson's body had been discovered, the liners were present in both trashcans and had not been removed. (RT 2953-2954.) People's Exhibit 161 showed the women's trashcan with liner. (RT 2953-2954.)

described his wife as strong-willed; if confronted with someone who wanted to rob or rape her, she would have resisted. Gilbert identified his wife's wallet which she ordinarily kept in her purse; she had a habit of keeping at least $50 in cash in purse. (RT 2964-2983.)

Steven Slaten, appellant's parole officer in 1991, reviewed appellant's Idaho and California prison records which showed that he had been sentenced to life imprisonment for rape, following a guilty plea to two counts of rape in Idaho. Appellant was paroled from Idaho State Prison in 1982. In 1982, appellant was convicted in Victorville of robbery and assault with intent to commit rape and sent to state prison. He was paroled on December 12, 1990 from the California prison system after serving 8 years. (RT 1967-1974.)

5. Prior Similar Crimes

Johnnie Clark testified over appellant's objections (see Argument II, *infra*) as to a prior 1972 rape committed by appellant in Boise, Idaho. Appellant entered the photography studio where Clark was working and said that he wanted to make an appointment to have his portrait taken. After making an appointment, appellant left but returned two more times over a 20-minute period. Appellant told Clark he was going to rob the studio. He ordered Clark to the back room and took $6 or $7 from her purse. While the robbery was in progress, customers entered the store. Clark took care of the customers; appellant watched from around a corner. Clark did not mention the robbery in progress fearful of endangering her customers.

After the customers left, appellant again ordered her to the back room. When Clark resisted, appellant repeatedly hit her and knocked her down. Clark stopped fighting and just laid on the floor; appellant raped her. On leaving, appellant told Clark not to call the police and to forget that she saw him, threatening to return and kill her. Appellant also pulled the telephone loose from the wall. Clark thought appellant had a knife but did not see one. Clark originally identified appellant during his trial in Idaho and again during the trial below. (RT 1794-1816.) In Clark's opinion, however, appellant appeared a lot older at trial. (RT 1819-1824.)

Cindy Makris testified over appellant's objections (see Argument II, *infra*) about a prior 1982 robbery and assault with intent to commit rape perpetrated by appellant in Victorville, a short distance away from the church where Gayle Johnson was killed in the present case. In addition to Makris' testimony, Richard Nestor, a general contractor who rescued Makris during the incident, was also permitted to testify at length, over appellant's continuing and further objections (RT 1745, 1828-1830), about his role in rescuing Makris and about the details of his pursuit of appellant during his flight from the scene of the crime. (See RT 1826-1896.)

In 1982, Makris managed a solar energy business. (RT 1897.) On March 29, 1982, appellant walked into Makris' office and asked first to use the phone in her office. Appellant stayed in the office, engaged in small talk with Makris about

the landlord, the nature of her business, and walk-in traffic. Appellant asked if he could wait in Makris' office for a real estate agent with whom he had an appointment to discuss renting another office in building. Appellant left when Makris went to lunch. Appellant returned after lunch. He said he was still waiting for the real estate agent. Appellant approached Makris, put a knife to her neck, and went through her purse. He backed Makris into the bathroom and ordered her to give him the money from her purse. He ordered Makris to dump the contents of her purse onto floor. Appellant told Makris that she better not be lying about not having more money; and he threatened to kill her. (RT 1897-1932.)

Appellant ordered Makris to remove her clothes. Appellant made no effort forcibly to remove her clothes. (RT 1948-1962.) Makris grabbed appellant's knife. She pushed appellant backward and struggled with him. Appellant grabbed Makris' hair, kneed her under the chin and told her as they struggled that if she tried it again, he would kill her. During the struggle appellant knifed Makris in the nose and through the roof of her mouth. Makris managed to push appellant away and flee out the front door as contractor Richard Nestor was about to enter. Makris told Nestor that appellant had a knife and was trying to rape her. Nestor told Makris to run; she ran to an adjacent office and called the police. Appellant fled from Makris' office; Nestor pursued appellant who was soon caught by police and arrested. (RT 1926-1947, 1962-1964.)

**B. Defense Evidence**

1. DNA Evidence Undermined

Dr. Laurence D. Mueller, Associate Prof. UC Irvine, Dept. of Ecology and Evolutionary Biology, testified that he specializes in population genetics and evolutionary biology. Dr. Mueller disputed Cellmark's methods and techniques for estimating match probabilities. (RT 3027-3085.) He testified that the databases used by Cellmark were inadequate; Cellmark should have used 15 to 20 different databases. Dr. Mueller also had strong objections to the product rule, match criteria, use of floating binns, and Cellmark's proficiency and error rate. In Dr. Mueller's opinion, Cellmark's error rate in its testing of actual DNA evidence at least through 1991 was 1 in 139. (RT 3070.) Using additional population databases and the counting method, Dr. Mueller came up with a DNA frequency profile of 1 in 185. (RT 3085-3089.) Even under the modified ceiling principle, Dr. Mueller own frequency estimate in this case was approximately a 1 in 3.6 million possibility that another person would have bands common to the bloodstain in the single DNA sample tested by Cellmark (rather than Dr. Cotton's frequency estimate of 1 in 24 million). (RT 3089-3096.)

2. Appellant's Testimony

Appellant testified on his own behalf. He acknowledged two prior 1973 Idaho rape convictions, an escape conviction from Idaho state prison, and a 1982 assault with intent to commit rape conviction. (RT 3173-3179.) Appellant

acknowledged visiting the High Desert Church on August 24, 1991 and leaving a prayer request in his stepbrother's name because he did not have a telephone. (RT 3180-3189, 3427-3436.) Appellant did not return to the church on August 26, 1991; instead, he helped his stepfather collect recyclables from motel and gas station dumpsters. Appellant acknowledged that on the morning of August 26 he went to the Lucky Market to buy cigarettes and later walked home. He did not stop at the church. (RT 3189-3201, 3436-3448, 3462-3496.)

The cuts on appellant's right hand occurred around August 22, 1991 while searching for recyclables in dumpsters. (RT3202-3210.) He did not get the cuts at the same time; appellant was left-handed; the knife found in his stepfather's truck was used to open cans; appellant kept the knife in the truck for use in work. (RT 3216-3217.)

Appellant wore Rustler jeans. However, the Rustler jeans and T-shirt retrieved from the mine shaft did not belong to him. Appellant did not toss his clothing into the mine shaft. He acknowledged that he had previously been to the mine shaft around August 16. The dog carcass found in the mine shaft was that of his own dog which was killed and dumped by Art Jennings. (RT 3210-3215.)

Over defense objections (RT 3219-3225, 3230-3234), appellant was cross-examined about details of the prior 1972 Idaho rape and 1982 Victorville robbery and assault of which he had been convicted. He acknowledged that he pleaded guilty to two counts of forcible rape in Idaho and had been sentenced to two

concurrent life terms. (RT 3234-3248.) He was later convicted by guilty plea of escape from Idaho State Prison. When paroled January 21, 1982, appellant went to Victorville, living with his mother (Pearl Jennings) and stepfather (Art Jennings) 7 or 8 miles from Cindy Makris' office in Apple Valley. Appellant helped Art Jennings in the scrap business, picking up recyclables until his arrest in March 1982. (RT 3381-3388.) Appellant denied attacking or robbing Makris in 1982, although he had been convicted of those crimes; he denied stabbing Makris in the nose. He denied cutting his hand during the assault. Appellant testified that he heard a scream from Makris' office after driving into the parking lot; he fled from the scene because he was on parole. (RT 3248-3295, 3304-3381.)

**C. Rebuttal**

Nina Pittsford testified that she was present at church on August 24 when appellant requested a prayer treatment. She identified appellant as the person who entered the church at that time. Appellant appeared unshaven, unkempt, and disheveled; Pittsford did not feel right about appellant and introduced him to Rev. Plate who talked to appellant only in the Garden Room. Rev. Plate asked appellant to fill out a treatment request. Appellant left after filling out the treatment request. He did not go into the minister's office to use the telephone. (RT 3513-3540.)

On cross-examination, Pittsford acknowledged that when previously interviewed on August 26, 1991, she reported seeing a black pickup truck for several days in the church parking lot. She noted a young man walking toward the

church from the pickup truck. Pittsford also reported in her statement to police trouble with transients entering the church. (RT 3540-3551.)

## II. Penalty Phase

### A. People's Case

Lynn Miles testified about obscene calls made by appellant to her on October 25, 1989, December 3, 1989, and on December 9, 1989 after his release from California prison for the Makris crimes. During several calls, appellant threatened Miles and her children. (RT 3894-3932.) During the October 25 call, appellant told Miles that he wanted to fuck [her] pussy;" in another call on December 3, 1989, appellant said that he was going to "fuck [Miles' daughter] Meagan." A tap, placed on Miles' telephone, was traced to Art Jennings with whom appellant was living. On December 11, 1989, Miles identified appellant's voice (RT 4440); she later testified at his parole revocation hearing on March 1, 1989. (RT 4441-4442, 4447.) Over his repeated objections (RT 3845-3846, 3931-3932), appellant was forced to read lines from the transcript of the October 9, 1989 telephone call that Miles had prepared from memory at the request of the police.[11] (RT 3925-3932.)

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[11]/ Sheriff's investigation copies of the telephone transcripts prepared by Miles, and which appellant was required to read to the jury during the penalty trial for identification purposes, appear in the record at 4 CT 916-919. On appellant's hearsay objections, the transcripts themselves were not admitted into evidence during the penalty trial. Appellant was required to read lines from the transcripts ostensibly to permit Miles to identify his voice even though she had previously

Dinah Jackson (RT 3952-3999) and her daughter, Laurel Richter (RT 3944-3952), testified about a second 1972 Idaho rape and kidnapping in which appellant invaded the Jackson home and kidnapped Mrs. Jackson at gunpoint while the children and grandmother were home. Appellant threatened to shoot the children. After kidnapping Jackson, appellant raped her twice and forced her to commit an act of oral copulation about which she had never previously testified. When Jackson later learned that appellant had escaped from prison in Idaho, she became frightened and relived her experiences all over again. The prison from which appellant escaped was only 10 miles from Jackson's home. (RT 3990-3999.)

Monica DiVencenzo, Gayle Johnson's daughter, identified a photo of her mother. Monica saw her mother every day before the murder; they were very close. Monica's own daughter usually stayed with her grandmother every Saturday and went to church with her on Sunday. (RT 4000-4003.)

**B. Defense Case**

1. Stepfather Art Jennings

Art Jennings, appellant's stepfather, testified about his background, work history, and relationship with appellant's mother and her 10 children with whom

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identified appellant's voice during his 1990 parole revocation hearing. (See RT 3845-3846.)

he began living in Wyoming in 1954. (RT 4031-4039.) Jennings denied that he ever disciplined appellant or any of his brothers and sisters. Jennings had nothing to do with the children as they were his wife's responsibility. She told Jennings, "if they [the children] need a whipping, I'll whip them." (RT 4061.) According to Jennings, he never hit any of the children. That was [his wife's] job." (RT 4079.)

Neither appellant nor his brothers and sisters ever went to school; they moved frequently with Jennings and his wife as transients from state to state. In Jennings' view, the children just ran wild. (RT 4080, 4105.) They were "just like a bunch of sheep in the mountains." (RT 4080.) Appellant's sister, Helen, died while the family was en route to Salt Lake City around 1955. Jennings denied that he killed Helen in the family car; rather, he blamed appellant's brother, Larry, for her death. (RT 4036.) Jennings denied that he sexually abused appellant's sister, Wilma, or beat any of the other children. (RT 4079.) Appellant and the other children were taken away from Jennings and his wife in 1957 while the family was living in McCook, Nebraska. After the children were removed and placed in the orphanage, Jennings and his wife never had any contact with them. (RT 4035, 4063.) Jennings did not have much knowledge or interest where they were or what they were doing. (RT 4063.)

Jennings and his wife lived in Victorville-Apple Valley at various times since 1973. (RT 4054-4083.) Appellant came to live with Jennings and his mother after being paroled from prison in Idaho in 1982. (RT 4064.) Appellant helped

Jennings collect items for recycling, although he was lazy and, in Jennings' opinion, did not do anything. (RT 4084.)

2. Parental Incompetence, Abuse, and Neglect

Appellant's aunt, Bessie Killebrew (age 74), who was seven years younger than Pearl, appellant's mother, testified that the family was born and raised in Nebraska. (RT 4114-4115.) Appellant's mother started running away at age 15 and was placed in a girls' home in 1939. (RT 4117-4118.) Appellant's mother was later transferred to a mental hospital in Nebraska. (RT 4118.) Appellant's mother married Ray Foster in 1940. (RT 4119.) She had 11 children by Ray; four pregnancies and two living children with Art Jennings. (RT 4121.) Ray Foster was strict with the children and used a strap. Appellant's mother swatted and spanked the kids. (RT 4128, 4132.) Bessie thought that the parental discipline of the children was a little harsh. (RT 4132.) In her opinion, appellant's family lived in poverty. (RT 4136.) Ray left home after appellant's then 12-year-old sister, Franji, accused her father of molesting her. Franji was sent to an Idaho correctional school. (RT 42139-4140.)

Appellant's mother met Art Jennings in 1955 and soon moved around the country with him and the children. (RT 4147-4151.) In the opinion of Rose Sanders, another of appellant's aunts who briefly testified, Jennings never had a job. (RT 4169.) The family was "dirt poor." (RT 4170.) Appellant and his brothers and sisters were removed from the mother and Jennings by Nebraska

social welfare authorities and sent to an orphanage. (RT 4152-4153.) Bessie never heard Pearl talk about the children or about losing them; Pearl never visited appellant or her other children at the orphanage. (RT 4153-4154.)

Two of appellant's brothers (Larry and Steven Foster) and two of his sisters (Wilma Sharp and Franji Evans) testified on his behalf about their upbringing, the instances of sexual abuse by their father and Art Jennings, the beatings and whippings inflicted by their mother and Art Jennings, their wanderings and transient life, how Jennings trained the children to steal, their lack of schooling, and life at the orphanage. (RT 4632-4639, 4686-4687, 4690, 4714. 4723, 4734-4736, 4741, 4745-4749, 4754-4755, 4757 (appellant tied to clothesline by Jennings and beaten with barbed wire); RT 4772-4773 (Larry, Steven, and appellant severely beaten after trying to shoot Jennings because they decided they had enough of Jennings' beatings); RT 4904-4905, 4908 (Franji molested for six years by father; mother took her to have abortion of child by father); RT 4915 (Franji raped by stepfather), RT 4920.)

Franji testified that she and her brothers and sisters were treated like animals. (RT 4904.) In Wilma's opinion, their mother was very unstable, beating the children just because they were there. (RT 4687.) Jennings use to beat her and the other children virtually on a daily basis. (RT 4693-4694, 4707, 4761.) Wilma saw Jennings try to molest Helen before she died; he also tried to molest Wilma, but she fought him off, being beaten instead. (RT 4695.) Larry and Steven

recalled that Wilma had in fact been regularly abused sexually by Jennings and that appellant was exposed and aware of it at an early age. (RT 4752, 4768.) Steven and his siblings were repeatedly exposed as children to sexual behavior by both their natural father, Jennings, and their mother at an early age. (RT 4768.) Steven recalled that Jennings repeatedly molested his sisters and that his mother continuously committed acts of incest with the boys. (RT 4769.) Larry and Wilma both saw Jennings smother and kill their sister Helen by smothering her with a pillow. (RT 4646, 4698.) Jennings blamed appellant for her death. (RT 4699, 4833.) Early on, Larry learned how to avoid the beatings by Jennings and his mother: "Stay away from the house, stay away from them, don't show up for dinner, don't ask for an extra piece of bread." (RT 4650.)

Larry, Steven, Wilma, and appellant were sent to Whitehall. (RT 4711.) Wilma recalled that the orphanage did not allow any communication with her brothers. (RT 4717.) She also recalled that the orphanage superintendent was rude and mean, calling the children "dirty little bastards" and telling them that they were no good. (RT 4719.) In her 9 years at the orphanage, Wilma never once received any communications or letters from her mother. (RT 4726-4727.)

At Whitehall, Larry was introduced to sex by a house parent and learned that "[y]ou got to hit them [women] in the mouth before you do anything or they don't like it." (RT 4669; see also 4790-4791 (Steven sent to mental hospital after having sex at age 12 with and assaulting one of the house mothers).) Appellant

learned the same lesson from the same house parent. (RT 4669.) From Whitehall, Larry was sent to a nearby mental institution, as was appellant, where he was also given electroshock treatments,[12] hydrotherapy,[13] and tranquilizers.[14] (RT 4664-4666.) While at the mental hospital, Larry saw appellant tied to a bed with a gag in his mouth about to undergo electroshock treatment. (RT 4667.) Wilma was also aware that appellant received electroshock treatment as a child while at the mental hospital. (RT 4728.)

Larry Foster served two years in the Marine Corps and was honorably discharged. In Washington, Larry was convicted of writing two bad $20 checks for which he was sentenced to 40 years. He served 7 years and then escaped for which he ultimately served an additional year in prison. (RT 4670, 4678.) After his release in 1972, Larry got married and moved to Sacramento. (RT 4670.) Larry and his wife lived in Sacramento since 1972 and raised 3 sons. (RT 4671.)

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[12]/ Larry described the electroshock therapy treatments that he and appellant were given: "What they do is tie you on a bed, fold a pillow, put it under your back, open your mouth, roll up a gauze gag and stick it in your mouth so you don't bite your tongue off, and put an electrode on each side of your head, of the temple. And when the electrode is in place, the nurse says, 'Treat,' the doctor or whoever has the box hits a button, electricity bounces off of your brain from side to side for about 90 seconds. It's designed to make you forget everything." (RT 4665.)

[13]/ Larry also described the hydrotherapy treatment that he and appellant received: "They gave me what they call the hydrotherapy, hot and cold, from hot water to ice in a bathtub, take you out of the ice, stick you back in the hot water and stick you back in the ice. Believe it or not, it will knock you out cold. It works the same way as electrical shock therapy does." (RT 4666.)

[14]/ According to Larry, the tranquilizers administered to the children "were enough to make a walking zombie out of a full-grown adult." (RT 4666.)

Larry attributed his salvation to his wife. (RT 4671-4672.)

Steven Foster spent many years in prison for crimes committed while still a youth after leaving Whitehall. (RT 4730-4732, 4793.) He was last released in 1975. Larry Foster committed his only felony in his early twenties and spent several years in prison. Both Larry and Steven required many years of help and assistance, particularly from their wives, to recover from childhood abuse, neglect, abandonment, mental hospitalization, and imprisonment.[15] (RT 4793-4795.)

3. Appellant's Horrendous Childhood and Youth

Appellant testified in his own behalf about his childhood and upbringing. (RT 4177-4220.) Art Jennings came into the picture in Caldwell, Idaho when appellant was about 8 years old. Appellant was not enrolled in school. (RT 4187.) When appellant first met him, Jennings handcuffed appellant to a railing and left

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[15]/ Brother Steven made the following eloquent plea for appellant's life:

"What he done was a terrible thing, is a heinous thing, but it, to me, was a cry for help. The man can't live out here like you and me. He can't make the normal decisions that you and I do. Had I not gotten married and got my life changed, I'd be sitting there instead of him. I found somebody that cared enough for me to straighten me out. He didn't have anybody. He didn't have anybody at all. And he is institutionalized. He belongs locked up away from society. He can't make it out here with you and I. He does not -- it's not going to benefit anybody to put him to death, nobody whatsoever. We can't bring the lady back. By putting him to death right now would only add to what Art and these people have done to him, and we can just prove that we are no better than they are. We haven't done anything but sit here and prove that they were right, they were justified in doing to us what they done. I got lucky. I was able to walk out of them shoes, and I can sit here a free man and talk. He didn't. That's all I want you people to consider when you consider this." (RT 4795-4796.)

him there for several hours ostensibly as a joke. (RT 4187-4188.) Appellant's mother, with children in tow, soon left Caldwell with Jennings, moving thereafter as itinerants from place to place, to Iowa, California, Utah, Idaho, Washington, and Nebraska. (RT 4189-4190, 4201-4202.)

Jennings taught appellant and his brothers and sisters how to steal food and money from stores, homes, and farms. (RT 4191-4192, 4208-4211, 4232.) Both Jennings and appellant's mother routinely beat the children. (RT 4193-4194, 4206-4207, 4220-4221, 4234.) In 1955, appellant's sister, Helen, died while the family was on the road near Salt Lake City, Utah. (RT 4197.) For may years, appellant thought his mother had accused him of killing Helen. (RT 4198.) After Helen's death, Jennings started beating the children more severely. (RT 4199-4201.) In 1955 or 1956, Jennings started molesting appellant's sister Wilma. (RT 4230.)

In 1957, appellant (age 10) and his ten brothers and sisters were taken away from their mother and Jennings while in McCook, Nebraska. (RT 4238-4242.) Appellant recalled that at a court hearing, his mother told the court "take them bastards; we don't want them." (RT 4249-4250; see also RT 4662, 4785 (brothers Larry and Steven recalled same incident).) Appellant and his brothers and sisters were sent to Whitehall orphanage in Lincoln, Nebraska. (RT 4250.) Appellant testified about Whitehall and how he tried several times to run away back to McCook to where his family had last lived. (RT 4253, 4258-4260, 4482.) He was

beaten at the orphanage and frequently punished. (RT 4261, 4264, 4268, 4486.)

After a few months at the orphanage, only appellant and Wilma remained; all of appellant's other brothers and sisters were apparently sent to foster families or adopted. (RT 4257.) Appellant never met or saw again five of his brothers and sisters.[16] (RT 4257, 4481.) Previously, appellant had attended school only for a few months in his entire life; although 10 years old on entering Whitehall, appellant was placed into first grade which he was forced to repeat. (RT 4262, 4269, 4485.) Altogether, appellant completed only three years of school while at the orphanage; he had no other formal schooling. (RT 4530.)

Appellant had several potential foster family placements; none was successful. At age 9, appellant was introduced to sex by a potential foster mother. At age 12, appellant was sent from the orphanage to the Nebraska State Hospital after he attempted to molest his housemother. (4487-4492.) Appellant recalled that the mental hospital staff held boxing matches between children as punishment. (RT 4493-4495.) At the hospital, appellant (as brother Larry) was administered Thorazine, Stellazine, and other powerful, anti-psychotic medications.[17] (RT 4495.) In the mental hospital, appellant was made to pull

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[16]/ Information in the record and attorney files reveals that yet another brother (not stepbrother Martin Jennings) -- but a younger brother who was initially placed in Whitehall with appellant and who was later adopted out of Whitehall -- was also convicted of a capital crime in another state and also sentenced to death.

[17]/ Appellant described the effects of the medication as "like being a zombie. The movement, speech, thinking process everything was slowed down to a snail's pace." (RT 4495.)

heavy padded wooden blocks similar in size to railroad ties. (RT 4496.) Appellant was also given hydrotherapy[18] and, later, electroshock treatments while in body restraints beginning when he was 12 or 13 years old. (RT 4493, 4497-4498.) Electroshock was administered every two or three weeks for about a year.[19] (RT 4499-4500.) Appellant ran away twice from the mental hospital. (RT 4500, 4503.) Appellant was about 14 years old when he returned to Whitehall from the mental hospital. (RT 4479, 4503.)

In his various attempts to run away from the orphanage, appellant always tried to return to McCook, Nebraska. (RT 4506, 4512-4513.) He was repeatedly told by the orphanage superintendent that his entire family was dead. (RT 4506.)

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[18]/ Appellant described the hydrotherapy as follows: "The ward attendants would take the tubs, fill them with water and then specifically start with hot water and there's a cover that goes over it, and the cover has fastening holes for it. They place you into the tub and pull a cover up around your neck. "You would sit in hot water, not to the burning point, but to the point where you came out of the water you would be nice and red. And then immediately upon that, the bottom end would be opened and they would put ice in it. The temperature version would go somewhere -- 110, 120 degrees down ... within a matter of 30, 45 seconds. ... [They would keep you in that] up to 25, 30 minutes. The treatment would reverse. They would drain the tub and fill it back with hot water, resubmerge you in that, go back colder -- back and forth like that. ... I used to do that two or three times a week [for about] eight months or so." (RT 4497-4498.)

[19]/ Appellant described the electroshock treatment -- (four series of 26 treatments) -- administered when he was about 12 or 13 years old as follows: "[They escorted me to the administration building] ... in leather restraints and then they had me get up on the gurney ... and then they strapped me on the gurney ... . Then they took a banding system and put it on my head and then hooked the wire to the top of it and ran it into what we called the black box. And then the black box is set for so many milliseconds. It's preset, and then all the operator is -- is -- they clear the table and the operator presses a toggle switch, and the little timer goes off. And during the process of the timing you receive a jolt of electricity." (RT 4498-4499.)

On being returned to the orphanage, appellant was placed in solitary confinement for lengthy periods and beaten. (RT 4507.) After one escape attempt in 1963, he was sent to the Kearney Boys School in Kearney, Nebraska, for troubled youths for about a year until 1964. (RT 4516, 4527.) There, appellant was visited by his biological father, Ray Foster, and his stepmother. At age 17, appellant was paroled to his father in Idaho. (RT 4535.)

Appellant stayed with his father and stepmother for about a year. (RT 4533, 4536.) In October 1965, appellant was arrested for car theft in Nevada and sentenced to an indeterminate term from 6 months to six years in federal prison. (RT 4541-4542.) He spent almost 3 years at FCI Lompoc, including a subsequent parole violation for auto theft. However, appellant managed to earn a GED while at Lompoc. (RT 4543, 4547.) Appellant was released from federal custody on October 31, 1971. (RT 4547, 4563.)

Appellant was arrested in 1972, subsequently convicted in 1973, and sentenced to two concurrent life terms after pleading guilty to two counts of rape in Idaho. (RT 4564-4565.) He was sent to Idaho State Prison in Boise. (RT 4565.) Strangely, appellant thought he would serve only 3 years before being considered for parole. (RT 4569, 4606, 4610.) When appellant learned he had to serve a minimum of 5 years before being considered for parole eligibility, he escaped on October 25, 1973, getting shot in the hand and left buttock during the escape. (RT 4569-4572.) (Appellant later claimed to be a Vietnam veteran and stated in prison

documents that he had been shot in the buttocks while in Vietnam.) Appellant was apprehended after the escape at a farm about 10-15 miles away from the prison. Appellant soon pleaded guilty to escape. (RT 4572-4574.)

While in Idaho prison, appellant became a dental assistant. (RT 4577.) In 1979, appellant earned a two-year AA degree in sociology from Boise State University. (RT 4578-4579.) He remained in prison from 1974 until 1980 when he was sent to Pocatello, Idaho on work release where he cooked for jail inmates and supervised trustees. (RT 4579-4580.) Appellant adjusted to life in prison; there were no problems after the escape; he enjoyed working in the dental clinic. He was paroled on January 18, 1982. (RT 4581-4583.)

On March 29, 1982, appellant was arrested in Victorville for the Makris robbery and assault with intent to commit rape. He had been out of prison for about two and a half months. (RT 4583.) He was convicted after trial by jury and sentenced to 13 years. He was given maximum security classification and sent first to Folsom and then Soledad in November 1985. (RT 4583-4584.) Appellant remained at Soledad for 2 1/2 years until transferred to R.J. Donovan, San Diego, in November 1987 where he worked as clerk until released in March 1989. (RT 4596-4593, 4601.) Appellant violated parole in December 1989 for making obscene and threatening phone calls. He was sent to minimum security CMC-SLO until December 12, 1990 when again paroled. (RT 4602, 4602.) He was arrested and served one day in April 1991 for being around a .22 rifle owned by

Art Jennings. (RT 4602.) He was arrested in the current case on September 10, 1991.

Appellant's work history and attitude while in California prisons were reported as good to excellent by prison supervisors and others with whom he came into contact. Appellant served as inmate representative on the men's advisory counsel in Soledad. (RT 4593-4594, 4599.) In a 1988 report from the R.J. Donovan Correctional Facility, appellant was described as performing assignments efficiently with minimal supervision. He was described as exercising personal initiative by following through on many projects to insure accurate and timely completion. (RT 4594.) In a 1987 report, appellant was described as a dependable and excellent textile worker. (RT 4595-4596.) In another 1987 prison report, appellant's work was described as consistently high quality, and he was termed as a good worker. In 1988, appellant was again described as an excellent worker with no supervisory problems. (RT 4596-4597.) In 1986, appellant was described as having excellent work attitude. He was described as level-headed and willing. (RT 4597.)

4. Abusive Orphanage Conditions

Samuel Zanderholm, his wife (Esther Zanderholm), Darlene Cummings and her twin brother, Daryld Schlereth, all testified about their experiences at Whitehall during the same period that appellant was at the orphanage. They knew appellant and his sister Wilma. (RT 4278, 4328, 4383-4384, 4397, 4448, 4463.)

Appellant attended Darlene Cummings' eighth grade graduation. (RT 4398-4399.)

All of the former Whitehall residents commonly testified that the orphanage was highly regimented; the children were kept in a strictly controlled environment. (RT 4281, 4298, 4316, 4385, 4395, 4401.) Mail was censored and correspondence from family members was kept from the children. (RT 4261, 4377-4380, 4403, 4459.) There was a lot of staff turnover. (RT 4404.) There was no family warmth or affection. (RT 4291, 4404-4405.) Family visits, if any, were monitored as though the children were in prison. (RT 4403.) The former residents believed that they were being punished by being sent to Whitehall. (RT 4417.)

Many children tried to run away. (RT 4318-4319, 4358, 4392, 4451.) Some children were paddled with a stick or rubber hose, slapped, spanked, or beaten; others were forced to stand against a wall for hours at a time. (RT 4283, 4304, 4333, 4389-4391, 4399, 4425-4427, 4450-4452, 4460.) Daryld Schlereth recalled that appellant was "worked over" at least a few times as a child. (RT 4469.) Troublemakers or discipline problems were sent to a nearby mental hospital, as was appellant who went for about a year. (RT 4461, 4465, 4468.) According to Darlene Cummings, it was common knowledge that children who went to the mental hospital were given electroshock treatment. (RT 4400.) In Darlene Cummings' opinion, when children returned to Whitehall from the mental hospital, they acted kind of strange and even looked different. The children did not act the same when they returned from the mental hospital. (RT 4399-4400.) In

Daryld Schlereth's opinion, when appellant returned from the mental hospital, it seemed like he got worse. Appellant was more rebellious and more violent; he did not like the treatment he received. (RT 4468-4469, 4477-4478.)

Orphanage children were not allowed to associate with children from the outside even if they went to local public school. (RT 4396.) For many years, even contact or social interaction between siblings and between the sexes was limited. (RT 4286, 4368, 4458.) Daryld Schlereth, for example, was never allowed to sit down or talk with his sister. (RT 4458, 4461.)

Whitehall did not prepare children for life on the outside because it was too regimented and governed by rules all the time. (RT 4381, 4431.) Everything was done in a disciplinary manner. There was no affection and little encouragement from the staff. There was lots of negative attention. (RT 4248-4249, 4381-4382, 4405.) Esther Zanderholm referred to the orphanage as a prison without walls. (RT 4369.) Daryld Schlereth recalled that when (at 12 years old) he arrived at the orphanage, all his personal effects were taken away, including everything he had been given by his parents, and he was issued a prison uniform. (RT 4440.)

Most of those who were placed in Whitehall (and who testified) seemed or appeared in adulthood dispirited, depressed, and apathetic. Darlene Cummings recalled, for example, that her experiences at Whitehall had a tremendous effect on her adult life. (RT 4430.) Recalling life at the orphanage became extremely emotional and upsetting for the former residents who testified. (RT 4329-4340,

4366, 4407.) Most were fit for only the most menial of jobs later in life. Samuel Zanderholm became a housekeeping agent at a veterans hospital in Lincoln, Nebraska. (RT 4290.) Esther Zanderholm did not complete high school. (RT 4355-4356.) Darlene Cummings worked in a laundry. (RT 4433.) Daryld Schlereth worked as a janitor. (RT 4466.)

5. Psychological Profile

Dr. Edward F. Fischer, a clinical psychologist, administered psychological tests to appellant. (RT 5056-5072.) In Dr. Fischer's opinion, appellant did not suffer from organic brain damage.[20] He was of normal intelligence, with excellent memory, and no brain dysfunction. Appellant had an IQ of 112 which was at the lower end of bright-normal. (RT 5083-5084, 5100.)

Based on the MMPI and other tests, Dr. Fischer was of the opinion that appellant had an antisocial personality under the DSM-IV classification system. (RT 5180.) He got along in a structured environment, like jail or prison, but needed to have his behavior controlled, since he was unable to function in the absence of external controls. At age 12, appellant was diagnosed with virtually the identical character disorder (then called passive/aggressive personality). (RT 5130.) Formation of the disorder occurred in distorted childhood caring

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[20]/ During cross-examination, Dr. Fischer testified that there was a possibility that appellant suffered brain damage, particularly after the electroshock treatments as a child. (RT 5448-5451.)

relationships, neglect, physical and sexual abuse. Characteristic of the disorder is the inability to relate to others; one is doomed to repeat dysfunctional patterns of behavior learned as child, although roles often become reversed -- becoming perpetrator of acts against others rather than victim. (RT 5130-5131.) A person suffering from this disorder in boredom seeks out stimulation either from substance or alcohol abuse or activities without fully considering consequences. Such persons don't plan ahead. Anti-social behaviors are rationalized. They are unable to learn from experience, do not learn from the aversive consequences of their acts, and punishment has no effect on extinguishing unwanted behaviors. (RT 5121.) Although appellant's witness, Dr. Fischer testified that the only way to get rid of appellant's behavior was "by extinction by preventing it from happening." (RT 5104-5134.)

In Dr. Fischer's opinion, appellant's family was extremely dysfunctional with substantial abuse, incest, thievery, even before Art Jennings arrived on the scene. Art Jennings himself had a history of delinquency and legal troubles since 1935. Appellant's mother had been in reformatories. (RT 5360-5370.)

Dr. Fischer emphasized that appellant is able to function only in an extremely controlled or structured environment. (RT 5135.) He considered appellant an unlikely escape risk. Idaho records indicated that appellant's 1972 crimes involved unprotected females as victims, reinforcing his conclusion that appellant could not function outside of prison. He was surprised that appellant

was paroled after only 10 years. Review of Nebraska records documented appellant's early behavioral problems. A report by the orphanage superintendent, for example, described appellant as sticking pins and scissors in his private organs which, in Dr. Fischer's opinion, documented the onset of unusual sexual activity. A 1965 orphanage summary described appellant as lazy. (RT 5134-5135.) He was described as dishonest, a manipulator who, as long as he got his way, would be pleasant, but denial would cause him to be disobedient and go into moody spells. Appellant stretched rules to the limit in Whitehall; he was transferred in August 1959 to Lincoln State Hospital for participating in homosexual relations (found in beds of some younger boys). In Dr. Fischer's opinion, appellant did not appear very truthful and did not admit certain things, including wrongdoing, as a matter of principle. Dr. Fischer read and considered other reports about appellant from Whitehall and the Kearney reformatory; appellant was described as taking the attitude that anything was okay if he did not get caught. Appellant was considered the aggressor in homosexual relations and engaged in autoerotic self-abuse. (RT 5370-5375, 5122-5125, 5492-5501.)

All reports and documents obtained by the defense about appellant's early life, orphanage, reformatory, and imprisonment were introduced into evidence. However, the Nebraska mental hospital records had been apparently purged, and there was no documentation about electroshock treatments administered to appellant. Dr. Fischer summarized pertinent matter from existing documents and

reports beginning when appellant was 10 years old. Appellant still wet his bed when he was 14 -- after age 6, bed wetting is considered pathological. Appellant was an aggressive bully; physically dirty; by 1963, his orphanage superintendent noted that appellant could no longer be handled at Whitehall. In Dr. Fischer's opinion, appellant messed up all of his foster placements so he never had any connection to other people or any enduring contacts in his life. Appellant continued to go to the state hospital even after he was transferred back to Whitehall where they monitored his medication. Other documents from the period 1961-1964 noted appellant was still mad at the whole world, growled at everyone. In Dr. Fischer's opinion, the absence of any competent help from interested relatives, as well as the rejection, instability, and neglect suffered by appellant while at the orphanage and mental hospital, all took a toll on his personality. Even at an early age, questions were being raised whether appellant could adjust to noninstitutional life. (RT 5375-5390.)

Dr. Fischer reviewed and summarized other documents including those pertaining to the Boys Training School at Kearney and the mental hospital. He noted that appellant was deemed sexually demonstrative, physically and verbally. A mental status examination in 1959 first concluded that appellant had a passive/aggressive personality. At that time, major tranquilizers were used to control his behavior. In Dr. Fischer's opinion, appellant was treated as a child with abusive medication. In Dr. Fischer's further opinion, appellant was probably

given electroshock treatments, hydrotherapy, isolation (locked alone in a room), and medication. (RT 5385-5405.)

If asked to diagnose one disorder, Dr. Fischer was of the opinion that appellant at about 12-14 would be classified as having oppositional defiant disorder, although still not bad enough to be a conduct disorder, yet manifesting many of the characteristics that later emerged as life-long patterns. The inception of appellant's criminal career (when he was caught and punished) and conduct disorder began at about age 13 or 14; he had moderate conduct disorder until sent to Kearney and then was severe ever since. Appellant's childhood conduct disorder was similar to psychopathy or antisocial personality. (RT 5405-5412.)

In Dr. Fischer's opinion, appellant could be maintained only in a controlled institution. He had the capacity to adjust very well to a penal institution. Women were usually his victims. In Dr. Fischer's opinion, society erred when appellant was released from prison in Idaho although then serving two life sentences. In Dr. Fischer's opinion, the physical abuse suffered by appellant during his early childhood affected his personality development and relations with women. The early physical and sexual abuse eroticized his behavior. At some point, appellant became institutionalized which provided external behavior controls; he was productive in prison in the sense of being a good worker; and got along with males. In Dr. Fischer's opinion, sociopaths as appellant were hard to treat as they don't get better; all you can do is maintain them in a controlled environment such

as a class 4 prison. (RT 5412-5425.)

On cross-examination, Dr. Fischer acknowledged that appellant probably killed Gayle Johnson. (RT 5425-5448.) He acknowledged over defense objection that appellant was organized and able to plan a task and follow through. Appellant was aware of societal values; he was able to appreciate the criminality of his conduct; not a drug abuser, although possibly an alcoholic. In Dr. Fischer's further opinion, appellant was able to control himself and not commit a murder. However, appellant could not control conditioned emotional responses to certain situations with women; in those situations, he would be reactive. Dr. Fischer acknowledged that he had seen nothing that appellant could not control; in his opinion, appellant rewrites reality to conform to his own vision of who and what he is. Appellant's actions in covering-up incriminating evidence after the Johnson killing demonstrated control over his behavior. Although Dr. Fischer stressed that appellant lacked internal controls to prevent him from committing certain crimes, he agreed that not all abused children commit murder and that not all people sent to Whitehall or Kearney committed murder. (RT 5425-5448; 5451-5492.)

On further cross-examination, Dr. Fischer acknowledged limited background and training in forensic psychology. His appearance at trial was his third in a murder case, all for the defense. Dr. Fischer conceded that psychology does not know what causes people to commit crimes; he conceded he adopted an eclectic theory (bits and pieces of other theories), which was denigrated by the

prosecutor as a pick-and-choose method of psychology. Dr. Fischer conceded that excessive coffee drinking and nicotine withdrawal were mental disorders under the DSM-IV. He also conceded that he considered himself part of the defense team and that he was trying to keep appellant from getting the death penalty. (RT 5514-5535.)

6. LWOP as Alternative Punishment

James Park retired from the California Department of Corrections (CDC) after a 31-year career. Park participated in developing the prisoner classification manual for the state. He had served as associate warden for administration at San Quentin from 1964 until 1972 and as associate warden at Soledad. Park had administrative responsibilities for death row prisoners. He was responsible for press, witnesses, and documentation for the 1967 execution of Aaron Mitchell. He had been responsible for other death row inmates, including Charles Manson, Sirhan Sirhan, and Gregory Powell. (RT 5187-5195.) After retirement, Park advised and consulted on new prison design and construction.

Park discussed the several levels of prisoner classification; all LWOPs would be given classification 4, maximum security. In level 4, prisons have gun coverage and were extremely secure. There were also special housing units for prisoners who could not handle even level 4. In level 4, prisoners may work and exercise, but were not given much freedom of movement. Privileges were minimal, although prisoners could have a TV or radio. (RT 5216-5231.) Not all

LWOPs would remain in level 4 for the rest of their lives; after good behavior and good work, point reductions would permit transfer of some LWOPs to level 3. There was not much difference between level 3 and level 4 -- both had the same gun coverage but just a little bit more freedom of movement in level 3. Of 1,500 LWOP prisoners at time of trial only 200 or 300 were in level 3 prisons. (RT 5195-5200.)

Based on Park's experience, level 4 prisoners -- the older prisoners -- tended to be a stabilizing influence on younger prisoners. In his opinion, life prisoners were probably better workers. Reviewing appellant's prison records, Park was of the opinion that he would be a classification 4 prisoner for many, many years, and would possibly die in a level 4 institution. Because of his offense, appellant's contacts with females would be restricted. Appellant was considered an excellent worker in state prisons. Were he still a prison supervisor, Park would want appellant for a clerk. Park had little expectation of violence by appellant in prison. In Park's opinion, appellant would probably pay his way through incarceration as an LWOP. He would be a useful prisoner and would contribute to the safe, good operation of a prison. (RT 5232-5241.)

# A. Guilt Phase Issues and Assignments of Error

## I

## THE COURT ERRED BY FAILING TO CONDUCT MEANINGFUL GENERAL VOIR DIRE OF THE SITTING AND ALTERNATE JURORS, THEREBY VIOLATING CODE OF CIVIL PROCEDURE § 223 AND APPELLANT'S RIGHTS TO A FAIR TRIAL, A FAIR AND IMPARTIAL JURY, DUE PROCESS OF LAW, AND TO RELIABLE GUILT AND PENALTY DETERMINATIONS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Introduction

As part of the jury selection process, all prospective jurors were required to fill out a comprehensive 32-page questionnaire. (See 2 CT 509-541 [questionnaire].) The court and counsel then undertook a superficial screening process to dismiss prospective jurors for hardship, stipulated cause, and other reasons.[21] Once this brief, preliminary screening process had been concluded and prospective jurors dismissed for hardship or other reasons, the trial court conducted death qualification voir dire of each prospective juror individually and out of the presence of other prospective jurors (see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80). As separately demonstrated in Argument XVI, *infra*, the death qualification of prospective jurors was constitutionally inadequate, deficient,

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[21]/ Consistent with the court's abdication of responsibility during death qualification and general voir dire (as discussed *infra* and in Argument XVI), hardship and other dismissals were concluded without explicit determination by the court of the nature or extent of the hardships claimed. (See, for example, RT 620, 623, 735, 743, 745.)

and defective as to penalty. As further demonstrated in Argument XVI, *infra*, in respect to penalty, the trial court failed to conduct or oversee any meaningful questioning of the seated and alternate jurors in violation of appellant's rights to fair penalty trial, a fair and impartial penalty jury, due process, and to a reliable determination of penalty as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. And as further discussed in Argument XVI, *infra*, the error as to penalty was prejudicial per se.

After the inadequate death qualification of prospective jurors, the trial court conducted general voir dire as part of the final jury selection process. As demonstrated below, the brief general voir dire -- at most but a minute or two for each prospective juror -- was also deficient and defective. Clearly manifest areas of juror bias and prejudice revealed in questionnaire responses -- unexplored and unexamined during death qualification -- were likewise not addressed during general voir dire. As in death qualification, the record strikingly reveals that the trial court utterly failed to ask during general voir dire any questions of the prospective jurors who were ultimately seated, including the alternates.

As with its conduct of death qualification (as fully discussed in Argument XVI, *infra*), the sum total of the court's participation and questioning during general voir dire was zero. The court ignored questionnaire responses, failed to inquire about areas of prejudice and bias clearly revealed in the questionnaires and prior death qualification responses of virtually every seated and alternate juror.

The trial court used a jury questionnaire to gather information but then ignored the questionnaire responses that explicitly and unambiguously indicated bias and prejudice; the court posed no follow-up questions to any of the prospective jurors ultimately selected in this case. Consequently, as with death qualification, and for the separate and additional reasons discussed below, the general voir dire in this case was statutorily and constitutionally inadequate, deficient, and defective. By failing to conduct any meaningful general voir dire of the seated and alternate jurors, the trial court's conduct of voir dire was inadequate under Code of Civil Procedure § 223. At the same time, the trial court's conduct and oversight of general voir dire violated appellant's fundamental rights to a fair trial, a fair and impartial jury, due process, and to a reliable determination of guilt (and penalty) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. If not prejudicial per se as to the determination of guilt, the constitutional juror selection violations during general voir dire were not harmless beyond a reasonable doubt.

### B. Factual and Procedural Background

During death qualification of the jury, defense counsel twice objected to the prosecutor's questions and urged that those questions "be reserved for general voir dire." (RT 1184.) Defense counsel specified that he was objecting to questioning by the prosecutor on areas "properly reserved for the general voir dire." (RT 1184.) The court sustained defense counsel's objections during death qualification

and ordered the prosecutor to confine himself to death penalty issues, "[a]nything else you should wait until further voir dire." (RT 1185.) At the conclusion of death qualification, general voir dire was conducted. However, the "further voir dire" contemplated by the court never materialized. General voir dire was superficial at best. The court did nothing and asked nothing of any prospective juror ultimately seated in this case. Jury questionnaire responses indicating bias or prejudice were ignored. As during death qualification, the trial court never asked even a single question, failing miserably to conduct meaningful or constitutionally adequate general voir dire of the ultimately-selected seated jurors and alternates.

The following is a summary of the general voir dire. As a general observation, the trial court previously asked no questions during death qualification of the any of the jurors discussed below. None of the responses in the jury questionnaires indicating areas of bias or prejudice was mentioned or examined at that time. The most striking aspect of the subsequent general voir dire, as set forth below, is the complete superficiality of the voir dire process and the total and utter failure of the trial court to ask any questions or participate in any meaningful manner in voir dire. Despite manifest bias or prejudice revealed in the jury questionnaires, the court did nothing, said nothing, and failed totally to illuminate or elucidate juror responses for bias or prejudice that might have constituted grounds for dismissal for cause.

*a. Juror No. 1*

During death qualification, the trial court sat silent and did not ask a single question. During general voir dire, defense counsel inquired about Juror No. 1's opinion on DNA and scientific evidence, (RT 1685-1685), whether he had an open mind, whether appellant was more likely to be guilty than innocent because charges were filed, and whether he watched any of the well-publicized and recently-concluded O.J. Simpson trial. (RT 1686.) The prosecutor simply asked whether Juror No. 1 recalled the substance of his conversation with the prosecutor after one of the murder trials on which he had previously apparently sat as a juror. Juror No. 1 reported that the prosecutor told him he "figured [he] would be a tough one." (RT 1700.) Asked whether he was a tough one, Juror No. 1 replied that "I weighed everything that was presented to me, I believe, to the best." (RT 1700.) As in death qualification, the court did not ask any questions during general voir dire. Remarkably, the court failed to ask any questions about the ability of Juror No. 1 to be fair or impartial after having served as a juror in a previous murder trial and after having conversed with the prosecutor in that case.

*b. Juror No. 2*

Juror No. 2 thought she could give both appellant the prosecutor a fair trial and could give appellant the benefit of his presumption of innocence. (RT 1715.) Juror No. 2 agreed to hold the state to its burden of trying to prove guilt beyond a reasonable doubt. (RT 1715.) Juror No. 2 watched some of the scientific

testimony in the O.J Simpson trial, although she did not watch it all and did not completely understand it. (RT 1715-1716.) Juror No. 2 acknowledged her right, duty, and obligation to weigh and consider all the testimony whether lay or expert and to weigh, consider, and accept that which she believed and reject that which she questioned. (RT 1716.) The prosecutor did not ask any questions. (RT 1716.) The court did not ask any questions.

*c. Juror No. 3*

In his questionnaire, Juror No. 3, a former military (for four years) and civilian police officer (for over 20 years), indicated it would be difficult to follow the court's instruction that "a defendant in a criminal case is presumed innocent unless proven guilty beyond a reasonable doubt." (Supp B -- Juror Questionnaires CT 1116.) The court made no inquiry. In respect to psychiatric or opinion testimony, Juror No. 3 was extremely dubious, stating "people can say anything for money." (Supp B -- Juror Questionnaires CT 1089.) The court made no inquiry. Juror No. 3 even questioned his own ability to be a fair and impartial juror. (See Supp B -- Juror Questionnaires CT 1125.) The prosecutor did not ask any questions. (RT 1700.) The court made no inquiry.

Juror No. 3 did not know much about scientific evidence and did not really watch the O.J Simpson trial. (RT 1717.) Juror No. 3 agreed with the presumption of innocence but had no idea whether appellant was more likely guilty because he had been charged with the crimes previously read by the judge. (RT 1719.) Juror

No. 3 agreed to listen to the entire case and to consider what all sides had to say. (RT 1718.) The prosecutor did not ask a single question. In the face of obvious issues of bias and prejudice, including the inability to follow the court's instructions and inability to remain impartial, the trial court remarkably remained silent, said nothing, and did not ask any questions.

*d. Juror No. 4*

In response to defense counsel questioning, Juror No. 4 said he did not know much about scientific evidence and was willing to learn. Juror No. 4 agreed to approach the case with an open mind and said that he did not have any preconceived notions and could be fair to both sides. (RT 1706.) In response to the prosecutor's single question, Juror No. 4 said that he did not have any problem with scientific evidence and was willing to accept it if it appeared to be reasonable and done properly. (RT 1706-1707) Here, again, the trial court did not ask any questions.

*e. Juror No. 5*

Juror No. 5 stated that she would be able to sit on the jury for a long time. She said she had an open mind and was willing to listen to the scientific evidence, although it would be a challenge. (RT No. 1707-1708.) Juror No. 5 agreed to give appellant the benefit of his presumption of innocence and believed in the applicable burden of proof. (RT 1708.) Juror No. 5 said that she could be fair and impartial to both sides, would listen to the entire trial, and "not start deciding until

the judge tells you it's time to decide." (RT 1709.) Juror No. 5 said that she could work with 11 other people. (RT 1709.) The prosecutor did not ask a single question. The court did not ask any questions.

*f. Juror No. 6*

Juror No. 6 indicated he had previously sat as a juror on two murder cases -- one in San Bernardino and one in Victorville. (RT 1660.) The opinions expressed by Juror No. 6 in his questionnaire and during questioning by the prosecutor were at odds -- placing himself originally in group 2 and then group 4.[22] (RT 1665.) Defense counsel asked whether Juror No. 6 knew anything "about this DNA stuff" (RT 1692), whether he could start with a "clean slate on both sides" and had an open mind about the charges (RT 1693), whether he understood the principles about presumption of innocence and proof beyond a reasonable doubt (RT 1693), and whether he could be fair to both sides. (RT 1693-1694.) The prosecutor did not ask a single question. (See RT 1700.) The court did not ask any questions.

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[22]/ The prospective jurors were asked to read five group descriptions describing various attitudes and positions on the death penalty and then place themselves in one of the five groups. Prospective jurors in Group 2 favored the death penalty, would not always vote for death in every case of murder with special circumstances, and would weigh and consider the aggravating and mitigating factors, although those factors were neither described, defined, nor specified. Prospective jurors in Group 4 had doubts about the death penalty but would not vote against it in every case.

*g. Juror No. 7*

Defense counsel inquired simply whether Juror No. 7 had an open mind about scientific evidence and expert opinions and could "give us the full benefit of [his] honest opinion on all issues, scientific, legal, factual, everything ... ." (RT 1699.) Neither the prosecutor nor the court asked a single question. (RT 177.)

*h. Juror No. 8*

In his questionnaire, Juror No. 8 indicated that he and his wife had previously been witnesses in a murder case. His neighbor had been murdered, and he had been called by the victim's wife. Juror No. 8 said that he "discovered" his neighbor's body. (Supp B -- Juror Questionnaires CT 1305.) The court made no inquiry.

Juror No. 8 also indicated in his questionnaire that he remembered something about the present case from the newspaper and remembered that defense counsel had been previously involved in the "Dean" murder trial. (Supp B -- Juror Questionnaires CT 1318.) The court did not inquire about the impact of pretrial publicity on the juror. Juror No. 8 reported extensive dealings with district attorneys and law enforcement officers in his profession. (RT 1621-1622.) The prosecutor did not ask any questions. (RT 1700.) The trial court did not ask a single question (see RT 1621-1626), failing to inquire whether the circumstances of the prior murder in which Juror No. 8 had been involved as a witness, or his knowledge and acquaintance with prosecutors and law enforcement officers in the

county, would affect his ability to be fair and impartial in this case.

Defense counsel asked whether Juror No. 8 had any particular opinions about scientific evidence (RT 1698) and whether he had an open mind and could be a fair and impartial juror. Counsel elicited from Juror No. 8 that he was a State Farm Insurance employee who was frequently involved in settling claims before the cases went to trial. (RT 1698-1699.) As with all other jurors, the court remained totally mute during general voir dire.

*i. Juror No. 9*

There was virtually no voir dire of Juror No. 9. Neither was there any probing of or even any references to his juror questionnaire. In response to defense counsel's question. Juror No. 9 said he did not know anything about "DNA stuff." (RT 1710.) Juror No. 9 agreed to decide what weight to give expert opinions and would give "us the benefit of [his] own individual opinion." (RT 1710-1711.) Neither the prosecutor nor the court asked any questions. (See RT 1711.)

*j. Juror No. 10*

Significantly, in her questionnaire, Juror No. 10 stated she belonged to a least two church organizations and was an active church member. She had been a church treasurer and worked with various church committees and church youth groups. (Supp B -- Juror Questionnaires CT 1367.) She had also participated in a church group that chose the church pastor. Supp B -- Juror Questionnaires CT

1368.) Juror No. 10 participated in an organization that was trying to promote a law to protect law enforcement officers. (Supp B -- Juror Questionnaires CT 1368.) She had unpleasant memories from prior juror experience recalling "unpleasant jurors with unreasonable evaluations and no common sense." (Supp B -- Juror Questionnaires CT 1371.)

Juror No. 10 noted that the defense attorneys in the O.J Simpson case were "an embarrassment to the legal profession." (Supp B -- Juror Questionnaires CT 1378.) Juror No. 10 carried a concealed weapon for protection. (Supp B -- Juror Questionnaires CT 1379.) She had relatives and close friends in law enforcement and the legal profession. (Supp B -- Juror Questionnaires CT 1381.) Neither the prosecutor nor the court asked any questions. (See RT 1714.) Specifically, the court did not ask whether Juror No. 10 could put aside her prior negative jury experience. The court did not ask if the juror would give more weight to law enforcement testimony than to that of lay witnesses. The court did not inquire into the juror's close friends in the legal profession. And, most significantly, the court did not explore obvious areas of bias and prejudice stemming from Juror No. 10's church membership and activities that were remarkably similar to those in which the victim had been engaged at the time she was killed.

*k. Juror No. 11*

In her questionnaire, Juror No. 11 indicated that her brother had been a witness in a drive-by shooting murder case and testified about what he saw. (Supp

B -- Juror Questionnaires CT 1404, 1409.) Juror No. 11 indicated she had worked at the central jail in Los Angeles and was well acquainted with police, sheriff, and jail or prison personnel. (Supp B -- Juror Questionnaires CT 1412, 1414.) She was also acquainted with psychologists and psychiatrists through her work in a hospital emergency room. (Supp B -- Juror Questionnaires CT 1397, 1415.) Juror No. 11 did not respond to the question about the value of psychiatric or psychological opinions. (Supp B -- Juror Questionnaires CT 1416.) The court did not elucidate missing or omitted questionnaire responses. The court did not elicit any information about possible bias or prejudice stemming from Juror No. 11's work in the Los Angeles central jail or her associations with law enforcement personnel and mental health professionals.

Defense counsel asked only about the familiarity of Juror No. 11 with scientific processes and, ambiguously, whether she understood that what the jurors would come to know or learn "will come straight from the witness stand." (RT 1704.) Juror No. 11 said she had an open mind about "those things" and about the entire case. (RT 1704.) The prosecutor did not ask any questions. (See RT 1700.) Once again, the trial court remained totally silent, asking nothing, saying nothing.

*l. Juror No. 12*

As an employee of San Bernardino County, Juror No. 12 received reserve sheriff training involving powers of arrest, firearm safety, and warrant training. (Supp B -- Juror Questionnaires CT 1431.) Juror No 12's wife was a full-time San

Bernardino County employee in Victorville. (Supp B -- Juror Questionnaires CT 1431.) Juror No. 12 himself was also an evacuation medic in the Air Force Reserve. He had previously assisted while on active duty in the transportation of wounded patients. (Supp B -- Juror Questionnaires CT 1432.)

Juror No. 12's sister-in-law worked as a San Bernardino County "victim witness secretary" in the District Attorney's office, thus revealing other possible areas of bias or prejudice. (Supp B -- Juror Questionnaires CT 1434.) Juror No. 12 had also previously testified in criminal cases in the course of his employment with and on behalf of San Bernardino County, further indicating that he would be possibly biased in favor of the prosecutor from and employed by the same county. (Supp B -- Juror Questionnaires CT 1437.)

Significantly, Juror No. 12 was acquainted with many San Bernardino County police, sheriff, and other law enforcement personnel both from work and from the Air Force Reserve. (Supp B -- Juror Questionnaires CT 1447.) He believed that testimony of law enforcement officers was more truthful or accurate than civilian testimony. (Supp B -- Juror Questionnaires CT 1447.) He even considered working for the LAPD and the San Bernardino County Sheriff. (Supp B -- Juror Questionnaires CT 1447.) In his opinion, repeat offenders caused "most big problems in society." (Supp B -- Juror Questionnaires CT 1444.)

Defense counsel inquired about Juror No. 12's biology degree and whether the juror knew anything about DNA, to which he responded in the affirmative.

(RT 1701.) Juror No. 12 mentioned what had been learned in college about DNA and recalled that Robin Cotton, who would testify at trial, also testified during the O.J. Simpson trial, parts of which he watched. (RT 1702-1703.) Juror No. 12 was not asked about his opinion of the O.J. Simpson trial or his impression of Dr. Cotton's testimony or DNA evidence in that trial, issues directly relevant to this case. (RT 1703.) Juror No. 12 said that he could be fair to both sides. (RT 1703.)

The prosecutor did not ask a single question. The court did not make any inquiry about patently obvious areas of bias or prejudice, including county employment, significant law enforcement contacts, family relationships with still more close ties to the prosecutor's office, and other areas of likely bias, prejudice, or grounds for exclusion for cause. Other than interrupt to declare a break (RT 1701), the trial court remained mute, failing to ask a single question. (See RT 1702-1703.)

*m. Alternate Juror No. 1*

Alternate Juror No. 1 worked full-time for a church and also held church leadership positions. (Supp B -- Juror Questionnaires CT 1462, 1465.) Her husband was a Victorville city employee; previously, he had been a church custodian. (Supp B -- Juror Questionnaires CT 1463.)

Alternate Juror No. 1 expressed the opinion that "criminals have more rights than the victims" and that there were an "excess amount of repeat offenders." (Supp B -- Juror Questionnaires CT 1476.) Alternate Juror No. 1

advocated stricter penalties in response to crime. (Supp B -- Juror Questionnaires CT 1477.) Alternate Juror No. 1 was related or friendly with police, sheriff, and fire department personnel. (Supp B -- Juror Questionnaires CT 1479.) She recalled hearing about this case on the radio. (Supp B -- Juror Questionnaires CT 1482.)

Alternate Juror No. 1 said she could be fair to both sides, would follow the law, and use her own independent judgment on weighing the law or expert scientific evidence. (RT 1736.) The prosecutor did not ask a single question. (See RT 1736.) The trial court said nothing, failing to inquire about the nature or extent of the alternate's relations and friendship with law enforcement officers, whether Alternate No. 1 would give more weight to law enforcement testimony, and, despite these relationships, could serve impartially and without bias on the jury panel.

*n. Alternate Juror No. 2*

Alternate Juror No. 2 repeatedly stated that the system and the law needs to get "stricter." (Supp B -- Juror Questionnaires CT 1509, 1510.) In respect to her views about law enforcement or police testimony, she stated that she thought "their jobs would be on the line if they were untrue." (Supp B -- Juror Questionnaires CT 1512.) Alternate Juror No. 2 also stated in her questionnaire that: "I believe is those that are in prison for awful things like rape, murder, and they are let out just to commit the same crime" [sic]. (Supp B -- Juror

Questionnaires CT 1509.) Alternate Juror No. 2 stated that if a defendant is found guilty of "a hideous crime, such as repeated [sic] sex offender, ..., life without parole is a waste to taxpayers." (Supp B -- Juror Questionnaires CT 1515.)

Alternate Juror No. 2 agreed to give her own independent judgment and would work on trying to understand "this scientific stuff." (RT 1736.) She agreed to weigh and consider all the "scientific stuff" and would give the case the benefit of her own individual opinion on every issue. Alternate Juror No. 2 agreed not to just "go with the flow" but would follow her own conscience. (RT 1737.) Neither the prosecutor nor the trial court asked a single questions. (RT 1737.)

*o. Alternate Juror No. 3*

Alternate juror No. 3 belonged to church organizations. (Supp B -- Juror Questionnaires CT 1531.) She had previously served as a juror in a rape case that resulted in a not guilty verdict. (Supp B -- Juror Questionnaires CT 1533.) Her daughter and son-in-law had been witnesses in a multiple murder case; the defendant in that case was convicted of first and second degree murder but acquitted on a third count. (Supp B -- Juror Questionnaires CT 1536.) Her son had been shot dead at a party; a great niece was killed in a random shooting. (Supp B -- Juror Questionnaires CT 1539, 1543.) Alternate Juror No. 3 felt that the DNA evidence in the O.J. Simpson trial "was not considered sufficiently." (Supp B -- Juror Questionnaires CT 1542.)

Alternate Juror No. 3 saw no reason why she would be unable to participate

as a juror for the next three months. (RT 1739.) Alternate Juror No. 3 heard all the other questions asked other jurors and would answer about the same. (RT 1740.) The prosecutor asked no questions. The trial court said nothing, asked nothing, failing to inquire about how the murder or death of her son and other relatives affected her view of the criminal justice system in general and appellant in particular. The court did not even inquire whether in light of her experiences and the murder of her son, Alternate Juror No. 3 could be fair and impartial. As with all other jurors, the trial court remained mute and impassive, making absolutely no inquiry, failing to engage the prospective juror even in the slightest degree or in any meaningful manner (RT 1740.)

*p. Alternate Juror No. 4*

Alternate Juror No. 4 said that he had no problems about sitting on the jury for three months. Juror No. 4 would give appellant the benefit of his presumption of innocence and would form his or her own opinion as to the weight to be given to the scientific evidence. (RT 1730.) The prosecutor did not ask a question.[23] Once again, the trial court asked nothing, said nothing, relying totally on jury questionnaire responses without any colloquy to determine what the prospective juror was thinking about this case. (See RT 1729-1730.)

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[23]/ Defense counsel noted to Alternate Juror No. 4: "[t]he [prosecutor] does not seem to be very nosy today so you'll have to rely on the questions that I have." However, defense counsel then asked virtually nothing of any meaning, substance, or significance. (See RT 1730.)

*q. Alternate Juror No. 5*

Alternate Juror No. 5 stated that he did not mind being the youngest person on the jury and would give the case the benefit of his own opinion. (RT 1738.) Alternate Juror No. 5 agreed to try to understand the scientific evidence and would work hard on it. (RT 1738.) He agreed to work with the other jurors but would give his own individual opinion. (RT 1739.) The prosecutor said nothing. The trial court did not ask any questions. (See RT 1739.)

*r. Alternate Juror No. 6* [24]

Alternate Juror No. 6 agreed to be fair to both sides and to give appellant the full benefit of his presumption of innocence. (RT 1723.) The prosecutor said nothing. As with every other juror, the court continued its pattern of complete and total abdication of voir dire responsibilities, remaining silent and failing to ask even a single question or probe even a single questionnaire response. (RT 1723.)

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[24]/ Juror roll call numbers have been used in the Clerk's Transcript to identify questionnaires of regular or sitting jurors and alternate jurors whose names have been redacted for confidentiality purposes.

Alternate Juror No. 6 has been erroneously designated as a sitting juror in the chronological/alphabetical list of jurors. (See Vol. 1 Supp B -- Juror Questionnaires at p. 11.) This chronological/alphabetical list of jurors also erroneously lists 13 [not 12] "sworn" jurors, among them Juror # 501 and only five [not six] "alternate" jurors. (See (Vol. 1 Supp B -- Juror Questionnaires at pp. 11-12.) Actually, Juror No. 501 was selected as Alternate Juror No. 6. (See Supp B -- Juror Questionnaires CT 7310-7311 [random list of jurors noting correspondence of sworn and alternate juror roll call numbers with sworn (1-12) and alternate (A1-A6) juror designation numbers].)

### C. Meaningful Voir Dire -- Constitutional Standards; Code of Civil Procedure § 223

The Sixth and Fourteenth Amendments to the United States Constitution require jury impartiality at the guilt phase of trial. (*People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Williams* (1997) 16 Cal.4th 635, 666, citing *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 and 740 (dis. opn. of Scalia, J.) [clarifying the constitutional underpinnings of the *Morgan* holding].) California's Constitution provides an identical guarantee. (Cal. Const., art. I, § 16; *People v. Williams, supra*, 16 Cal.4th at p. 666; see *People v. Johnson* (1992) 3 Cal.4th 1183, 1210-1211; *People v. Gordon* (1990) 50 Cal.3d 1223, 1248, fn. 4.) Likewise, under both the United States and California Constitutions, a sentencing jury in a capital case must be impartial. (*People v. Williams, supra*, 16 Cal.4th 635, 666-667; see also *Morgan v. Illinois, supra*, 504 U.S. at pp.726-728.)

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

While the right to an impartial jury enjoys constitutional protection, the precise manner of choosing that jury is not similarly endowed. (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 246.) "[T]here is no constitutional right to any particular manner of conducting the voir dire and selecting a jury so long as

such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed." (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 474; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086 [right to voir dire as means to achieve impartial jury].) As alternatively stated by the United States Supreme Court, "The Constitution ... does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*Morgan v. Illinois, supra,* 504 U.S. at p. 729.)

In California, the trial court controls voir dire. (*People v. Bolin* (1998) 18 Cal.4th 297, 315, fn. 2.) Code of Civil Procedure § 223, in effect at the time of appellant's trial, provides:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. ... [P] Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. [P] The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

The language of Code of Civil Procedure § 223 is not ambiguous; it is categorical in providing that the trial court "shall conduct the examination of prospective jurors." This Court has previously emphasized that by virtue of Code of Civil Procedure § 223, the trial court has primary responsibility for questioning

prospective jurors. (*People v. Box* (2000) 23 Cal.4th 1153, 1178-1179; see also *People v. Wilborn* (1999) 70 Cal.App.4th 339, 347.) The decision whether to investigate the possibility of juror bias or impartiality, as well as the ultimate decision whether to retain or discharge a juror, rests within the sound discretion of the trial court. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351.) However, as elsewhere stated in *People v. Taylor* (1992) 5 Cal.App.4th 1299, the trial judge "is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses." (*Id.* at p. 1314.) Thus, the *Taylor* court stressed that "with the heightened authority of the trial court in the conduct of voir dire, mandated under [Code of Civil Procedures § 223], goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*Ibid.*) Here, of course, the trial court did nothing, failing to conduct meaningful death qualification (see Argument XVI, *infra*) or general voir dire, asking no questions of any of the seated and alternate jurors despite the mandate of § 223.

By virtue of Code of Civil Procedure § 223 and decisional law, and considering as well that the scope and nature of voir dire is within the trial court's discretion to which great deference is ordinarily accorded (*People v. Waidla* (2000) 22 Cal.4th 690, 713-714), such discretion is abused when the court, as here, has made neither a sincere nor reasoned effort to evaluate possible juror bias or prejudice or "if the questioning is not reasonably sufficient to test the jury for

bias or partiality." (*People v. Silva* (2001) 25 Cal.4th 345, 385.) Under the circumstances of this case, the trial court's failure or refusal to ask not one single question regarding bias or prejudice fell well short of satisfying the court's statutory and constitutional duties.

While in the view of the United States Supreme Court, there is ordinarily no requirement that prospective jurors must be questioned with respect to various areas of possible prejudice (*Ristaino v. Ross* (1976) 424 U.S. 589, 596), at the same time the High Court explicitly recognized that in some cases, circumstances would present a "constitutionally significant likelihood" that, absent questioning, potential areas of juror bias could not be uncovered and that, as a consequence, more pointed questioning on these subjects is constitutionally required. (*Id.*) Based on the juror questionnaire responses alone and the fact that this was a capital case requiring heightened scrutiny, there was a constitutionally significant likelihood that some questioning of at least some of the jurors, based on questionnaire responses, was required to expose or uncover juror bias or impartiality. (See Subsection E, *infra*; see also Argument XVII.) Yet the trial court did nothing. In every respect, the trial court failed to meet its statutory responsibilities under Code of Civil Procedure § 223 and its state and federal constitutional duties, making neither a sincere nor reasoned effort to evaluate possible juror bias or prejudice. The failure of the court to ask any questions was neither adequate nor meaningful.

### D. The Trial Court Failed to Conduct Meaningful Voir Dire and Deprived Appellant of his Rights to Trial by a Fair and Impartial Jury, Due Process, and Reliable Determination of Guilt Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and California Counterparts

When voir dire is inadequate, the defense is denied information upon which intelligently to exercise both its challenges for cause and its peremptory challenges. Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, this Court has never required that counsel use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire. (*People v. Bolden* (2002) 29 Cal.4th 515, 537.)

Appellant submits that in the present case, the trial court abdicated its responsibilities in respect to the conduct of general voir dire and failed to conduct a meaningful general voir dire likely to uncover juror bias or impartiality. Here, the trial court used a jury questionnaire to gather information but then ignored the questionnaire responses that indicated areas of potential, possible, or actual bias, and posed no follow-up questions to any of the prospective jurors -- sitting or alternate -- on general voir dire. The trial court's conduct of general voir dire was inadequate under Code of Civil Procedure § 223 and rendered appellant's trial fundamentally unfair in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Holt* (1997) 15 Cal.4th 619, 661.)

Voir dire played a critical function in assuring appellant that his Fifth and

Sixth Amendment rights to a fair trial and impartial jury would be honored. Absent meaningful or adequate voir dire, the trial court's responsibility to remove prospective jurors who were not able impartially to follow the court's instructions and evaluate the evidence could not be fulfilled. (*Rosales-Lopez v. United States, supra,* 451 U.S. at p. 188.) Although the trial court permitted counsel to question jurors, the court itself posed no questions to any of the seated and alternate jurors despite numerous juror questionnaire responses that revealed significant issues of potential, possible, or actual bias and impartiality.

In *People v. Holt, supra,* 15 Cal.4th 619, the Court reiterated the principles set out by the High Court in *Mu'Min v. Virginia* (1991) 500 U.S. 415, in considering a claim of inadequate voir dire. The court advised trial judges to follow the language and formulae for voir dire recommended by the Judicial Council in the California Standards of Judicial Administration to ensure that all appropriate areas of inquiry are covered in an appropriate manner. (*People v. Holt, supra*, 15 Cal.4th at p. 661.) Here, in the juror questionnaire, the trial court asked most of the questions recommended in the Standards but then did not engage in any follow-up questioning based on the answers given by prospective jurors. It was apparent in this case that the process of having prospective jurors respond to the court's questionnaire was alone deemed important to the trial court, not the substance of the answers given, because the answers and questionnaire responses were totally ignored by the court. Fundamentally, the court did not really conduct

voir dire. The court made absolutely no effort to explore any of the answers given by prospective jurors in questionnaire responses that indicated areas of bias or impartiality requiring further exploration.

The jury questionnaire used in this case contained most of the areas of inquiry specified in section 8.5 of the California Standards of Judicial Administration. The questionnaire was created and used to discover bias, impartiality, or prejudice relevant to a challenge for cause or affecting the qualifications of the prospective jurors who were chosen as sitting or alternate jurors in this case. It is striking that without exception, none of the answers by any of the prospective jurors that plainly manifested bias, impartiality, or prejudice relevant to challenges for cause was followed-up by the court. It was as though the trial court, having required prospective jurors to answer a series of questions, ignored its further obligation to read the responses found in questionnaires, or to probe prospective jurors about their answers to insure the selection of a fair and impartial jury.

This Court has previously held that questionnaire responses alone, "without the benefit of the trial court's explanation of the governing legal principles," do not provide an adequate basis for a juror's excusal for cause. (*People v. Heard* (2003) 31 Cal.4th 946, 964.) Certainly, and of necessity, as the Court has observed, not every aspect of every potential juror's background can be explored during voir dire. (*People v. Majors* (1998) 18 Cal.4th 385, 420.) Unlike the

situation in *People v. Jones* (2003) 29 Cal.4th 1229, 1247, fn. 7, where the Court found questionnaire and voir dire answers consistent and "entirely unexceptional," here there were a number of questionnaire answers by several prospective jurors who ultimately served as sitting or alternate jurors that raised obvious and serious issues of bias or hardened views that demanded at least some -- let alone careful -- exploration by the trial court charged with the duty to ensure a fair trial by an impartial jury. (See also Subsection E, *infra*; see also Argument XVII, *infra*.) Yet the trial court did nothing -- no follow-up, no exploration, not even the slightest indication by the court that it was aware of questionnaire responses. Although the trial court certainly had discretion in respect to the course and conduct of questioning prospective jurors to test their responses and possible bias or impartiality as reflected in the juror questionnaires, the trial court ignored the questionnaires, ignored the answers, ignored potential bias or areas of potential impartiality, and failed to undertake any inquiry of any of the prospective jurors who were ultimately selected as sitting or alternate jurors. In short, the trial court totally abdicated its responsibilities to conduct meaningful and adequate voir dire.

In *People v. Bolden, supra*, the Court found that a trial court's voir dire was adequate when the court asked questions of prospective jurors and permitted counsel to ask additional questions. (*Id.* at p. 538.) Although the jury questionnaires, as in *Bolden,* asked prospective jurors a variety of questions, the court here totally failed to follow-up on any of the questionnaire responses by

several jurors that appeared on their face to be ambiguous, biased, or in need of further explanation.

Moreover, unlike *Bolden*, at the outset of general voir dire, the trial court did not request prospective jurors not seated in the jury box "to pay attention to the questions" or to "make a little mental or written note" if any of the questions applied to them so that if they were called into the jury box they could then direct the court's attention to any question that applied to them. (*People v. Bolden, supra*, 29 Cal.4th at p. 539.) The trial court here probably did not so instruct the jury, because it had no intention of asking, and thereafter did not ask, any questions. Unlike *Bolden*, prospective jurors not originally seated in the jury box were not advised by the court of their obligation to disclose any information that might have indicated bias or impartiality. Here, the trial court's voir dire procedure that ignored questionnaire responses, as well as the court's total failure to question any of the prospective jurors who were ultimately selected as sitting and alternate jurors in this case, failed to satisfy Code of Civil Procedure § 223 or the requirements of the United States and California Constitutions that a fair and impartial jury determine questions of guilt.

### E. The Failure to Conduct Meaningful Voir Dire Was Prejudicial Per Se; The Error Also Cannot Be Deemed Harmless Beyond a Reasonable Doubt

The right to have a fair and impartial jury to determine guilt or innocence is one of the most important constitutional guarantees. At the same time, a trial

court's broad discretion in the conduct of voir dire is subject to the demand of fairness. (*Wolfe v. Brigano* (6th Cir. 2000) 232 F.2d 499, 504 (Wellford, J., concurring) (quoting *United States v. Nell* (5th Cir. 1976) 526 F.2d 1223, 1229.) At stake is the fundamental constitutional Sixth Amendment right to an impartial jury. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged, and a conviction by a jury so selected must be set aside. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283.)

In *People v. Holt, supra,* 15 Cal.4th at p. 661, this Court held that reversal of judgment is required when voir dire was "so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair." By the Court's own jurisprudence, the constitutional error committed by the trial court during general voir dire was prejudicial per se; the *Chapman v. California* (1967) 386 U.S. 18, 24, standard of error does not apply. In *People v. Cash* (2002) 28 Cal.4th 703, the Court reversed a death judgment and sentence because of inadequate voir dire. Where the comprehensiveness of the entire voir dire is at issue, a defendant who establishes that "any juror who eventually served was biased against him" is entitled to reversal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Avena* (1996) 13 Cal.4th 394, 413.)

Here, virtually every sitting and alternate juror in this case expressed strong bias or prejudice, or manifested potential bias or prejudice as demonstrated in Subsection B, *supra*, in such a way as to demand close and careful questioning.

The total and utter failure of the trial court to respond appropriately to the jury questionnaires or conduct meaningful voir dire created the very real risk that one or more jurors based the determination of appellant's guilt (and penalty determination) not on the evidence at trial but on improper motives proscribed by law. Accordingly, the trial court's failure to conduct meaningful voir dire in this case compels doubt that the guilt and penalty determinations were made by a jury empanelled in compliance with the Fifth, Sixth, Eighth, and Fourteenth Amendments. Because the trial court's conduct of general voir dire was so inadequate and insufficient -- indeed nonexistent -- appellant's trial was rendered fundamentally unfair. The judgment of conviction on counts 1, 2, and 3, enhancements, the special circumstance findings, and the sentence of death must therefore be reversed.

Even if the trial court's failure to conduct meaningful voir dire is not prejudicial per se, the error must still be deemed prejudicial under the alternatively applicable standard of review. Because the trial court's failure to conduct meaningful voir dire in this case undermined appellant's fundamental constitutional rights to a fair trial, a fair and impartial jury, due process, and a reliable determination of guilt (and penalty) guaranteed by the United States and California Constitutions, the proper standard of review (if the error is not otherwise prejudicial per se) is the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension under *Chapman v. California*

(1967) 386 U.S. 18, 24, not the harmless error standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836.

In *People v. Kipp* (1998) 18 Cal.4th 349, 368, the Court analyzed prejudice by examining the record to determine whether any juror who actually served should have been excused for cause. The Court stressed that mere speculation that additional questioning might have disclosed a ground for challenge is insufficient to warrant relief. (See also *People v. Holt, supra*, 15 Cal.4th 619, 705; *People v. Freeman* (1994) 8 Cal.4th 450, 487; *People v. Fauber* (1992) 2 Cal.4th 792, 846, fn. 17.) The Court's discussion and analysis in *Kipp*, however, appears to be at odds with the applicable and governing *Chapman* test involving fundamental constitutional error in the jury selection context. Even if *Kipp* were were to apply, however, an examination of the record in this case reveals that there were jurors who actually served who were biased or prejudiced and should have been excused for cause. (See Argument XVII, *infra*.)

Whether a prospective juror is biased or impartial is determined through voir dire. Such a determination is based on voir dire responses, answers to juror questionnaires (as in this case), and demeanor, among other factors. As this Court has emphasized, voir dire in a capital case requires at least some preparation. (See *People v. Heard, supra*, 31 Cal.4th at p. 966, fn. 9 [discussing voir dire obligations of trial courts and adequacy of trial court efforts to fulfill responsibilities in selecting juries in capital cases].) Even the dissent in *People v. Heard, supra,* 31

Cal.4th at p. 989 [concurring & dis. opn. Brown, J., joined by Baxter and Chin, JJ.]), stressed that "preparation is incumbent" on the trial court, signifying that there must be some indication that the court has read the jury questionnaires used, digested the responses, and, then during voir dire, has both prepared and undertaken follow-up questioning where areas of potential or possible bias are revealed.

Here, the trial court's failure to conduct meaningful or constitutionally adequate voir dire makes it impossible to determine from the record whether some of the prospective jurors who were ultimately seated as jurors or alternates held disqualifying views. Thus, initially and for this reason, the court's error cannot be dismissed as harmless. (See *Morgan v. Illinois, supra*, 504 U.S. at p. 739.) Nevertheless, juror responses and questionnaire answers do indicate that several sitting jurors should have been excused for cause.[25] The responses of these jurors revealed and exposed bias and impartiality against appellant or a likely inability to remain impartial in this case. (See *People v. Avena, supra,* 13 Cal.4th at pp. 413-414; *People v. Bittaker, supra,* 48 Cal.3d at pp. 1085-1087.)

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[25]/ The focus of the fairness claim here is on the sitting, rather than the alternate, jurors. None of the alternates replaced a sitting juror either during the guilt or penalty trials. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 114 [although referring to prospective jurors who were apparently neither sitting or alternate jurors; see also *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; see *Ross v. Oklahoma* (1988) 487 U.S. 81, 85-86.) Analysis of the responses of several alternate jurors, however, does reveal as well areas of possible bias that also justified their discharge for cause and supports appellant's assertions that the trial court failed to engage in meaningful or constitutionally adequate voir dire.

As discussed above in Subsection B, *supra*, Juror No. 3 was a former military (for 4 years) and civilian police officer (for over 20 years). He stated in his questionnaire that it would be difficult to follow the court's instruction that "a defendant in a criminal case is presumed innocent unless proven guilty beyond a reasonable doubt." (Supp B -- Juror Questionnaires CT 1116.) In respect to psychiatric or opinion testimony, Juror No. 3 stated "people can say anything for money." (Supp B -- Juror Questionnaires CT 1089.) Significantly, he even questioned his own ability to be a fair and impartial juror: "Only that my background in police training may make it very difficult." He also questioned whether his "police atmosphere can be subdued." (Supp B -- Juror Questionnaires CT 1125.) The court did nothing to probe any of these responses indicating areas of inherent bias and impartiality on several fronts that should otherwise have prompted Juror No. 3 to be excused for cause.

In his questionnaire, Juror No. 8 indicated that previously both he and his wife had been witnesses in a murder case. Indeed, in that case, Juror No. 8's neighbor had been murdered; he even discovered his neighbor's body. (Supp B -- Juror Questionnaires CT 1305.) In addition, Juror No. 8 also indicated that he remembered something about the present case from reading newspaper and indicated he recalled that one of appellant's attorneys had been previously involved in the "Dean" murder trial with which he expressed familiarity. (Supp B -- Juror Questionnaires CT 1318.) Here, again, the court did not explore or probe

likely areas bias or impartiality. The court did not ascertain whether the facts in the present case would cause Juror No. 8 to intermingle or associate facts of his neighbor's death with the killing in this case or engender any feelings of bias against appellant. The trial court did not explore or probe the depth of knowledge that Juror No. 8 possessed about the present case from pretrial publicity, and the court did not inquire into his knowledge of or feelings about one of appellant's attorneys based on his knowledge of another murder case. Thus, once again, the trial court ignored questionnaire responses, ignored patently manifest issues of bias and impartiality, and failed to explore the strong likelihood that the experiences of Juror No. 8, particularly in respect to the killing of his neighbor and his discovery of his neighbor's body, would spillover and adversely affect his duties as a juror in this case.

The killing in the present case occurred in a church. The victim was an active church volunteer and an active participant in church activities. While it would not be unusual or even unobjectionable for prospective jurors to be religious or even active members of a church or religious denomination, certainly those prospective jurors who indicated they were very active in religious or church activities should have prompted at least some scrutiny for possible bias or impartiality. Here, again, the trial court did nothing, said nothing, ignoring questionnaire responses of at least one ultimately-seated juror who indicated that she was very active in the affairs of her church under circumstances very similar to

the victim in this case.

Juror No. 10 stated in her questionnaire that she belonged to a least two church organizations. She had been a church treasurer and, as the victim in this case, worked with various church committees and church youth groups. (Supp B -- Juror Questionnaires CT 1367.) She had also participated in a church group that chose the church pastor. Supp B -- Juror Questionnaires CT 1368.) Moreover, Juror No. 10 reported participating in an organization that was trying to promote a law to protect law enforcement officers. (Supp B -- Juror Questionnaires CT 1368.) She even indicated previous unpleasant memories about prior juror experience recalling "unpleasant jurors with unreasonable evaluations and no common sense." (Supp B -- Juror Questionnaires CT 1371.) Juror No. 10 noted that the defense attorneys in a prominent Los Angeles murder case were "an embarrassment to the legal profession," strongly suggesting bias or prejudice against defense counsel in this case. (Supp B -- Juror Questionnaires CT 1378.) Juror No. 10 stated that for protection she carried a concealed weapon. (Supp B -- Juror Questionnaires CT 1379.) She even had relatives and close friends in law enforcement. (Supp B -- Juror Questionnaires CT 1381.) As with the other jurors, the trial court did not explore any of these areas of likely bias or impartiality.

Juror No. 11 indicated that her brother had been a witness in a drive-by shooting murder case and had testified about what he saw. (Supp B -- Juror Questionnaires CT 1404, 1409.) Juror No. 11 indicated she had worked at the

central jail in Los Angeles and was acquainted with police, sheriff, and jail or prison personnel. (Supp B -- Juror Questionnaires CT 1412, 1414.) Although Juror No. 11 indicated she was acquainted with psychologists and psychiatrists through her work in a hospital emergency room (Supp B -- Juror Questionnaires CT 1397, 1415), she did not answer the question, nor was she asked, about the value of psychiatric or psychological opinions. (Supp B -- Juror Questionnaires CT 1416.) Again, the court did not ask any questions and said nothing -- even when it was apparent that counsel by their questioning did not clear up these areas of potential bias.

As an employee of San Bernardino County, Juror No. 12 received reserve sheriff training. (Supp B -- Juror Questionnaires CT 1431.) Juror No 12's wife was a full-time San Bernardino County employee in Victorville. (Supp B -- Juror Questionnaires CT 1431.) Juror No. 12 had been an evacuation medic in the Air Force Reserve and assisted while serving on active duty in the transportation of wounded patients. (Supp B -- Juror Questionnaires CT 1432.)

Equally significant, the sister-in-law of Juror No. 12 worked as a San Bernardino County "victim witness secretary" in the District Attorney's office. (Supp B -- Juror Questionnaires CT 1434.) Juror No. 12 had also been a witness in criminal cases in the course of his employment with San Bernardino County; as a county employee, he regularly testified as a witness for the county in county prosecutions. (Supp B -- Juror Questionnaires CT 1437.) He was familiar with

many San Bernardino County police, sheriff, and other law enforcement personnel both from work and in the Air Force Reserve. (Supp B -- Juror Questionnaires CT 1447.) He believed that testimony of law enforcement officers was more truthful and accurate than civilian testimony. (Supp B -- Juror Questionnaires CT 1447.) He even had considered working for the Los Angeles Police Department and the San Bernardino County Sheriff. (Supp B -- Juror Questionnaires CT 1447.) There was no follow-up by the court in respect to any of these areas.

As to all of the sitting and alternate jurors, the court did not ask any questions. Like its conduct of death qualification (see Argument XVI, *infra*), the trial court remained mute and silent during general voir dire. The court ignored the jurors' questionnaire responses as to those areas that indicated possible or likely bias or impartiality. The court's inaction and passivity guaranteed that it would fail completely and utterly to uncover or elicit the existence of bias, impartiality, or prejudice. Even as to those topics about which prospective jurors expressed strong feelings, or even which may have stopped short of presumptive bias that nevertheless had the clear potential of significantly skewing the jury deliberations (see, for example, *United States v. Jones* (9th Cir. 1983) 722 F.2d 528, 529-530, quoting *United States v. Robinson* (D.C. Cir. 1973) 475 F.2d 376, 380-381), the trial court did nothing. Many of the sitting jurors' responses manifested "an impermissible threat to the fair trial guaranteed by due process" that the trial court failed to probe. By any measure or standard of prejudice, the

trial court's conduct of voir dire was so inadequate as to compel the conclusion that the resulting trial was fundamentally unfair to appellant. (*People v. Holt, supra*, 15 Cal.4th at p. 661.) The judgment of conviction on all counts, the special circumstance findings, and the sentence of death must therefore be reversed.

### F. The Court Should Independently Examine the Record; Even Under a Deferential Abuse of Discretion Analysis and Absent a Specific Showing of Prejudice, the Judgment of Conviction on all Counts Must Be Reversed

Even if the Court applies the more deferential abuse of discretion standard, reversal of the judgment of conviction on all counts is still mandated after independent review by the Court (see *People v. Cromer* (2001) 24 Cal.4th 889, 893-894). With the expanded discretion given to trial courts under Code of Civil Procedure § 223, voir dire still must be minimally adequate to ensure a fair and impartial trial. Indeed, this Court has repeatedly recognized the necessity of probing and searching voir dire as a means to secure the criminal defendant's fundamental state and federal right to an impartial jury. As stressed by the Court:

> Voir dire plays a critical function in assuring the criminal defendant his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.
>
> (*In re Hitchings* (1993) 6 Cal.4th 97, 110.)

The Court's reasoning in *Hitchings* applies with greater force in this capital

case and compels the same result. The trial court's oversight and conduct of voir dire in this case demonstrate the same inadequacies as discussed, for example, by the Supreme Court of New Jersey in *State v. Williams* (1988) 113 N.J. 393, 550 A.2d 1172. In *Williams*, the court reversed a defendant's conviction and death sentence where, under circumstances comparable to the present case, the trial court relied heavily on prospective juror responses to a form questionnaire but failed to conduct any meaningful voir dire to follow-up on those responses. In language that could equally-well describe the trial court's conduct of voir dire in this case, the New Jersey Supreme Court found that the trial court's reliance on the questionnaires with minimal follow-up questioning was not constitutionally sufficient. (*Id.*; 550 A.2d at p. 1179.)

In both *Williams* and the present case, the general voir dire, following the inadequate and insufficient death qualification voir dire, resulted in a "lack of significant information regarding jurors' attitudes on a host of issues [which] effectively denied both parties the ability to challenge jurors for cause, and perhaps most importantly left the trial court unable to fairly evaluate the fitness of many jurors to serve." (*State v. Williams, supra*, 550 A.2d at p. 1179.) In appellant's case, as demonstrated above, counsels' voir dire was cursory and the trial court never asked a single question during either death qualification (see Argument XVI, *infra*) or general voir dire -- even in the face of numerous questionnaire responses by many prospective jurors, (as discussed above in

Subsection D, *infra*), strongly indicating the likelihood of bias or prejudice. The court's inadequate voir dire in this case resulted not only in a lack of information gathered, but also the failure to probe prospective jurors of obvious areas of bias and prejudice as revealed in their questionnaires.

Because of the inadequate and insufficient general voir dire, the trial court did not have enough information about the prospective jurors who were ultimately impaneled in this case to determine their fitness to serve or whether they should be challenged for cause. The court thus failed in its statutory and constitutional duties to uncover or elicit the existence of bias, impartiality, or prejudice. Accordingly, the trial court's abdication of its responsibilities cannot constitute a valid exercise of discretion, and its decisions concerning voir dire and the qualifications of jurors to serve are not entitled to deference on appeal. This Court should independently review the record and reverse the judgment of conviction on all counts because there is no assurance that impartial jurors were selected to hear appellant's capital case.

## II

## THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF PRIOR CRIMES; THE ERROR ALSO VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

On April 21, 1995, the prosecution moved in limine to admit in the guilt phase evidence of prior crimes committed by appellant in 1972 (rape of Johnnie Clark in Idaho) and in 1982 (robbery and assault to commit rape of Cindy Makris in Victorville). (1 Supp A 110-141.) The prosecution argued that the evidence of prior crimes was relevant to establish appellant's identity, a common plan and scheme, and intent. (See 1 Supp A CT 119, 120.) The prosecution also asserted that the probative value of the evidence substantially outweighed the probability of undue prejudice, confusion, or the likelihood that the jury would be misled. (1 Supp A CT 120, 135-140 (motion in limine); see also 1 Supp A CT 96-98 (supplemental brief).) The motion was granted on April 21, 1995. (CT 285.)

In support of its motion, the prosecution asserted that the 1982 Makris incident and the current crime "took place in a particular small area of Apple Valley, within ¾ of a mile of each other. The fact that Apple Valley is a relatively rural and less populated area makes this factor even more significant." (1 Supp A CT 122.) The prosecution also asserted that the current charged crimes were

"almost a carbon copy" of the 1982 Makris incident. "The only difference is that no one interrupted his robbery/stabbing of Gayle Johnson." (1 Supp A CT124.) In addition, the prosecution asserted that appellant "utilized his own unique method, time, place, location, and choice of victim ... ." (1 Supp A CT 124.) Specifically, the prosecution offered the following similarities in respect to the 1982 Makris incident and the current charged crimes:

1. Both crimes occurred in the same small area of a rural town and within a short distance of each other;

2. Both crimes occurred at approximately the same time of day -- noon to 1:30 p.m.;

3. Both crimes occurred in an office;

4. Both victims were working alone in an office;

5. In both cases, appellant made two separate trips to the location of the attacks;

6. In both cases, during his first trip to the location appellant gave a phony story about the purpose of his visit;

7. In both cases, the contents of the victims' purses were emptied out on the floor;

8. In both cases, the victims were moved into a back room;

9. In the Makris case, before the stabbing, she was told to disrobe. In the Gayle Johnson case, Johnson's shoe was taken off and placed on the desk before

the stabbing; and

10. The current crime occurred shortly after appellant had been released on parole for the Makris attack. The Makris attack occurred shortly after he had been released from parole for the Clark attack. (1 Supp A CT 124-125.)

The prosecution also asserted that the same modus operandi was used by appellant in his 1972 attack on Johnnie Clark in Idaho. The prosecution offered the following similarities in respect to the prior 1972 rape and the current charged crimes (1 Supp A CT 126):

1. Clark was robbed at noon while working alone in an office;

2. Appellant made two trips to the location where Clark was working;

3. On his first trip to Clark's office, appellant gave a phony story about the purpose of his visit;

4. Appellant robbed Clark of her purse and took money from it; and

5. Clark did not resist, although a knife was not seen or used.

Appellant objected to the introduction of evidence of both prior crimes. (See 1 Supp A CT 70-95.) He argued that the evidence was inadmissible under Evidence Code § 1101, subdivisions (a) and (b, and stressed that it was inadmissible pursuant to Evidence Code § 352. (See 1 Supp A CT 73, 89, 93-95.)

In proceedings held April 21, 1995 on the prosecution's motion, the prosecutor represented to the court that he "planned to present the evidence in the *briefest manner possible* which to me would seem to be to call the victims of each

of those offenses and to show the certified copies of the Defendant's conviction." (RT 509 [italics added].) The prosecutor also emphasized in seeking admissibility of the prior crimes evidence that "there's no need for me to reprove the offenses; merely, to show the circumstances and the similarity, and the victims can do that." (RT 509.)

The trial court granted the prosecution's motion, finding that the prior and current charged crimes "do share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (RT 534.) The court also ruled that the probative value of the evidence outweighed the prejudicial effect under Evidence Code § 352. (RT 534-535.)

On March 4, 1996, appellant renewed his motion to exclude evidence of the prior 1972 Idaho and 1982 Victorville crimes. (RT 1744-1745.) Appellant lodged a continuing objection to the introduction of the prior crimes evidence. The trial court denied the objection, noting appellant's continuing objection. (RT 1745.)

At trial, the testimony of Johnnie Clark was first presented. As summarized in the Statement of Facts, *supra*, Clark testified as to the prior 1972 rape committed by appellant in Boise, Idaho. Contrary to its previous representation and argument in support of admissibility that the evidence and testimony would be limited and brief, the prosecutor then called Richard Nestor who was not one of the witnesses to whom the prosecutor had previously referred in seeking admissibility of the evidence. The prosecutor previously had given no indication

that he intended to introduce Nestor's testimony as well.

Over appellant's continuing objections (RT 1744-1745), Nestor was permitted to testify at length about his role in the 1982 Makris incident and about the details of his pursuit of appellant during his flight from the scene of the crime after the incident. Facts or details about appellant's flight and attempts to escape apprehension had never been listed or cited by the prosecution as similar in any way to the current charged crimes. Only after Nestor testified, the prosecutor called Cindy Makris who also testified at length about the 1982 robbery and assault with intent to commit rape committed by appellant. The testimony of Nestor and Makris are summarized in the Statement of Facts, *supra.*

At the conclusion of trial, the court gave a limiting instruction in the language of CALJIC No. 2.50 (1994 Revision) that the other crimes evidence involving Cindy Makris and Johnnie Clark was admitted and must be considered only if it tended to show a characteristic method, plan, or scheme similar to the method, plan, or scheme used in the charged crimes, or to show intent or identity. (See CT 412.) The trial court did not instruct the jury in the language of CALJIC No. 2.09 [evidence limited as to purpose] as also requested by appellant. (See RT 3559.)

### B. The Prior 1972 and 1982 Crimes Were Fundamentally Dissimilar to the Instant Offense

Evidence Code § 1101, subdivision (b), permits the admission of other or

prior crimes evidence against a defendant when relevant to prove some fact, such as motive, intent, or identity, other than his or her disposition to commit such an act. Subdivision (a) of § 1101 prohibits the admission of such evidence for the purpose of showing the defendant's bad character or criminal propensity. It recognizes, however, that there are facts other than criminal propensity to which other or prior crimes evidence may be relevant. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

The categories listed in Evidence Code § 1101, subdivision (b) are examples of facts that legitimately may be proved by other or prior crimes evidence, but the list is not exclusive. (*People v. Key* (1984) 153 Cal.App.3d 888, 894; see also *People v. Thompson* (1980) 27 Cal.3d 303, 315, fn. 14.) As this Court has previously explained, the admissibility of other-crimes evidence depends on the materiality of the fact sought to be proved or disproved, the tendency of the other or prior crime to prove or disprove the material fact, and the existence of any policy requiring exclusion of the evidence. (*People v. Thompson, supra*, 27 Cal.3d at p. 315.) In order to be material, the fact in dispute "may be either an ultimate fact in the proceeding or an intermediate fact 'from which such ultimate fact[] may be . . . inferred.' " (*Id.* [fn. omitted].)

The prosecutor in this case used the prior crimes evidence to prove identity as well as common plan and scheme, intent to kill, premeditation and deliberation, and intent to rob. In *People v. Ewoldt, supra*, 7 Cal.4th at p. 403, the Court held

that the greatest degree of similarity is required for evidence of prior crimes or misconduct to be relevant to prove identity. For identity to be established, the prior crimes and the charged crimes must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (*Id.*) However, as the Court has elsewhere noted, because other crimes evidence, particularly sex crimes, is so inherently prejudicial, its relevance must be examined and received with extreme caution. (*People v. Thompson, supra*, 27 Cal.3d at p. 318.) Indeed, as this Court has also stressed in *Thompson*, all doubts about the connection of the prior crime to the crime charged must be resolved in the accused's favor. (*People v. Thompson, supra*, 27 Cal.3d at p. 318.) In other words, where the connection between the prior crime and the ultimate fact in dispute is not clear, the court should exclude the evidence. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.)

A lesser degree of similarity is required to establish relevance on the issue of common design or plan than is required to establish identity. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) For this purpose, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.)

The least degree of similarity is required to establish relevance on the issue of intent. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) For this purpose, the

other or prior crimes need only be "sufficiently similar" to the charged offenses to support the inference that the defendant "probably harbor[ed] the same intent in each instance." (*Ibid.*)

Here, considering the characteristics of the prior 1972 and 1982 crimes, it is evident that the trial court abused its discretion in ruling that the charged and prior offenses were sufficiently similar to support an inference, as found by the trial court, that appellant committed all acts, harbored the same intent in each instance, or was acting pursuant to a common plan or design. Both the prior 1972 and 1982 crimes were fundamentally dissimilar to the charged crimes in that the former crimes were committed for the purpose of sexual gratification whereas the current crimes had no such hallmarks. The prosecution alleged burglary and robbery as the motive, not sex. As to identity, the prior crimes and charged crimes did not share common features that were sufficiently distinctive so as to support the inference that appellant necessarily committed both the prior and current crimes.

While all three victims were women, the pattern and characteristics of the crimes were neither so unusual nor distinctive as to be like a signature pointing ineluctably to appellant as the likely perpetrator. In the former incidents, appellant was motivated primarily to rape or sexually assault the victims; in the current case, there was no evidence that he harbored a similar motive, plan, or design, and none was alleged. In the former incidents, appellant made repeated visits on the same day. Here, appellant legitimately entered the church days before the killing and,

at that time, filled out a prayer request form for his mother. There was no evidence that appellant had visited the church on any other occasion, had ever entered the church office, or had previously met the victim as he had the victims of his prior crimes.

The fact that a shoe was found on the office desk in the current case after the killing was hardly similar to the prior crimes where the victims were either forced or ordered to disrobe. Moreover, because paramedics arrived at the church office and removed some of the victim's clothing, the placement of a stray shoe did not necessarily signify that it had been forcibly removed or must have been removed before the victim was killed and her body discovered. Furthermore, it is not unusual for office workers to remove shoes for greater comfort during working hours. Unlike the prior crimes, there was absolutely no evidence of a sexual motive or intent in the current case other than innuendos repeatedly made by the prosecutor during trial. The victim was not unclothed; her clothing had not been disturbed or removed. Unlike both the 1972 and 1982 prior crimes, there was no physical evidence at the scene of the current case to suggest that a sexual assault had been intended or that the victim had been sexually attacked before or after death.

Moreover, unlike the current case, identity had not been a significant issue as to the prior crimes. Appellant pleaded guilty to the Idaho crimes; he admitted culpability. Appellant had also been personally identified by the prior victims

and, in the 1982 case, also by an additional witness to the charged crimes. Appellant made no effort before or during the prior crimes to conceal his identity from the victims. In the current case, the perpetrator was not personally identified by any witness, and considerable efforts were made after the killing to preclude the possibility of identification.

Because the prior offenses were above-all sexual in nature, the circumstances of those crimes did not display the same highly distinctive features with the current charged crimes, so that evidence of the prior crimes had substantial probative value on the issues of identity, common plan or design, or intent in the current case. That each of the victims was a female was not a highly distinctive common mark. Since there was no sexual motive shown or alleged in the current crimes, the gender of the victim was purely coincidental. A male office worker, working alone in the church office, would have been equally vulnerable to an intruder bent on robbery as alleged by the prosecution.

Probative value was further undermined by the gap in time and staleness of the prior incidents, each separated by a span of approximately 10 years. As noted by this Court in *People v. Archerd* (1970) 3 Cal.3d 615, 639, the remoteness of evidence affects its weight. (See also *People v. Thomas* (1978) 20 Cal.3d 457, 466 [evidence of prior molestations occurring more than 10 years earlier deemed too remote in time to be relevant to present charges and potentially prejudicial].) Further, the prosecution did not have to rely on either the 1972 or 1982 prior

crimes to prove material and disputed factual issues in the current case. The prosecution's case-in-chief was not dependent on proof of the prior crimes or a showing that appellant killed the victim in this case because he had previously committed rape or attempted sexual assault on other victims. There was other independent evidence to prove all the material disputed facts so that evidence of the prior crimes could have been excluded as merely cumulative. (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 405-406.)

The prior crimes and incidents were fundamentally sex or sexually-motivated crimes, not theft-related as charged in this case. Previously, this Court has "voiced numerous warnings" about the danger of prejudice outweighing probative value when the prior crimes are sexual in nature. (See, for example, *People v. Kelley* (1967) 20 Cal.2d 232, 238-239.) Here, other than conjecture, speculation, and innuendo, the current crimes were not so motivated as to support inferences regarding identity, intent, motive, or a common plan. While evidence of appellant's prior crimes showed that he had previously committed and had been convicted of bad acts, those prior sexually-motivated crimes had little or no independent likelihood of establishing the principal issue of identity in the charged theft-related crimes.

Moreover, as to intent, motive, or common scheme or plan for which purpose the evidence of prior crimes was not offered by the prosecutor, even here the prior crimes did not constitute or amount to a distinctive pattern or signature.

The prior crimes were sexually motivated. In the present case, there was no evidence of a similar motive or intent. In the prior crimes, appellant used a similar ruse to gain the confidence of his victims and put them at ease to gain advantage over them before committing or attempting to commit sex crimes. Here, other than the fact that appellant had previously visited the church and appropriately requested prayer for his mother, there was no evidence of a ruse or an unusual or distinctive pattern similar to the prior crimes. A common signature or characteristic with the prior crimes was not established by the evidence in this case. Consequently, under both the higher standard to show identity and the lesser standard to show other common features as articulated by the Court in *Ewoldt* (even if it were also applicable),[26] the evidence of appellant's prior crimes should not have been admitted under Evidence Code § 1101. (*People v. Ewoldt, supra*, 7 Cal.4th at 402-403.)

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[26]/ In *Hassoldt v. Pacific Media Group, Inc.* (2000) 84 Cal.App.4th 153, 166, the Court of Appeal interpreted *Ewoldt* to mean that where the identity of the actor is in dispute and the prior misconduct fails to satisfy the stringent "so unusual and distinctive as to be like a signature" standard enunciated in *Ewoldt*, that prior conduct is not admissible on such issues as intent, motive or lack of mistake or accident -- all of which issues presume the identity of the actor is known. "Indeed, it would make no sense to admit evidence of prior acts on the issue of intent, motive or lack of mistake or accident where the identity of the actor is not yet determined. Stated otherwise, it would not be relevant to inquire into the issues of intent or motive until it is established the defendant is the person or entity whose motive or intent is at issue." (*Id.*)

### C. The Evidence Should Have Been Excluded Under Evidence Code § 352

Evidence Code § 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The ruling is reviewed under an abuse of discretion standard. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

This Court has often recognized that evidence of prior crimes is inherently prejudicial. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 380; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) The prejudice generally arises from the danger that the jury, relying on the prior crime, will impermissibly infer that the defendant is a person of bad character with a propensity to commit crimes. (See Evid. Code, § 1101, subd. (a).)

In this case, there is an even stronger reason why the evidence of appellant's prior crimes was prejudicial. The evidence informed the jury that after appellant committed both prior crimes, he had been convicted and sentenced to lengthy terms of imprisonment -- indeed, life imprisonment after his 1973 convictions. The jury also knew that in each case appellant had been released from prison. Once the jury here learned that appellant had committed prior sex crimes, had been convicted and then released, and then subsequently and allegedly

killed the next victim, the outcome of this trial was foreordained. No jury under these circumstances would ever acquit appellant of the crimes charged in this case -- whatever doubts may have existed as to burden of proof -- given appellant's prior record. Instead, the jury would ensure that appellant would never be released by finding him guilty of first degree murder with special circumstances. Given the highly inflammatory and prejudicial nature of appellant's prior sex crimes (see *People v. Thompson, supra,* 27 Cal.3d at p. 318; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404), the evidence should have been excluded.

### D. Even Assuming the Admissibility of Makris' Testimony, Richard Nestor's Testimony Was Inadmissible, Cumulative, and Prejudicial

#### 1. Factual and Procedural Background

The prosecution represented in its in limine motion that evidence of the prior 1982 crime would be limited and would be proved through the testimony of a single witness -- Cindy Makris -- and by a certified copy of the judgment of conviction. (1 Supp A CT 140.) The court based its ruling on the prosecutor's representations that the evidence would be limited in scope.

Despite representations in the in limine motion that only Makris would testify in respect to the1982 robbery and assault with intent to commit rape committed by appellant in Victorville, at trial the prosecutor commenced the case-in-chief by discussing the details of appellant's flight from the scene of 1982 crime and his efforts to avoid apprehension, not the details of the crime itself

about which Makris would testify. (See RT 1752-1755.) In opening argument, the prosecutor's discussion of the details of the 1982 crime to be recounted by Cindy Makris covers two pages of reporter's transcript. The prosecutor's discussion of details of appellant's flight and efforts to escape or avoid apprehension covers three pages of reporter's transcript. (See RT 1752-1755.)

At trial, contrary to his former representations in his in limine motion, the prosecutor led off not with Makris' testimony but with Richard Nestor's testimony about his role in rescuing Makris and, over appellant's strenuous objections, about the details of his pursuit of appellant after appellant fled from the scene of the crime. Appellant objected to Nestor's testimony on the grounds that it went beyond the scope of the court's ruling on the prosecutor's in limine motion and violated the proscriptions of Evidence Code § 352. (RT 1828-1829.) The prosecutor argued that Nestor's testimony "was necessary to identify" appellant "as Cindy Makris' attacker" even though he previously represented that Makris alone would be testifying and even though appellant had been convicted of that crime as the documentation would show. Without discussing or ruling on the Evidence Code § 352 grounds, the trial court overruled appellant's objections. (RT 1830.)

2. Nestor's Testimony Was Inadmissible

Under certain circumstances, facts underlying a prior conviction may be introduced into evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 818-819;

*People v. Cain* (1995) 10 Cal.4th 1, 70-71.) In *People v. Thompson, supra,* the Court established a three-prong inquiry for analysis of admissibility of prior crimes evidence. The decision must turn on three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the prior crime to prove or disprove the material fact, and (3) the existence of any rule or policy requiring the exclusion of relevant evidence, e.g., Evidence Code § 352. (*Id.* at p. 315; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404; *People v. Sully* (1991) 53 Cal.3d 1195, 1224.) In addition, a direct relationship between the prior offense and an element of the charged offense must exist for the introduction of the past acts to be proper. (*People v. Daniels, supra,* 52 Cal.3d at p. 857.) Furthermore, because other crimes evidence is so inherently prejudicial, its relevance is to be examined with extreme care. The evidence must be received with extreme caution, and all doubts about its connection to the crime charged must be resolved in the accused's favor. (*People v. Thompson, supra*, 27 Cal.3d at p. 318.) In other words, where the connection between the prior crime and the ultimate fact in dispute is not clear, the court should exclude the evidence. (*People v. Daniels, supra,* 52 Cal.3d at p. 856.)

Here, although not an element of the crimes charged, identity was a principal issue in this case. Appellant's identity as the perpetrator of the prior crimes was established by prison and court records showing that he had been convicted of the prior crimes and through Makris' testimony identifying appellant

as her attacker. Likewise, none of the other elements of murder, burglary, or robbery was established by inferences drawn from appellant's efforts to flee from the scene of the 1982 Makris incident as recounted by Richard Nestor. Nestor's testimony did not aid in establishing a direct relationship between the prior Makris crime and the current charged crimes. Vehicular flight or escape from the 1982 Makris crime was a unique incident; appellant did not engage in similar or comparable conduct either during the 1972 Clark incident or during the current charged crimes. While the victim's car was taken after the killing in the current case, there was no chase and no flight as involved in 1982. Thus, the details of appellant's flight after the 1982 crime failed to offer any similar or shared marks with either the prior 1972 rape or the charged crimes. The evidence or details of appellant's flight in 1982, provided by the testimony of Richard Nestor, simply had nothing in common with the current charged crimes or any other prior act or crimes and was irrelevant particularly in light of the prosecutor's proffer of evidence in his in limine motion.

It seems apparent that the prosecutor wanted evidence of appellant's flight in the 1982 Makris incident, not to establish identity, intent, motive, or common scheme or plan, to tie appellant to the charged crimes, but for extraneous, prejudicial reasons to show that appellant was a bad character generally and skew during the guilt phase the jury's potential consideration of penalty were appellant

convicted as charged.[27] During the guilt trial, evidence of appellant's flight in 1982 had absolutely no probative value to show intent, motive, or common plan or scheme or any other element of the prosecution's case. Even the prosecutor represented originally that this evidence would not be introduced. Appellant's flight was irrelevant to identity, since Nestor as easily could have identified appellant without additional testimony as to the details of appellant's flight and vehicular chase. In sum, Nestor's testimony about appellant's flight from the 1982 crime scene was marginally probative and hardly useful in proving simply by a preponderance of the evidence that appellant in 1982 committed a similar prior crime in Victorville involving Cindy Makris.

3. Nestor's Testimony Was Prejudicial

When evidence of prior misconduct is presented to the trier of fact, there is inherent danger of prejudice to the accused. Such evidence must be reviewed preliminarily for prejudice, admitted only when probative value outweighs prejudicial effect, and then received with caution. (*People v. Malone* (1988) 47 Cal.3d 1, 17 [also noting that because of its inflammatory impact, evidence of other crimes, although relevant on one of the theories specified in Evid. Code § 1101, subd. (b), should be excluded when not relevant to an issue expressly in

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[27]/ Although the Makris robbery and assault were listed, appellant's flight from Nestor was not specified by the prosecutor prior to trial in its notice of evidence to be introduced in aggravation in the penalty phase. (See CT 174-178.)

dispute].) On all counts, the trial court here erred and abused its discretion.

The trial court here failed to conduct the required balancing test under Evidence Code § 352. There is no indication in the record that the court did so. Even if the court inferentially or *sub silentio* performed some sort of balancing test, weighing probative value versus prejudicial impact, the court still erred in admitting Nestor's testimony over appellant's objections and contrary to the prosecutor's in limine motion, because by any measure or standard Nestor's minimally probative testimony was hugely prejudicial both as to guilt and penalty.

As noted many years ago by the Court of Appeal in *Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291-292, and cited with approval by this Court, for example, in *People v. Gray* (1985) 39 Cal.3d 576, 585, "[t]he balancing test requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in [Evidence Code] section 352 for exclusion." This balancing test is particularly critical in a criminal trial. (*People v. Laverne* (1971) 4 Cal.3d 735, 744.) Where the evidence relates to a critical issue, directly supports an inference relevant to that issue, and other evidence does not as directly support the same inference, the testimony should be received over an Evidence Code § 352 objection absent highly unusual circumstances.

Here, in contrast, Nestor's testimony neither directly nor strongly supported

any inferences relevant to the elements of the charged crimes or key issues, such as identity, that had to be proved in this case. The fact and circumstances of appellant's flight from the 1982 crime scene was of no consequence or significance in proving any of the crimes charged. Without conceding admissibility, the direct testimony of Cindy Makris, together with documentation establishing appellant's conviction following that incident, arguably met the minimal preponderance of the evidence standard in order to otherwise permit the jury to use those crimes for the purposes offered. The Makris testimony far exceeded the value of the Nestor testimony in supporting inferences of identity, intent, and so forth for which the evidence of prior crimes had been offered. At the same time, the certain prejudice flowing from the Nestor testimony (not only to issues of guilt but also, potentially, penalty), and the strong likelihood that the jury would conflate the 1982 flight with guilt and the issue of penalty, vastly exceeded any relevance or value of Nestor's testimony.

Moreover, the prosecutor devoted far more time during the guilt trial to appellant's flight as recounted by Nestor than he did to the ostensibly more significant and germane testimony of Makris herself. Under these circumstances, there was no reasonable basis for the exercise of trial court discretion admitting Nestor's testimony over appellant's objections. The prejudicial effect of Nestor's testimony, its irrelevance to the elements of the crimes charged, yet its impact on both the over-all issues of guilt and penalty, was much greater than its probative

value.

Even under the traditional *Watson* test, which asks whether the other crimes evidence "helped secure [the] convictions" (*People v. Hayes* (1989) 49 Cal.3d 1260, 1270), or, whether it is reasonably probable the verdict was affected by the error (*People v. Watson, supra*, 46 Cal.2d at p. 836), the answer must surely be in the affirmative in this case and the error deemed prejudicial. There were no eyewitnesses to the charged crimes. The prosecution's case was largely based on circumstantial evidence and tenuous inferences drawn from that evidence. Appellant himself testified that he did not visit the church on the day the victim was killed. In light of testimony that the blood evidence when gathered or tested may have been contaminated, the testimony of both criminalist David Stockwell and Dr. Robin Cotton of Cellmark Diagnostics were subject to doubt. Indeed, defense-elicited testimony that Cellmark Diagnostics failed to engage in proper, independent proficiency testing further undermined the strength of the blood and DNA evidence on which the prosecution heavily relied. In addition, even if admissible, the other crimes testimony by Johnnie Clark and Cindy Makris did not tie appellant directly to the charged crimes. At best, Nestor's testimony had marginal or no probative value in proving any of the essential elements or key issues of the crimes with which appellant was charged. The evidence had no value other than to portray appellant as a bad or evil person and to skew the jury's determination of both guilt and penalty. Surely, Nestor's testimony helped secure

appellant's convictions and affected both the jury's verdicts in this case and the penalty imposed. Consequently, the evidence cannot be deemed harmless even under *Watson.*

### E. Admissibility of Other Crimes Evidence Also Violated Appellant's Rights to Due Process, to Present a Defense, Fair Trial, and to a Reliable and Nonarbitrary Determination of Guilt and Penalty Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

The application of the ordinary rules of evidence in a capital case as a general rule does not impermissibly infringe on a defendant's rights to due process of law, to present a defense, and to a reliable and nonarbitrary determination of guilt. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Here, for the reasons explained in Subsections B, C, and D, *supra*, the trial court's ruling permitting evidence of appellant's prior 1972 and 1982 crimes violated these fundamental constitutional rights.

In *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970, the Seventh Circuit Court of Appeals held that due process is violated if the prejudicial effect of admitted evidence so far outweighs the probative value that the defendant is denied a fair trial. In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384, the Ninth Circuit Court of Appeals held that even if prejudice far outweighs probative value there is no violation of due process as long as there is *some* permissible inference the jury may draw from the evidence. (But see *Henry v. Estelle* (9th Cir. 1994) 33 F.3d 1037, 1042, revd. on another point in *Duncan v. Henry* (1995) 513

U.S. 364 [discussing due process limitations on the admission of irrelevant character or criminal propensity evidence immaterial to any legitimate issue at trial].) Even under this generous standard, appellant's federal constitutional rights were violated here. The prejudicial effect of the Clark and Makris testimony outweighed its probative value, thereby denying appellant a fair trial and other fundamental federal constitutional rights. As to the Nestor testimony, *no* permissible inferences at all could be drawn from his irrelevant, yet inflammatory, testimony. Since the prejudicial impact of his testimony far exceeded or outweighed any possible probative value, as discussed in Subsection D, *supra*, even under a more generous or forgiving *McKinney v. Rees* standard, at the very least appellant's fundamental due process and fair trial rights were violated by the introduction of the Nestor testimony.

### F. The Evidence Was Not Harmless Beyond a Reasonable Doubt; Even Under The *Watson* Standard, the Evidence Was Prejudicial

Because the trial court's ruling admitting evidence of prior crimes, including Nestor's irrelevant yet inflammatory testimony, undermined appellant's fundamental constitutional rights guaranteed by the United States Constitution, including the rights to due process, fair trial, and reliable determination of guilt and penalty, the proper standard of review is the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension under *Chapman v. California, supra,* 386 U.S. at p. 24, not the harmless error standard announced in

*People v. Watson, supra,* 46 Cal.2d at p. 836.

In addition to the prejudice discussed in Subsections B, C, D, and E, *supra*, the details of appellant's prior crimes and convictions essentially told the jury appellant had been convicted of serious and inflammatory crimes in the past, sentenced to prison (indeed, even life in prison), yet had still been released. The prosecutor devoted inordinate time to this inflammatory evidence; over 20 pages of trial transcript were devoted by the prosecutor during closing argument to the details of appellant's prior convictions. (See RT 3622-3642.) Once the jury learned -- and then was repeatedly reminded by the prosecutor at every turn -- that appellant had been previously convicted of violent sexual crimes involving women and had been released despite a life sentence, the outcome of this trial was not in doubt. No jury under these circumstances would ever have returned a verdict partially or totally absolving appellant of the crimes charged; instead, and regardless of any other evidence of guilt, the jury would ensure that appellant would never be released by finding him guilty of first degree murder with special circumstances.

The testimony of Richard Nestor was doubly prejudicial first because it neither supported any inferences relevant to the elements of the charged crimes or key issues, such as identity or intent, that had to be proved in this case. Appellant's flight from the scene of the Makris incident in 1982 was of no consequence or significance in this case. Nevertheless, there was a great risk that

Nestor's testimony would confuse the question of appellant's guilt with the appropriate punishment given his prior flight and efforts to avoid apprehension and arrest. The testimony and evidence of appellant's prior crimes, as in *People v. McDermott* (2002) 28 Cal.4th 946, 999, was not "relatively brief." The potential prejudicial impact of the evidence was not limited by the court's jury instructions as in *People v. Lewis* (2001) 25 Cal.4th 610.

In *People v. Lewis, supra*, the trial court appropriately limited any prejudicial impact of prior uncharged crimes evidence by instructing the jury in the language of CALJIC No. 2.50. (*Id.* at p. 637.) That instruction covered all of the prior crimes evidence admitted during the trial in *Lewis*. Here, in contrast, although the court also gave the same general limiting instruction, it referred only to the prior crimes again Clark and Makris (and implicitly their testimony alone), not to Nestor's additional testimony about uncharged acts which was not so limited by any of the court's instructions.[28] (See CT 412.) Moreover, although the

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[28]/ CALJIC No. 2.50 (1994 Revision) given by the court provided as follows:

> "Evidence has been introduced for the purpose of showing that the defendant committed crimes other than for which he is on trial, to wit: the crimes against Cindy Makris and Johnnie Clark.
>
> "Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> "Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> "A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the

trial court also gave CALJIC No. 2.50.1,[29] that instruction, too, again referred to the crimes purportedly committed against Makris and Clark and failed to mention or include the testimony given by Nestor about other prior uncharged acts or crimes or limit the use or consideration by the jury of that testimony in any way. (See CT 413.) The record clearly shows that despite defense counsel's repeated objections to define the nature and scope of Nestor's testimony (see RT 1826-1830), and counsel's requests for appropriate limiting instructions (see RT 3558-3568), the trial court ruled that no evidence had been presented as to require

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> commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused.
>
> "For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case.
>
> "You are not permitted to consider such evidence for any other purpose."
>
> (CT 412.)

[29]/ CALJIC No. 2.50.1 given by the court provided as follows:

> "Within the meaning of the preceding instruction [CALJIC No. 2.50], such other crime or crimes purportedly committed by the defendant, Richard Don Foster, against Cindy Makris and Johnnie Clark must be proved by a preponderance of the evidence.
>
> "You must not consider such evidence for any purpose unless you are satisfied that the defendant committed such other crime or crimes.
>
> "The prosecution has the burden of proving these facts by a preponderance of the evidence."
>
> (CT 413.)

further admonitions to the jury or additional limiting instructions as requested by appellant.

The evidence of appellant's prior crimes, particularly Nestor's testimony, portrayed appellant as a bad or evil person, thereby affecting the jury's determination of guilt and skewing its penalty determination toward death. When all other, indirect or circumstantial evidence of guilt is additionally considered, the other crimes evidence simply cannot be deemed harmless beyond a reasonable doubt. There were no eyewitnesses in this case to the charged crimes. The lead-off prior crimes evidence at best constituted tenuous, indirect evidence of guilt. Appellant himself testified that he did not visit the church on the day the victim was killed. The blood evidence was suspect by virtue of possible contamination during collection and improper testing procedures. Cellmark Diagnostics failed to engage in proper, independent proficiency testing, further undermining the strength or reliability of the blood and DNA evidence on which the prosecution heavily relied.

The other crimes testimony by Johnnie Clark and Cindy Makris did not tie appellant directly to the charged crimes. At best, Nestor's testimony had marginal or no probative value in proving any of the essential elements or key issues of the crimes with which appellant was charged. The evidence had no value other than to portray appellant as a bad or evil person. Surely, Nestor's testimony helped secure appellant's convictions and affected both the jury's verdicts in this case and

the penalty imposed. The prosecutor devoted far more time during the guilt trial to appellant's flight as recounted by Nestor than he did to the ostensibly more significant and germane testimony of Makris herself. The prejudicial effect of Nestor's testimony alone, its irrelevance to the elements of the crimes charged, yet its impact on both the over-all issues of guilt and penalty, was much greater than its probative value. Under these circumstances, therefore, the evidence of appellant's prior crimes through the Clark and Makris testimony, together with the vastly more inflammatory and prejudicial Nestor testimony, cannot be deemed harmless beyond a reasonable doubt pursuant to *Chapman v. California, supra.* The other crimes evidence introduced the prosecution's case and was repeatedly invoked by the prosecutor from the beginning of the guilt phase to rendition of the verdicts. Given the overwhelming emphasis placed on this evidence by the prosecutor at trial, the evidence undoubtedly helped secure appellant's convictions and likely affected the jury's verdicts. Consequently, for these and the other reasons discussed above, even under the lesser standard of *People v. Watson, supra,* the error cannot be deemed harmless.

## III

## BY EXPANDING THE NATURE AND SCOPE OF CROSS-EXAMINATION TO INCLUDE DETAILS OF PRIOR CONVICTIONS AFTER APPELLANT TESTIFIED, THE TRIAL COURT ERRONEOUSLY MISLED AND INDUCED APPELLANT TO WAIVE HIS PRIVILEGE AGAINST SELF-INCRIMINATION, DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND FURTHER RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

Before appellant testified, defense counsel moved for an offer of proof as to which prior convictions the prosecutor intended to use to impeach appellant's credibility. (RT 3152-3153.) Before he decided to testify and waive his privilege against self-incrimination, appellant sought to define the scope of permissible impeachment with prior convictions. The trial court indicated that underlying details or evidence of the crimes would not be admissible, just the facts of conviction. As stated in colloquy between defense counsel and the court:

> MR. CRAIG: * * *
>
> Now, the rules are you can be asked, if you're a witness, whether you've been convicted of this offense and that's it. You can't go into evidence on it. It's just the fact of the conviction.
>
> THE COURT: Right.

(RT 3163.)

The trial court also ruled that appellant's credibility could be impeached only with the two 1973 Idaho convictions, the 1973 Idaho escape conviction, and the 1982 robbery and assault with intent to commit rape convictions. (RT 3167-3168.) Anticipating that appellant would testify by virtue of the court's ruling, and that the prosecutor would seek to impeach his credibility, defense counsel again clarified in open court the trial court's ruling that appellant would be questioned only "if he's convicted of a felony and what that felony was, and that's it. There's no details, no relitigation or anything like that." (RT 3170.)

At the beginning of his testimony, to anticipate and preempt impeachment by the prosecutor, appellant acknowledged that he had been convicted of two counts of rape in Idaho in 1973, escape from an Idaho prison in 1973, and robbery and assault with intent to commit rape in 1982 in San Bernardino County. (RT 3174.) Appellant was explicit and unequivocal in acknowledging those prior convictions. (RT 3174.)

Just before appellant concluded his direct examination and contrary to the trial court's prior ruling limiting impeachment, the prosecutor sought permission to expand the scope of cross-examination to include details of appellant's convictions, noting that appellant "hasn't been questioned about his prior offenses." (RT 3220.) Defense counsel argued that appellant had admitted the prior crimes, that specific evidence of the underlying prior crimes would be extremely prejudicial, that further cross-examination about the details would

exceed the scope of direct examination, that the evidence would not be relevant, and such expansion would contravene the court's prior ruling precluding examination about details of the prior crimes. (RT 3220-3221, 3230.)

Although appellant admitted the prior convictions during direct examination, the prosecutor newly asserted that details about those crimes were admissible since the crimes had to be proved at trial by a preponderance of the evidence.[30] (RT 3222, 3232-3233.) Over appellant's objections, the court revoked its prior ruling (on which appellant had relied in deciding whether or not to testify and to waive his privilege against self-incrimination) and held that since appellant denied the current charged crimes, he could additionally be cross-examined extensively about the details of his prior convictions. (RT 3221, 3230; see also RT 3361 (further objections to use of appellant's 1982 trial testimony to impeach his credibility).) Absent any change in circumstances and ignoring its prior ruling, the trial court stated:

---

[30]/ It is not clear what the prosecutor meant by this argument. Since appellant explicitly and unequivocally admitted during his testimony that he had been convicted of two counts of rape in Idaho in 1973, escape from an Idaho prison in 1973, and robbery and assault with intent to commit rape in 1982 in San Bernardino County, the notion that the prosecutor somehow had to elicit underlying details to prove those prior crimes for § 667, subd. (a) enhancement or for Evidence Code § 1101 purposes, appears devoid of any merit. Certified abstracts of judgment and other documents introduced by the prosecutor and appellant's direct testimony that he had been convicted of those crimes sufficed to establish their validity.

> Well, a denial was entered; right? I think that's the point, though, ... . that he does place the matter of identity squarely at issue, and the prosecutor's attempt to establish on cross-examination his involvement of [prior] offenses with similarity to the charge[d] offenses indicating malefactor [sic] which is proper.
>
> (RT 3233.)

On commencing his cross-examination of appellant, right off the bat, the prosecutor, over appellant's objection, asked the following patently objectionable question:

> Q. Mr. Foster, one of the things that the jury will be told that they can consider in deciding this case is prior crimes committed by you.
> I'd like to ask you about those prior crimes. Could you tell the jury how and why you robbed and raped Johnnie Clark?
>
> (RT 3234.)

Defense counsel objected, and the court sustained the objection. (RT 3234.) The prosecutor immediately asked the same question again -- "Would you tell the jury the details of how you robbed and raped Johnnie Clark?" (RT 3234-3235.) Defense counsel's objections were again sustained. (RT 3235.) However, despite appellant's objections, the prosecutor was then permitted to cross-examine appellant extensively not only about details of the 1973 conviction which he had admitted on direct but also about his 1973 escape conviction, as well as the details of the 1982 robbery and assault with intent to commit rape, including details of appellant's flight. (See RT 3235-3248, 3252-3295, 3304-3352, 3355-85.) Indeed,

appellant's cross-examination about the details of his prior crimes covers more than 150 pages of trial transcript. (RT 3234-3380.)

For example, the prosecutor repeatedly elicited from appellant details that he committed an act of "forcible rape" against Johnnie Clark in Idaho and "forcibly raped" her. (RT 3238, 3242-3243.) The prosecutor inquired whether appellant put his hands on Johnnie Clark's breast and thigh, which appellant denied. (RT 3240.) The prosecutor elicited from appellant that he got on top of her and raped the victim while she was lying on the floor. (RT 3243.) The prosecutor repeatedly inquired whether appellant planned to rape the victim or whether it was a "spur-of-the-moment thing." (RT 3244.) The prosecutor elicited from appellant that he picked Clark because she was "sexually exciting" to him. (RT 3245.) Over appellant's further objections (RT 3248), the prosecutor was permitted to elicit repeatedly from appellant details of his arrest, his guilty plea, and even why appellant was testifying that he pleaded guilty to rape. (RT 3250, 3252.)

Although appellant conceded that he had been convicted of the Makris robbery and assault with intent to commit rape in Victorville in 1982, over repeated defense objections, the prosecutor was permitted to elicit details of those crimes. (See 3261-3283.) The prosecutor was permitted, over appellant's objections, to cite and quote testimony given during prior 1973 and 1982 proceedings about details of those crimes (see, for example, 3241-3242, 3283,

3286, 3358-3360, 3367-3370) and even graphically to illustrate details of the prior crimes, at one point lying on the floor (over appellant's objection) to simulate the 1972 rape victim's position (RT 3242-3243.)

In addition to the 150 transcript pages of details elicited about appellant's prior crimes, the following patently objectionable and improper questions were asked of appellant during cross-examination:

> Q. Are you trying to leave the impression that if you commit a crime, you just admit it?
>
> (RT 3251.)

Appellant's objection was sustained. (RT 3251.)

> Q. You don't like prison --
>
> (RT 3252.)

Appellant's objection was sustained. (RT 3252.)

> Q. After you were released from prison in 1982, did you -- had you gotten any insight as to why you committed those crimes that landed you in prison back in 1972?
>
> (RT 3258.)

Appellant's objection was sustained; the question and appellant's answer were ordered stricken. (RT 3258-3259.)

> Q. Did you do something at your 1982 trial to try to disguise your appearance?
>
> (RT 3360.)

Appellant's objection was sustained. (RT 3360.)

Q. So when you were released on December 12th, 1990, you had spent about 18 years in prison for the 1972 crime and 1982 crimes, is that correct, approximately?

(RT 3373.)

Appellant's objection was sustained. (RT 3373.)

Q. Well, during that period of time, isn't it true that you spent this time in prison all because victims had come into court and identified you as their attacker

(RT 3373.)

Appellant's objection was sustained. (RT 3373.)

Q. You knew if you committed the crime of murder, you could get the death penalty?

(RT 3379.)

Appellant's objection was sustained pursuant to Evidence Code § 352. (RT 3377-3379.) Defense counsel again reiterated his continuing objection to the prosecutor's questions. (RT 3379-3380.)

During closing argument, the prosecutor devoted 20 pages of trial transcript to the details of appellant's prior 1973 and 1982 convictions. (See RT 3622-3642.)

### B. The Trial Court Erred by Misleading Appellant and Inducing Him to Waive His Privilege Against Self-Incrimination in Violation of the Fifth and Fourteenth Amendments to the United States Constitution; Appellant's Waiver Was Neither Knowing, Intelligent, Nor Made with a Full and Complete Understanding of Its Consequences

A defendant's right to testify in his own defense is based on the Fourteenth Amendment due process clause, the Sixth Amendment compulsory process clause,

and the Fifth Amendment privilege against self-incrimination. (*Rock v. Arkansas* (1987) 83 U.S. 44, 51-53.) Appellant acknowledges that generally, in the absence of trial court restrictions, when a defendant voluntarily testifies, the prosecutor may amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them. (*People v. Cooper* (1991) 53 Cal.3d 771, 822.) In *People v. Smith* (2003) 30 Cal.4th 581, the district attorney questioned the defendant about prior and other crimes. In upholding the prosecutor's cross-examination, the Court stressed that the prosecution, unlike the situation here, did not "elicit *details* about other crimes … ." (*Id.* at p. 616 [italics added].)

The point made by this Court in *Smith* is that the right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 ["Notwithstanding the importance of the confrontation right, it is not absolute"]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.)

The present case is different in obvious ways from *Cooper, Smith,* and like cases. Unlike a defendant who voluntarily takes the stand and testifies about matters that become the subject of resisted cross-examination, appellant here -- before he testified and before he waived his privilege against self-incrimination -- sought and obtained a ruling from the trial court on the scope of cross-examination

in respect to his prior convictions and crimes on which his decision to testify was then based. Unlike *Cooper*, the trial court's ruling here constituted both the basis of appellant's decision to testify on his own behalf and induced him to waive his fundamental Fifth Amendment privilege.

As a general rule, a waiver is "an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) However, as with other fundamental constitutional rights, appellant's waiver of his privilege against self-incrimination was invalid unless it was knowing and intelligent, (that is, made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it), as well as voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. (See *People v. Collins* (2001) 26 Cal.4th 297, 305; *Colorado v. Spring* (1987) 479 U.S. 564, 573 [requirement of knowing, intelligent, and voluntary waiver of the Fifth Amendment privilege against self-incrimination].)

In the present case, a fundamental constitutional right or privilege is involved. Although clearly waivable, it could be validly waived by appellant only if his decision to do so was knowing, intelligent, and voluntary. The evidence in the record shows that his decision cannot be deemed knowing, intelligent, and voluntary, since it was predicated on a ruling that the trial court promptly revoked after appellant surrendered his constitutional privilege and testified according to

the terms of the court's original ruling. Having been misled and induced to waive his privilege against self-incrimination, appellant's waiver cannot be deemed knowing, intelligent, or voluntary once the court both revoked its ruling on which appellant relied and then fundamentally changed the ground rules for appellant's cross-examination after he testified on direct examination. As a consequence, appellant's waiver of his Fifth Amendment privilege against self-incrimination was invalid.

The trial court's actions in effect impermissibly and unconstitutionally penalized appellant for his decision to forego his privilege against self-incrimination. (See *Wainwright v. Greenfield* (1986) 474 U.S. 284, 295 ["evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized" is impermissible].)

In *Wainwright v. Greenfield, supra*, 474 U.S. 284, the High Court held that the prosecution could not attempt to disprove the defendant's claim that he was insane at the time of the alleged offense by introducing evidence that the defendant, following his arrest, understood *Miranda* warnings and invoked his rights to remain silent and obtain counsel. The High Court stated that "it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using

silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction." (*Id.* at p. 292..)

While the precise situation and circumstances of *Wainwright* are obviously different from the present case, the reasoning and constitutional underpinnings of that decision are here applicable and compel the conclusion that the trial court by its ruling first induced appellant to waive his privilege against self-incrimination and then penalized appellant for foregoing his constitutional privilege. Although appellant's credibility was at issue, the prosecutor would not have been able to cross-examine or impeach him had appellant not waived his constitutional privilege against self-incrimination relying, in so doing, on the trial court's ruling restricting the scope of the prosecutor's inquiry.

Under the circumstances of this case, the waiver itself cannot be deemed to have been knowing, intelligent, or voluntary as it was induced through misrepresentation, if not outright deception, by the trial court and the prosecutor. Preliminarily, in a variety of contexts, the United States Supreme Court has explained that the privilege against self-incrimination "does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers ... ." (*Gardner v. Broderick* (1968) 392 U.S. 273, 279.) In

*Spevack v. Klein* (1967) 385 U.S. 511, 514, the High Court explained that the privilege against self-incrimination is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, ... ." The Court also advised well over 100 years ago in language apposite to this case: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." (*Boyd v. United States* (1886) 116 U.S. 616, 635.)

### C. The Trial Court Erred by Expanding the Nature and Scope of Permissible Cross-Examination Without Adequate or Sufficient Notice in Violation of Appellant's Rights to Substantive and Procedural Due Process, Fair Trial, and Trial by Jury Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

The constitutional right to confront adverse witnesses in a criminal prosecution applies to the states (*Pointer v. Texas* (1965) 380 U.S. 400) and is also guaranteed independently by the California Constitution (Cal. Const., art. I, § 15). Certainly, once a defendant takes the stand and testifies, the prosecutor on cross-examination generally is permitted "to explore the identical subject matter in much

greater detail." (*People v. Green* (1979) 95 Cal.App.3d 991, 1007; accord, *People v. Cooper, supra,* 53 Cal.3d at p. 822 [stating that "the permissible scope of cross-examination is 'very wide' "].) At the same time, however, the right to confront and to cross-examine is not absolute and may, in appropriate cases, be limited to accommodate other legitimate interests in the criminal trial process. (*Chambers v. Mississippi, supra,* 410 U.S. at p. 295; *People v. Cromer, supra,* 24 Cal.4th at p. 897 ["Notwithstanding the importance of the confrontation right, it is not absolute"].)

Due process concerns itself with the fairness of the trial as a whole. (*People v. Pope* (1979) 23 Cal.3d 412, 423; *In re Gaines* (1965) 63 Cal.2d 234, 237; see also *Greer v. Miller* (1987) 483 U.S. 756, 765-766.) While due process is an elusive concept, its exact boundaries undefinable, and its content varies according to specific factual contexts (*Hannah v. Larche* (1960) 363 U.S. 420, 442), at its very core is the notion of fair play whether procedural or substantive. Indeed, the essence of due process is the protection of the individual against arbitrary action. (*Ohio Bell Telephone Co. v. Public Utilities Com.* (1937) 301 U.S. 292, 302.)

The United States Supreme Court has established that when governmental action may substantially affect the life of an individual, the government must conduct its adjudicative proceedings in accordance with the basic requisites of procedural due process. (See *In re Tucker* (1971) 5 Cal.3d 171, 191.) The extent to which procedural due process must be afforded the recipient is influenced by

the extent to which he may be "condemned to suffer grievous loss." (*Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 168 (Frankfurter, J., concurring).) The greater the potential loss, the greater the process due. Because a capital trial inherently potentially entails the most serious type of "grievous loss" -- deprivation of life by the state -- procedural due process invariably has been constitutionally compelled in these cases. The consequences of a capital trial are so severe to invoke the basic requisites of procedural and substantive due process. What is being protected not only is life itself but the right to a fair determination of the facts upon which the state would deprive a person of life and liberty.

A cornerstone of the structure of due process is notice appropriate to the nature or circumstances of the case. (*Mullane v. Central Hanover Bank & Tr. Co.* (1950) 339 U.S. 306, 313.) Justice Cardozo once wrote that the "protection of the individual against arbitrary action" is the very essence of due process. (*Ohio Bell Tel. Co. v. Comm'n, supra,* 301 U.S. at p. 302.) In criminal cases, due process affords to the affected individual the right to timely and adequate notice. (*In re Oliver* (1948) 333 U.S. 257, 273; *Cole v. Arkansas* (1948) 333 U.S. 196, 201.) Notice also forms the prerequisite to effective assertion or waiver of any constitutional or other rights, such as waiver of the privilege against self-incrimination underlying a defendant's determination whether or not to testify; without notice, vindication of these rights would be essentially fortuitous. (e.g., *In*

*re Gault* (1967) 387 U.S. 1, 73 (concurring and dissenting opn. of Harlan, J.); *Jacob v. Roberts* (1912) 223 U.S. 261, 265; *Twining v. New Jersey* (1908) 211 U.S. 78, 110-111.)

Here, the trial court's initial ruling before appellant agreed to testify defined for appellant the permissible scope of cross-examination and formed, as well, the basis of his decision to waive his constitutional privilege against self-incrimination. After appellant waived his privilege against self-incrimination and testified, the trial court eliminated the limitations or restrictions it had previously placed on cross-examination, to appellant's detriment. There was no change in circumstances that justified the trial court's about-face. The prosecutor's newly hatched (and bogus) theories of admissibility -- offered for the first time only after appellant waived his privilege against self-incrimination and testified -- were beside the point once the court made its ruling about the nature and scope of cross-examination, the ruling undeniably forming the predicate of appellant's decision to waive his constitutional rights and testify. Because appellant was not adequately notified by the trial court before he waived his privilege against self-incrimination that the court's ruling might be fundamentally changed or revoked once he waived his privilege against self-incrimination and testified, the trial court violated the heightened procedural and substantive due process notice requirements in a capital case (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638) and rendered appellant's trial fundamentally unfair contrary to the Fifth and Fourteenth Amendments to the

United States Constitution. (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 288.)

In essence, the trial court here performed the judicial equivalent of a bait-and-switch, telling appellant one thing to induce him to waive his self-incrimination privilege and then another after appellant waived his rights and subjected himself to prosecutorial cross-examination far in excess of the parameters originally established by the court. Appellant was not told in advance of his waiver or testimony that he would in fact be subjecting himself to lengthy and detailed cross-examination of a sort neither contemplated by nor within the scope of the trial court's initial ruling. And by revoking its ruling as to the permissible scope of cross-examination after appellant waived of his Fifth Amendment privilege, the trial court also permitted the prosecutor, without constitutionally adequate notice, to surprise appellant through cross-examination beyond the scope of his direct testimony and about largely collateral matters that the court itself previously precluded. In addition, the evidence adduced had the further, insidious tendency to confuse the jury as to the precise purpose of the prosecutor's cross-examination and tended to skew not only the jury's consideration of guilt but penalty.

By changing the bases and scope of cross-examination without notice and contrary to its initial ruling, the trial court also permitted the prosecutor to suggest inferentially that appellant was hiding something during his testimony, because he

himself did not testify as to the details his prior crimes pursuant to the court's ruling. The prosecutor thus gained a further and additional unfair advantage over appellant by virtue of the lack of proper notice: the prosecutor was able not only to introduce details of the prior crimes but also to use his questioning to suggest appellant had evaded responsibility for prior crimes even though appellant testified precisely in accordance with the trial court's ruling on which he predicated his decision to waive his self-incrimination privilege and testify.

A minimum due process protection that applied here was the requirement that the trial court, having notified appellant in its ruling of the permissible scope and extent of cross-examination, restrict the cross-examination accordingly. The trial court should not have induced appellant to waive his privilege against self-incrimination through inadequate or insufficient notice and then revoke that ruling after appellant waived his Fifth Amendment privilege and subjected himself to cross-examination at variance in purpose and scope with the trial court's initial ruling.

The United States Supreme Court has stressed that in an adjudicative proceeding "due process of law requires that, at some stage of the proceedings, before the [governmental action] becomes irrevocably fixed, the [affected individual] ... must have notice ... ." (*Londoner v. City of Denver* (1908) 210 U.S. 373, 385-386; see also *Oyler v. Boles* (1962) 368 U.S. 448, 452.) Here, appellant was not adequately or properly notified by the trial court of the nature, scope, or

intent of its ruling on which appellant directly and explicitly relied before agreeing to waive his privilege against self-incrimination and subject himself to cross-examination to his ultimate detriment. Appellant was not on notice that the trial court could arbitrarily abandon its prior ruling, without any change in factual circumstances, and allow the sort of far-ranging and prejudicial cross-examination ultimately permitted here.

### D. The Error Was Prejudicial Per Se; Alternatively, the Error Was Not Harmless Beyond a Reasonable Doubt; the Error Also Violated Appellant's Rights to a Reliable Determination of Guilt, and Derivatively Penalty, Guaranteed by the Eighth Amendment to the United States Constitution

The violation of appellant's privilege against self-incrimination and his rights to procedural and substantive due process and to a fair trial constituted fundamental structural defects that rendered the guilt, and derivatively the penalty, proceedings unfair regardless of the evidence. (See *People v. Flood* (1998) 18 Cal.4th 470, 489-490; *People v. Wims* (1995) 10 Cal.4th 293, 312-314.) The privilege against self-incrimination is obviously one of the "basic protections" to which both this Court (*People v. Wims, supra*, 10 Cal.4th at pp. 312-313) and the United States Supreme Court (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282) have referred, the violation of which constitutes a structural defect in the course and conduct of appellant's trial. (*People v. Collins, supra,* 26 Cal.4th at p. 310-311 [manner in which trial court induced defendant to waive fundamental constitutional right constituted prejudicial error reversible per se].) As elsewhere

stressed by this Court in *People v. Cahill* (1993) 5 Cal.4th 479, 493, some federal constitutional errors are not subject to the ordinary or generally applicable harmless error analysis and may require reversal of the judgment "notwithstanding the strength of the evidence contained in the record in a particular case." (*Id.* at p. 493 [listing examples, including ineffectual waiver of fundamental constitutional rights].)

Even if the trial court's federal constitutional errors, including violation of appellant's fundamental Fifth Amendment privilege against self-incrimination and his Fourteenth Amendment rights to substantive and procedural due process of law, are not deemed prejudicial per se, they must still be deemed prejudicial under the alternatively applicable standard of review. Under the Fourteenth Amendment to the United States Constitution, prejudice is presumed unless the government establishes that the errors were harmless beyond a reasonable doubt. (See, e.g., *Rose v. Clark* (1986) 478 U.S. 570, 576-579.)

Because the trial court erred in violation of appellant's rights to due process, fair trial, and trial by a fair and impartial jury, and to a reliable determination of guilt (and penalty), the proper standard of review (if the error is not otherwise prejudicial per se) is the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension under *Chapman v. California, supra,* 386 U.S. at p. 24, not the harmless error standard announced in *People v. Watson, supra,* 46 Cal.2d at p. 836.

In the present case, the trial court permitted the prosecutor to "impeach" appellant extensively about details of prior crimes that did not come out during the prosecutor's case-in-chief. Appellant already admitted in his direct testimony, and pursuant to the trial court's ruling on his in limine motion, that he had been convicted of the prior crimes. The testimony elicited during the prosecutor's cross-examination was extremely inflammatory. Because the prosecutor also cross-examined appellant over and over again about details of his escape and flight from Richard Nestor, there was a further danger that the jury would conclude, based on the cross-examination alone, that appellant had not taken responsibility for his prior acts and crimes and had therefore not been sufficiently punished for those prior crimes.

In essence, the purpose and impact of the prosecutor's cross-examination were not simply to impeach appellant's credibility or aid in establishing any of the elements of the charged crimes, identity, or motive, but primarily to prejudice the jury's consideration of punishment during the guilt phase and skew the jury's deliberations -- both as to guilt and penalty -- in support of a death verdict. On learning inflammatory and irrelevant details of the prior crimes from appellant himself during cross-examination, the jury could only conclude that appellant had been deceptive on direct examination and had escaped deserved punishment following his prior crimes and that most, if not all, of his victims remained unavenged. (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

The prosecutor devoted more than 150 pages of trial transcript to his "impeachment" cross-examination of appellant. Designed to inflame the jury, the various subjects elicited by the prosecutor did little more than show that appellant was a convicted sex offender who attacked women and who largely managed to evade acceptance of responsibility or severe punishment for those crimes. The prosecutor repeatedly elicited from appellant details of the 1972 Clark rape in Idaho. The prosecutor elicited testimony from appellant that he picked Clark because she was "sexually exciting" to him. The prosecutor was even permitted, over appellant's objections, graphically to illustrate the prior rape by lying on the floor and simulating the rape victim's position. The prosecutor repeatedly was permitted to elicit extraneous details of appellant's arrest, his guilty plea, and even why appellant was testifying that he had pleaded guilty to rape. Finally, although appellant admitted that he had been convicted in 1982 of robbery and assault with intent to commit rape, the prosecutor was permitted to elicit from appellant repeated denials that he attacked, stabbed, robbed Makris, or tried to rape her, further inflaming the jury.

In his closing argument, the prosecutor devoted more than 20 pages to the prior crimes. Although there was no evidence of a sexual assault or a sexual motive, the prosecutor repeatedly urged the jury to consider the similarities between appellant's prior sex crimes, citing in this regard appellant's testimony on cross-examination (RT 3627, 3636, 3838), in determining appellant's guilt in this

case. (See RT 3624-3625, 3756.)

The prosecutor's cross-examination of appellant and his use of that testimony during closing argument affected the jury's determination of guilt and helped skew the penalty determination toward death. When all other, indirect or circumstantial evidence of guilt is additionally considered, the trial court's error in permitting the prosecutor to cross-examine appellant about the details of his prior sex crimes cannot be deemed harmless beyond a reasonable. Appellant's testimony during cross-examination did not tie him to the charged crimes. Of marginal or no probative value, the cross-examination nevertheless portrayed appellant as a bad or evil person. The prosecutor devoted far more time during the guilt trial to cross-examining appellant about the details of his prior crimes than he did to virtually any other witness. The prejudicial effect of the cross-examination, its irrelevance to the elements of the crimes charged, yet its impact on both the over-all issues of guilt and penalty, vastly outweighed any probative value. For the above reasons and under the circumstances of this case, the court's error in expanding the permissible scope of appellant's cross-examination, its violation of appellant's right to due process, fair trial, and a reliable determination of guilt and penalty, and his privilege against self-incrimination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution was not harmless beyond a reasonable doubt under the applicable *Chapman* standard of review. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Reversal is required.

## IV

## THIRD PARTY CONTACTS WITH JURORS DURING TRIAL TAINTED THE JURY AND CREATED A PRESUMPTION OF PREJUDICE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY IMPARTIAL JURY, DUE PROCESS, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

1. Threatening Notes Involving Juror No. 9

At the beginning of the Monday morning session of trial on April 1, 1996, the trial court notified counsel that a juror had informed the court that on the previous Friday (March 29, 1996) the juror found notes left on his truck parked outside the courthouse and that he had become extremely concerned and upset as a consequence. The juror informed the court that he had been subsequently advised that the notes had been left by a friend. The court represented that it was "no big deal" and asked counsel if the juror should be examined about the matter. (RT 3297.) Defense counsel asked whether the court was aware of the nature of the notes. The court reported that the juror had thrown away the notes. (RT 3298.) Defense counsel asked for an inquiry, expressing concern about the contents of the notes and why they caused the juror to become alarmed. (RT 3298.)

The court examined Juror No. 9, who reported that notes had been left on his truck outside court on the previous Wednesday (March 26, 1996) and Thursday (March 28, 1996). Juror No. 9 was not placed under oath before being

examined by the court. Juror No. 9 reported that on Thursday evening he was informed during choir practice by a friend that his friend, aware that he was a sitting juror in this case, had written and placed the notes on his truck as "a little joke." RT 3299.) When asked the nature of the notes, Juror No. 9 stated as follows:

> It was just saying -- the first one said something about knowing that I had two dogs; I like country music -- which I do -- and then the other one said something like -- said I looked up; I looked down -- I can't remember exactly. It just didn't make any sense and -- you know.
>
> (RT 3200.)

Juror No. 9 acknowledged that the notes caused concern in his mind. (RT 3299.) In reply to the court's question whether the receipt of those notes would "affect [his] service as a juror on your decision" in this case, Juror No. 9 replied equivocally: "I don't think so." (RT 3300.) Juror No. 9 also acknowledged that he had also spoken to Juror No. 12 about the notes; indeed, he said that Juror No. 12 was present when he retrieved one of the notes from the windshield of his truck on the previous Wednesday. (RT 3300.)

The court examined Juror No. 12, again without placing him under oath. The court asked Juror No.12 whether he saw Juror No. 9 receive a note on his truck. (RT 3302.) Juror No. 12 acknowledged that he had, but denied it would affect his decision in this case. (RT 3301-3302.) The court did not inquire whether Juror No. 12 had spoken with other jurors about the incident. The court

instructed Juror No. 12 not to speak with the other jurors about the notes. (RT 3302.) The court called together the entire jury and admonished the jury as follows:

> Ladies and gentlemen, this morning you may have heard [the bailiff] inquiring of one of your members if they had a note with them.
>
> Last week, one of the jurors received on his windshield two successive days a note having nothing to do with the trial and that juror found out on Thursday that it was a friend of his playing a joke and he was leaving a couple of notes. So it had nothing to do with the trial.
>
> Having heard about the note or notes under the circumstances, does that cause anybody concern?
>
> [The jurors replied collectively in the negative.]
>
> THE COURT: Okay. Is there anybody who would be affected in any way by that circumstance?
>
> [The jurors replied collectively in the negative.]
>
> THE COURT: Okay. And I just instruct you to disregard that occurrence. It was a joke arising out of a friendship and has nothing to do with the trial, all right. Okay. Thank you very much.
>
> (RT 3304.)

After the court's admonition, the prosecutor resumed his cross-examination of appellant. (RT 3304.)

2. Incident Involving Juror DeMaio

At the conclusion of the morning trial session on April 2, 1996, both sides rested. (RT 3351-3352.) The court was then advised that one of the jurors (Juror

DeMaio[31]) reported to the bailiff that someone had spoken to him in the court parking lot about being a juror in this case. (RT 3553.) The bailiff corrected the court, stating that the juror had overhead comments by third parties that they "wouldn't want to have to be a juror in the case." (RT 3553-3554.)

The court inquired of Juror DeMaio about the nature of the comments he overheard. The inquiry disclosed that Juror DeMaio had been explicitly identified by third parties as a sitting juror. Indeed, Juror DeMaio reported that he overheard two people "discussing me as a juror." (RT 3554.) One said to the other, referring to Juror DeMaio, "there is one of the jurors on the trial" and the other person said that "I wouldn't want to be a juror on this trial." (RT 3555.) Juror DeMaio did not recognize the people who pointed him out and had never seen them before. Asked "what sort of impression" the comments had, Juror DeMaio stated: "Didn't bother

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[31]/ Juror DeMaio is identified by name in the record on appeal in respect to this incident; his name was not redacted as were those of other sitting and alternate jurors. (See RT 3553.) Although Juror DeMaio was one of the 12 sitting jurors, because of other statutorily-mandated redactions, it is not possible to determine from the record Juror DeMaio's juror or roll call number. In the same manner, it is not possible to review all potentially pertinent portions of the entire record as to Juror DeMaio for possible prejudice because his name cannot be associated with a redacted juror number and thereby correlated with other information in the record on appeal, his juror questionnaire, or voir dire. Similarly, the entire record cannot be reviewed to determine the likelihood that he was actually biased or prejudiced (*In re Carpenter* (1995) 9 Cal.4th 634, 654), or the requisite heightened scrutiny undertaken to which this capital case is subject. (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585.) Hence, in the absence of an adequate or complete record to review, the trial court's inquiry and Juror DeMaio's responses cannot simply be dismissed as harmless. (See *Morgan v. Illinois, supra,* 504 U.S. at p. 739.)

me in any way, shape, or form. It's just I was identified as one of the -- one of the jurors." (RT 3555.) In response to the court's questions, Juror DeMaio said that the incident would not bother him "in terms of performing [his] functions as a juror." (RT 3555.) The court asked Juror DeMaio not to mention the incident to anyone else and to disregard what he may have heard. (RT 3556.) The court did not inquire whether any jurors had overheard the comments or had themselves heard similar comments from third parties during the trial.

**B. Right to an Impartial Jury**

An accused has a constitutional right to a trial by an impartial jury. (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings, supra,* 6 Cal.4th at p. 110; see *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.) An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112) and every member is "'capable and willing to decide the case solely on the evidence before it.'" (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217.)

Penal Code § 1089 provides, in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the

court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

A trial court is authorized by § 1089 to discharge a juror if, among other reasons, "good cause" is shown that the juror is "unable to perform his duty." When a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty -- not counsel's -- to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error. (*People v. Burgener* (1986) 41 Cal.3d 505, 520, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743; see also *People v. Williams, supra,* 16 Cal.4th at p. 231.)

Jurors in a criminal action subscribe to an oath to render a true verdict according to the evidence. Under their oath, jurors cannot receive, as here, impressions from any other source or third parties. (See *People v. Compton* (1971) 6 Cal.3d 55, 60.) Also of relevance here, even though a juror may claim he can be impartial, he can still be properly excluded from the case if there are factors weighing against this possibility or if it is more likely than not that the juror cannot render a fair and unbiased decision. (*People v. Farris* (1977) 66 Cal.App.3d 376, 386.)

When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror

conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct. (See, e.g., *People v. Nesler, supra*, 16 Cal.4th at pp. 578-579; *In re Carpenter* (1995) 9 Cal.4th 634, 647; *In re Hitchings, supra*, 6 Cal.4th at p. 118.) A sitting juror's involuntary exposure to events outside the trial evidence, even if not "misconduct" in the pejorative sense, may require similar examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by intimidation or other inappropriate means or contact. (See, e.g., *Remmer v. United States* (1954) 347 U.S. 227, 229; *People v. Cobb* (1955) 45 Cal.2d 158, 161.)

A juror's inability to perform or discharge his or her oath must, as a general rule, appear as a demonstrable reality and will not be presumed. (*People v. Johnson* (1993) 6 Cal.4th 1, 21; see also *People v. Fudge, supra,* 7 Cal.4th at p. 1099 [no abuse of discretion to discharge juror anxious about paperwork involved in termination of employment].) It must be stressed, however, that the "demonstrable reality" justifying discharge need not be actual or proved bias on the juror's part as the trial court assumed in this case. As noted by this Court in *People v. Price* (1991) 1 Cal.4th 324, 400, a trial court may discharge the juror if, after examination of the juror, "the record discloses reasonable grounds for inferring bias as a demonstrable reality even though the juror continues to deny bias has occurred in the present case." (See *People v. Farris, supra,* 66 Cal.App.3d

at pp. 386-387; *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1244-1245.)

Had the incidents involving Juror No. 9 and Juror DeMaio, and possibly Juror No. 12, occurred prior to final jury selection, those jurors could and ought to have been excused for cause at that time. Of course, these incidents did not occur at the time of jury selection but during a crucial period of the trial itself, shortly before the jury commenced its deliberations.

In the present case, there was more than ample evidence that both Juror No. 9 and Juror DeMaio could not discharge their functions as jurors with complete impartiality after they were tainted with improper, outside contacts. There was also a strong likelihood that Juror No. 12 was equally tainted because he, too, observed the notes and had other contacts and conversations about them with Juror No. 9. For at least three days during trial just before deliberations commenced, Juror No. 9 became apprehensive about his personal safety and was made potentially fearful or resentful of appellant after finding notes on his truck that he construed to be threatening or intimidating in nature. Surely, his views and attitudes about appellant were affected by the receipt of those notes.

Juror No. 9 himself acknowledged that he was so affected; he became so apprehensive that, as in *People v. Lucas* (1995) 12 Cal.4th 415, 489, Juror No. 9 brought his fears and apprehension to the court's attention, further manifesting his concern and agitation over it. Equally significant, both Juror No. 9 and Juror DeMaio, having been personally identified and singled out as jurors in this case,

became acutely aware of potential community interest and expectations as to both guilt and penalty verdicts on being exposed to outside third-party contacts. Under these circumstances, their lack of impartiality resulting from improper third-party contacts could be inferred from the nature of the incidents in which they became involved. (See *People v. Green* (1995) 31 Cal.App.4th 1001,1012 [trial court entitled to infer that juror had lost her impartiality and, hence, was unable to perform her duty as a juror].)

### C. The Third Party Contacts Were Presumptively Prejudicial

The receipt by Juror No. 9 of threatening, intimidating, or improper third-party contacts during trial, and Juror No. 12's personal awareness of the incident as well as his contacts and conversations with Juror No. 9, raised a rebuttable presumption of prejudice as to both jurors. (*In re Carpenter, supra,* 9 Cal.4th at p. 647.) A presumption of prejudice also arose in the case of Juror DeMaio who was personally singled out and identified by anonymous third parties as a juror in this case.

A presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record, including the nature of the misconduct or other event, and the surrounding circumstances, indicate there is no reasonable probability of prejudice, i.e., no substantial likelihood that any of the jurors were actually biased against the defendant. (*In re Hamilton* **(1999)** 20 Cal.4th 273, 296; see also *People v. Majors, supra,* 18 Cal.4th at p. 417.)

In cases that generate much attention or passion in the community, or that involve allegedly dangerous persons, the mere suggestion that the identity or views of jurors may be conveyed to the parties and the public, even after the trial is over, understandably may cause anxiety and fear in jurors, and distort the process by which a verdict is reached. The jury system incorporated in the state and federal constitutions was not intended to satisfy "yearnings for perfect knowledge of how a verdict is reached, nor to provide assurances to the public of the primacy of logic in human affairs. Nor was it subordinated to a 'right to know' found in the First Amendment." (*United States v. Thom*as (2d Cir. 1997) 116 F.3d 606, 618-619.) Rather, as further noted by the court in *Thomas*, the jury is supposed to reach its decisions in the "mystery and security of secrecy." Accordingly, conduct or contacts that undermine the secrecy of jury deliberations "are nothing less than objections to the jury system itself." (*Id.* at pp. 618-619.)

Certainly, no individual juror comes to jury duty with his or her "mind a blank slate," and, as it has been said, "[I]t is in the balanced wisdom of group experience applied to collective deliberation that the strength of the jury system theoretically lies." (*People v. Kelly* (1986) 185 Cal.App.3d 118, 128.)

Here, both Juror No. 9 and Juror DeMaio were more than blank slates in this case after they were contaminated by threatening, intimidating, or otherwise improper third-party contacts. Juror No. 9 was threatened with intimidating notes that he very likely attributed to appellant whose guilt and penalty he was asked to

determine. At least one other juror also witnessed one of the incidents. He, too, may have been contaminated by the incident, but, as discussed in Subsection D, *infra*, the trial court did not fully or adequately question him as to what he witnessed, what Juror No. 9 may have told him, or what he may also have revealed to other jurors after the notes were received.

Likewise, Juror DeMaio was personally singled out and identified by anonymous members of the community as a sitting juror in appellant's case. Identified during trial by the community as a juror in this case, surely Juror DeMaio would not but believe that the community and its members were watching him and closely following the case and the outcome. On receiving threatening or intimidating notes, or on being personally identified as a juror in this case (which could not have been construed to mean anything other than the community expected the jury to find appellant guilty and impose the death penalty), neither Juror No. 9 nor Juror DeMaio thereafter should have been presumed able to ignore what had happened, ignore the threats or intimidation, ignore community expectations, and deliberate appellant's fate in a neutral and dispassionate manner, a fundamental constitutional right to which appellant was surely entitled. In light of the entire record, the nature of the incidents involving Juror No. 9, Juror No. 12, and Juror DeMaio, and their responses, there was a reasonable probability of prejudice as to all three jurors in this case.

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### D. The Trial Court's Inquiry Was Insufficient and Inadequate to Rebut the Presumption of Prejudice

When a trial court is aware of possible juror misconduct, the court must "make whatever inquiry is reasonably necessary" to resolve the matter. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 417.) The failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review. (*People v. Keenan* (1988) 46 Cal.3d 478, 532, quoting *People v. Burgener, supra*, 41 Cal.3d 505, 519-520.) "The law is clear ... that the court must investigate reports of juror misconduct to determine whether cause exists to replace an offending juror with a substitute." (*People v. Keenan, supra,* 46 Cal.3d at p. 432.)

In *People v. McNeal* (1979) 90 Cal.App.3d 830, the trial court received a note from the jury foreperson on the first day of deliberations indicating that one of the jurors possessed personal knowledge concerning the testimony of a defense witness. Defense counsel requested a formal hearing but the trial judge declared that he was "not going into the facts." (*Id.* at p. 836.) The juror at issue was questioned outside the presence of the other jurors, but was instructed not "to go into factual matters." (*Ibid.*) When asked whether she could deliberate fairly and impartially, the juror stated cryptically that she "still can't find that I can say 'guilty' when I can't believe it." (*Ibid.*) Upon further questioning, the juror indicated she could disregard any information that was "outside the evidence," and she was permitted to rejoin the jury and resume deliberations. (*Ibid.*)

The Court of Appeal in *McNeal* reversed the resulting judgment of conviction, holding that the trial court erred in failing to conduct a more extensive hearing, noting in language apposite to the present case: "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality." (*People v. McNeal, supra*, 90 Cal.App.3d at p. 838.)

It is also clear that any investigation should be complete enough to determine the nature of the misconduct and whether there is good cause to excuse the affected or tainted juror or jurors. (*People v. Burgener, supra*, 41 Cal.3d at pp. 519-520.) In *Burgener*, overruled on other grounds in *People v. Reyes, supra,* 19 Cal.4th at p. 753, the jury foreperson on the second day of deliberations told the court, outside the presence of the remainder of the jury, that another juror was intoxicated from drugs and had been in that condition on the first day of deliberations as well. The foreperson reported that four jurors independently had noticed the smell of marijuana on the offending juror. The trial court consulted with counsel and suggested that the court either examine the juror in chambers or replace her with an alternate. Defense counsel objected, but agreed with the court's further suggestion that he admonish the entire jury against using intoxicants. The jury returned verdicts of guilty the following day.

Relying upon the Court of Appeal's decision in *McNeal*, the Court held that the trial court erred in failing to conduct a hearing adequate to ascertain the juror's condition and whether her ability to deliberate was impaired." (*People v.*

*Burgener, supra*, 41 Cal.3d at p. 518.) "[O]nce the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error." (*Id.* at p. 520.)

*Burgener* is particularly apposite to this case, because it teaches that the duty to investigate is an obligation imposed on the trial court, not counsel. Even though counsel may object or suggest a lesser or different means of inquiry, the trial court must conduct a full hearing or inquiry to ascertain the nature of the misconduct or incident, the extent to which the juror or jury may have been affected or impaired, and whether good cause exists to replace the juror or jurors involved or to contemplate other measures to lessen or eliminate the prejudice that the defendant may suffer.

Here, the trial court examined Juror No. 9 who reported that notes had been left on his truck outside court on the previous Wednesday (March 26, 1996) and Thursday (March 28, 1996). Juror No. 9 was not placed under oath before being examined. His answers were incomplete. He was not questioned about the contents of all of the notes but was permitted simply to describe the contents of one note and make them appear simply as jokes, not threats as he had previously stated. The trial court's inquiry was equally superficial both in determining what Juror No. 12 personally observed and what information he may have learned from

Juror No. 9 when the notes were discussed. Here, too, the court failed to conduct any meaningful inquiry to determine if Juror No. 12 had also been impermissibly tainted.

In light of *McNeal* and *Burgener*, the trial court's inquiry of Juror No. 12 was deficient. Although Juror No. 9 acknowledged that he had also spoken to Juror No. 12 and reported that Juror No. 12 was present when at least one of the notes was found on his truck, Juror No. 12 was not examined under oath. Juror No. 12 acknowledged that he had witnessed an incident involving Juror No. 9 but was only asked whether it would affect his decision in this case. (RT 3301-3302.) The court did not inquire whether Juror No. 12 had spoken further with Juror No. 9 about the incident or with other jurors and, if so, what may have been said. Here, again, the nature of the court's limited inquiry inherently would not have elicited any substantive information about possible misconduct or its impact on the affected jurors or other members of the jury who may have learned of the incident.

The court's examination of Juror DeMaio was also insufficient to determine either the nature of possible misconduct or its impact. As with the other jurors, Juror DeMaio was not placed under oath. The court asked superficial questions that were unlikely to elicit any substantive information. The court did not inquire whether any other jurors had overheard the comments, whether any other similar comments had been previously made or overheard by Juror DeMaio, or whether the other jurors had been involved in similar incidents during the trial. While the

trial court was not obligated to conduct a detailed and lengthy examination, certainly it was required in a capital trial to undertake a more thorough investigation or inquiry, one tailored to the type of misconduct involved and one designed to ascertain or gauge the likely impact of third party contacts on jurors in this case. The court's inquiry here failed on all counts.

**E. The Presumption of Prejudice Was Not Rebutted**

Juror misconduct of the sort involved in this case gives rise to a presumption of prejudice as a matter of law. (*In re Carpenter, supra*, 9 Cal.4th at p. 651.) That means that the People must rebut the presumption or lose the verdict. (*People v. Marshall* (1990) 50 Cal.3d 907, 949.)

In determining whether the presumption of prejudice has been rebutted, the usual harmless error tests for determining the prejudicial effect of an error (*Chapman v. California, supra,* 386 U.S. at pp. 23-24; *People v. Watson, supra*, 46 Cal.2d at p. 836) are inapplicable. Convincing evidence of guilt does not deprive a defendant of the right to a fair trial since a fair trial includes, among other things, the right to an unbiased jury. (*People v. Diaz* (1984) 15 Cal.App.3d 926, 933-935; *People v. Martinez* (1978) 82 Cal.App.3d 1, 21-22.)

This Court in *Carpenter* summarized the law relating to prejudice arising from juror misconduct: "[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside

only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations omitted.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant." (*In re Carpenter, supra*, 9 Cal.4th at p. 653.)

As such, in other cases, third-party contacts, tampering contact, or communication with a sitting juror, have raised a rebuttable presumption of prejudice. (E.g., *People v. Nesler, supra*, 16 Cal.4th at p. 578; *In re Carpenter, supra*, 9 Cal.4th at pp. 651-652; *People v. Marshall, supra,* 50 Cal.3d at p. 950.) As noted by this Court, the presumption of prejudice accommodates the fact that the external circumstances of an incident are often themselves reliable indicators of bias or prejudice (see, e.g., *In re Hitchings, supra*, 6 Cal.4th at pp. 119-120).

Whether a verdict must be overturned for jury misconduct or irregularity is resolved by reference to the substantial likelihood test, an objective standard. (*Id.* at p. 118.) The presumption of prejudice is rebutted, and the verdict will not be disturbed, only if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that any of the jurors were actually biased against the defendant. (E.g., *In re Carpenter,*

*supra*, 9 Cal.4th at p. 653; *In re Hitchings, supra*, 6 Cal.4th at p. 121.) As discussed by the United States Supreme Court, the standard is a pragmatic one, mindful of the "realities of courtroom life" (*Rushen v. Spain* (1983) 464 U.S. 114, 119) and of the competing interest in the stability of criminal verdicts (*id.* at pp. 118-119; *In re Carpenter, supra*, 9 Cal.4th at p. 655).

Here, there was uncontroverted evidence of improper third party contacts with three jurors during trial. The misconduct was serious in nature, causing at least one of the jurors to become extremely apprehensive and fearful about his personal safety during the trial and another juror, at the very least, to be aware of the problem and the issue of personal safety. Another juror was singled out and identified by anonymous members of the community as a sitting juror in this case. Having been so identified, the juror would likely harbor notions that the community and its members were watching him, closely following the case and his role as a juror in the outcome of trial. As for the presumption of prejudice that thus arose as a consequence, both prongs of the *Carpenter* test were present in this case. Judged objectively, the misconduct inherently and substantially was likely to have influenced one or more jurors in this case. Second, the nature of the misconduct and the surrounding circumstances indicate it is substantially likely that one or more sitting jurors were actually biased against appellant as a result of the misconduct. (*In re Carpenter, supra*, 9 Cal.4th at p. 653.)

Identity of the perpetrator and the threat of future violence were certainly

key issues that the jury had to consider and evaluate in the guilt and penalty trials. Since Juror No. 9 likely attributed the threatening notes to appellant, it is highly unlikely that the juror, under these circumstances, would not also conclude that appellant as well must have been the perpetrator of the charged crimes. In addition, when viewed objectively, any juror, for days feeling apprehensive about his or her personal safety at the hands of appellant, would in all likelihood be biased regarding the guilt and, to a greater degree, penalty verdicts in this case.

A vote for either death or life imprisonment without parole obviously depends in part on a determination by each of the sitting jurors whether the threat of future violence by appellant could be contained. If appellant were perceived even for a few days during trial to have instigated threatening notes or indirectly to have threatened a sitting juror, it is unlikely that the juror or jurors involved would remain unbiased. The fact that an unbiased jury may well have reached the same verdict is irrelevant. In any event, the guilt and penalty verdicts in this case must be set aside whether or not "an unbiased jury would have reached the same verdict. ... A biased adjudicator is one of the few 'structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards.' " (*In re Carpenter, supra*, 9 Cal.4th at p. 654, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; see also *People v. Pierce* (1979) 24 Cal.3d 199, 207 [conviction reversed where juror discussed case with neighbor].)

### F. The Error Is Nonetheless Prejudicial Even Absent a Presumption of Prejudice

Even if the third party contacts during trial were not inherently prejudicial, there was nonetheless a substantial likelihood that appellant was prejudiced. A judgment adverse to a defendant in a criminal case must be reversed or vacated whenever the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. (*In re Hitchings, supra*, 6 Cal.4th at p. 118.)

When the trial court errs by failing to conduct a sufficient or adequate inquiry, or in failing to discharge a tainted juror or jurors, in the absence of a presumption of prejudice, the ultimate issue of influence on the jury is resolved on appeal by reference to the substantial likelihood test, an objective standard. In effect, as this Court has previously stated, the extra-judicial material must be examined and a determination made whether it is inherently likely to have influenced the juror or jurors involved. (*Id*; see also *People v. Marshall, supra,* 50 Cal.3d at pp. 950-951.)

As discussed by this Court in an analogous situation, where a juror has received information from extraneous sources, the effect of such receipt is judged by a review of the entire record. The verdict will be set aside if there appears a *substantial likelihood* of juror bias. Such bias is manifested in two different ways. Bias will be found if the extraneous material, judged objectively, is inherently and

substantially likely to have influenced the juror. (See, e.g., *People v. Holloway, supra*, 50 Cal.3d at pp. 1110-1112; *People v. Marshall, supra*, 50 Cal.3d at pp. 951-952.) The verdict will also be set aside if it is substantially likely that the juror was actually biased against the defendant. (E.g., *In re Hitchings, supra*, 6 Cal.4th at p. 121.) The judgment must be set aside if the court finds prejudice under either test. (*In re Carpenter, supra,* 9 Cal.4th at p. 653.)

The prejudice analysis in case of juror impartiality or bias is different from and less tolerant than the harmless-error analysis for ordinary error at trial. As stated in *United States v. Vasquez* (9th Cir. 1979) 597 F.2d 192, 193, the key question is whether there exists a *possibility* that the extrinsic information influenced the verdict. Thus, as noted by this Court in *Carpenter*:

> "[The substantial likelihood of a] biased adjudicator is one of the few "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; see also *Rose v. Clark* (1986) 478 U.S. 570, 577-577-578; *Morgan v. Illinois* (1992) 504 U.S. 719, 729; [other citations omitted]. Thus, even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias . . . , the totality of the circumstances . . . must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. Under this . . . 'circumstantial[]' test the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered.
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> (*In re Carpenter, supra*, 9 Cal.4th at p. 654.)

The transcript of the hearing conducted by the trial court and the nature of

the incidents described by Juror No. 9, Juror No. 12, and Juror DeMaio compel the conclusion that there was a strong likelihood that the third-party contacts were inherently and substantially likely to have influenced the jurors, even though the jurors themselves stated otherwise.

First, it must be stressed that not only Juror No. 9 was tainted by the threatening notes but potentially Juror No. 12 was equally tainted as well. Juror No. 12 witnessed at least one of the incidents involving Juror No. 9. He spoke with Juror No. 9 about the threatening notes. The trial court did not adequately explore with Juror No. 12 what he saw and, more importantly, what Juror No. 9 may have told him about the threatening notes or their contents. In addition, when questioned, Juror No. 9 did not explicitly state that he was unaffected by the threatening notes. He only stated that he did not think so, a response far different than a categorical denial that the threatening notes caused any impact on him during the trial or would have none on the deliberations about to commence.

If a juror receives what he believes are threatening notes, and thereafter becomes apprehensive about his safety, there is a substantial likelihood that the juror's views and attitudes about the defendant on trial will have changed. Neither Juror No. 9 nor Juror No. 12 who was also aware of the threatening notes, and who actually observed Juror No. 9 when he first received what was taken as a threatening note, would have remained unbiased against appellant who could only have been deemed to have been involved in the perceived threats. It would have

been objectively unlikely for any reasonable juror, in the same circumstances as Juror No. 9, or Juror No. 12 who witnessed one of the incidents, to divorce perceived threats and the apprehension about personal safety from a dispassionate analysis of appellant's intent and nature of his participation in the alleged crimes. Further, the perceived threatening notes involving Juror No. 9, as well as Juror No. 12, did not occur before trial or in the remote past, the passage of time thereby diminishing or dampening the emotional impact on the affected jurors. Rather, the perceived threatening notes were received in the midst of trial shortly before commencement of guilt-trial deliberations.

Any sitting juror who felt apprehensive about personal safety for days at the hands of appellant would in all likelihood have been biased regarding the guilt determination and, to a greater degree, the penalty in this case. A vote for either death or life imprisonment without parole obviously would depend, in part, on a determination by each of the sitting jurors whether the threat of future violence by appellant could be contained. If appellant were perceived even for a few days during trial to have instigated threatening notes or indirectly to have threatened a sitting juror, it is unlikely that the juror or jurors involved would remain unbiased.

The incident involving Juror DeMaio also tended to create inherent bias because it was substantially likely to cause him to believe that the community was both closely watching him and expected a particular verdict and sentence at the

end of the proceedings. In effect, by having been pointed out and identified as a juror in this case, Juror DeMaio was tainted by community pressure to vote for guilt and death because that is what the community would expect. Having a juror on the panel who was personally identified as a sitting juror and inherently pressured by virtue of having been personally identified offered little likelihood that the jury's deliberations would not be tainted by the community pressure brought to bear through Juror DeMaio. Bias and impartiality were inherent.

Based on the incidents in which the jurors were involved, there is every reason to believe that none of them could remain objective or put the incidents in which they were involved out of their minds for the rest of the trial. The very fact that Juror No. 9 became emotionally upset and apprehensive during trial on receiving what he perceived to be threatening notes rendered it likely that he carried that emotional baggage into the jury room during deliberations, evaluating the evidence of appellant's guilt, and later penalty, through the lens of that incident. The same was likely true of Juror No. 12, although we do not know precisely how he reacted, since the trial court's inquiry was completely deficient. It was also unlikely that Juror DeMaio remained unaffected by community pressure once he was identified as a sitting juror in this case and once he overheard others expressing the view that they would not want to be in his place -- a statement that easily could be construed to mean that the outside community, of which Juror DeMaio was a part, expected verdicts of guilt and a penalty of death.

Thus, bias was also inherent in the incident involving Juror DeMaio.

### G. The Error Also Violated Appellant's Rights to Due Process, Fair Trial, Impartial Jury, and to a Reliable Determination of Guilt and Penalty Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A defendant is guaranteed the right to a trial by a fair and impartial jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (See also Cal. Const., art. I, § 16 [state counterpart].) *People v. Earp, supra,* 20 Cal.4th at p. 853; *People v. Williams, supra,* 16 Cal.4th at p. 666, citing *Morgan v. Illinois, supra,* 504 U.S. at pp. 726-728 and 740 (dis. opn. of Scalia, J.) [clarifying the constitutional underpinnings of the *Morgan* holding].) Likewise, under both the United States and California Constitutions, a sentencing jury in a capital case must be impartial. (*People v. Williams, supra*, 16 Cal.4th at pp. 666-667; see also *Morgan v. Illinois, supra*, 504 U.S. at pp. 726-728.) The most general interpretation of a fair trial is that it be conducted before unprejudiced jurors. (*Jones v. Kemp* (N.D. Ga 1989) 706 F.Supp. 1534, 1560.) As emphatically stated by this Court, "[a] defendant has a right to an unbiased and unprejudiced jury." (*People v. Hord* (1993) 15 Cal.4th 711, 724.)

In addition, and for the reasons discussed in Subsections B, through F, *supra*, the violation of appellant's fundamental right to a fair and impartial jury under the Fifth, Sixth, and Fourteenth Amendments also constitutes a deprivation of the right to a reliable jury verdict in a capital case under the Eighth Amendment

to the United States Constitution. (*Edmund v. Florida* (1982) 458 U.S. 782, 784.) Here, appellant was deprived not only of a reliable determination of guilt but also of penalty. Therefore, the constitutional error in this case compels reversal of the judgment of conviction on all counts, enhancements, special circumstance findings, and penalty.

## V

## THE TRIAL COURT ERRED IN ORDERING APPELLANT TO BE PHYSICALLY RESTRAINED AT TRIAL IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, FAIR TRIAL, AND ASSISTANCE OF COUNSEL, AND THE PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

On December 20, 1995, the prosecutor moved to restrain appellant physically at trial. (1 Supp A CT 146-195.) The prosecutor argued that in 1973, over 20 years before trial, appellant escaped from the Idaho State Prison and that during his escape appellant was shot by a prison guard. The prosecutor also offered that in the 1982 Makris incident appellant fled from the scene of the crime in his truck to avoid apprehension and arrest. (See 1 Supp A CT 146-147, 154-195 [Nestor's 1982 trial testimony about appellant's flight from crime scene attached as Exhibit 2 to People's motion].)

In hearings on the motion to restrain appellant, the trial court indicated that the restraints to be utilized would include both leg restraints and a stun belt, not one or the other. (RT 552.) Counsel for appellant indicated that while the defense did not oppose the use of a stun belt alone, appellant opposed leg restraints. (RT 553.) Appellant thus never consented to the use of both shackles and a stun belt. Counsel stressed that there had been no escape attempts by appellant in the present case, and he had not posed any discipline problems while in custody for five years

awaiting trial. (RT 553.) Indeed, counsel emphasized that "[i]n all the time [appellant] has been in court in this matter he has conducted himself as an absolute gentleman. He's not be[en] even verbally obstreperous in the least. [The prosecutor] can only rely on an incident that happened almost 20 years ago." (RT 555.) Neither the court nor the prosecutor disagreed with defense counsel. Counsel also noted in his objection that "[p]utting [appellant] in a condition where the jury will or where we can guarantee that the jury will, under no circumstances, ever see leg restraints is virtually impossible ... ." (RT 556.) Counsel argued that physical restraints were thus unnecessary and prejudicial and that "the jury is going to see it sometime along the way." (RT 556.)

The trial court acknowledged that the jury was "going to know." (RT 556.) The court even observed, and thus appellant was undoubtedly made aware if had not already known, that a stun belt, worn by another defendant in another recent case in the same courthouse, had been accidentally activated in that case. (RT 553.) Nevertheless, finding that appellant had 20 years before exhibited violence and a firm commitment to escape, the trial court ordered appellant restrained both by a stun belt and by leg chains. (CT 299; RT 558-559.)

At the commencement of jury selection, the court noted that "with regard to Mr. Foster and his restraints, the counsel table that we have here is built in such a way that you can't see from the side. *And if Mr. Foster keeps his legs under the table*, those restraints cannot be seen." (RT 600 [*italics added*].) The court made

no finding with respect to visibility of the stun belt or whether any portions of which may have been observed by the jury during trial.

When discussing proposed jury instructions, the court asked counsel whether CALJIC No. 1.04 [defendant physically restrained -- cautionary instruction] should be given, speculating that "there's never been a time given when Mr. Foster is seated when any of the jurors could see that he was restrained." (RT 2996.) Counsel stated: "I don't see any point in bringing it to the jurors' attention. ..." (RT 2996.) After further colloquy, the court observed: "So it seems to me that since there's never been an occasion where the jurors could see the restraint, that [CALJIC No. 1.04] need not be given." (RT 2996.) Counsel stated "[u]nless something inadvertent happens, I don't want to draw the attention." (RT 2996.)

After both sides rested, the court again discussed proposed jury instructions with counsel, including CALJIC No. 1.04 pertaining to physical restraints. The court noted: "Then we come to 1.04 which is [']Defendant physically restrained -- cautionary instruction.['] There's never been a time, including when Mr. Foster testified, that any juror ever saw the restraint." (RT 3559.) Although he did not agree with the trial court that the jury had never observed appellant in restraints during trial, defense counsel objected to the use of CALJIC No. 1.04, noting, "I don't want to wave the flag on that. I ask that not be admitted." (RT 3559.) The court replied, "Okay. It's out." (RT 3559.)

### B. There Was No Manifest Need for Requiring Appellant to Wear Either or Both Leg Shackles and a Stun Belt

The use of shackles in court has long been met with disapproval. (See *People v. Harrington* (1871) 42 Cal. 165, 168-169 [reversing conviction for unnecessary shackling].) Indeed, Penal Code § 688 explicitly provides: "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

In *People v. Duran* (1976) 16 Cal.3d 282, 290-291, the Court reaffirmed the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. The Court further explained in *Duran* that "[t]he imposition of restraints in a proper case is normally a judicial function in which the prosecutor plays no necessary part. Although the prosecutor may bring to the court's attention matters which bear on the issue, it is the function of the court, not the prosecutor, to initiate whatever procedures the court deems sufficient in order that it might make a due process determination of record that restraints are necessary." (*Id.* at p. 293, fn. 12.)

Various cases have indicated what circumstances will demonstrate such a manifest need. (See, for example, *People v. Kimball* (1936) 5 Cal.2d 608, 611 [defendant expressed present or future intent to escape, threatened to kill witnesses, secreted lead pipe in courtroom]; *People v. Burwell* (1955) 44 Cal.2d 16, 33 [in letters defendant stated that he intended to procure a weapon and escape

from the courtroom with the aid of friends]; *People v. Hillery* (1967) 65 Cal.2d 795, 806 [defendant resisted being brought to court, refused to dress for court, and had to be taken bodily from prison to court]; *People v. Burnett* (1967) 251 Cal.App.2d 651, 655 [evidence of recent escape attempt]; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-863 [defendant attempted to escape from county jail while awaiting trial on other escape charges]; *People v. Loomis* (1938) 27 Cal.App.2d 236, 239 [defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers, and threw himself on the floor].) Common to all these cases was some evidence of current or contemporaneous escape attempts, expression of a current or planned intent to escape, or some incidents of improper or inappropriate courtroom conduct by the defendant. Nothing of the sort was shown or offered in the present case.

In addition to emphasizing that restraints should not be imposed in the absence of a showing of a manifest need (*People v. Duran, supra,* 16 Cal.3d at p. 291), the Court specified how such need should be determined. "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion."

(See also *People v. Cunningham, supra,* 25 Cal.4th at p. 988 [recognizing that trial court properly may order the imposition of restraints when there is evidence of nonconforming conduct].) Here, again, appellant never manifested non-conforming behavior in court or in jail for five years awaiting trial.

That appellant was charged with a violent crime was not enough to establish a sufficient threat of violence or disruption to justify physical restraints during trial. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944; *People v. Duran, supra*, 16 Cal.3d at pp. 290-291.) Nor did the courthouse layout, which was never cited or mentioned by the trial court, establish any individualized suspicion that appellant would engage in nonconforming conduct. (*People v. Seaton* (2001) 26 Cal.4th 598, 652.)

Finally, in *Duran* the Court considered whether the trial court's shackling of the defendant in that case constituted an abuse of discretion. In analyzing the question, the Court stated: "No reasons for shackling the defendant appear on the record. There is no showing that defendant threatened to escape or behaved violently before coming to court or while in court. The fact that defendant was a state prison inmate who had been convicted of robbery and was charged with a violent crime did not, without more, justify the use of physical restraints. As our discussion heretofore indicates, the trial judge must make the decision to use physical restraints on a case-by-case basis. The court cannot adopt a general policy of imposing such restraints upon prison inmates charged with new offenses

unless there is a showing of necessity on the record." (*People v. Duran, supra*, 16 Cal.3d at p. 293.) Reversing the defendant's conviction, the Court concluded in *Duran* that the trial court in that case abused its discretion in approving the shackling of the defendant at trial. (*Id.* at pp. 293, 296)

In *People v. Cox* (1991) 53 Cal.3d 618, also a death penalty case, defense counsel himself raised the possibility of an escape attempt. While opposing shackles, defense counsel did not oppose handcuffing the defendant to a chair so that the jury would not see. In response, the trial court ordered the defendant handcuffed to his chair. On the following day, counsel stated that the defendant had indicated that the handcuff was uncomfortable. Counsel requested that it be removed, but the trial court rejected the request. A day or so later, the defendant was shackled based on prior information about the possibility of escape and other jail rumors to the same effect. In light of that information, the trial court "felt it was better to be safe than sorry." (*People v. Cox, supra*, 53 Cal.3d at p. 650-651.)

On appeal, this Court held that the record in *Cox* failed to demonstrate the requisite manifest need to satisfy the *Duran* standard. (*People v. Cox, supra*, 53 Cal.3d 618, 651.) The Court explained: "While the instant record may be rife with an undercurrent of tension and charged emotion on all sides, it does not contain a single substantiation of violence or the threat of violence on the part of the accused. Although the shackling decision was not based on a 'general policy' to restrain all persons charged with capital offenses, neither did it follow 'a showing

of necessity' for such measures." This Court concluded that the trial court abused its discretion in ordering the defendant in *Cox* to be physically restrained in any manner." (*Id.* at p. 652.)

In *People v. Hill* (1998) 17 Cal.4th 800, also a capital case, the defendant suddenly stood up during a pretrial proceeding and walked toward the lockup, saying "'he had enough of this shit.'" (*Id.* at p. 839.) At the next court session, defense counsel complained that the defendant improperly had been declared a security risk. At trial, the defendant was shackled, as appellant, with chains around his legs.

Reversing the defendant's conviction for cumulative error including improper shackling, this Court in *Hill* held that the trial court erred in permitting the defendant to be shackled at trial. By failing to determine independently whether, in its view, there existed a manifest need to place the defendant in restraints, the trial court abdicated its responsibility and abused its discretion. (*People v. Hill, supra*, 17 Cal.4th at p. 842.)

More recently, this Court considered the use of stun belts of the type also worn by appellant at trial in this case. (*People v. Mar* (2002) 28 Cal.4th 1201.) The Court held that *People v. Duran, supra*, 16 Cal.3d 282, properly governs a trial court's decision to compel a defendant in a criminal case to wear a stun belt at trial. The Court stressed that the holding in *Duran* clearly was not limited to restraints upon a defendant that are visible to the jury. (*People v. Mar, supra*, 28

Cal.4th at p. 1219; see also *People v. Duran, supra*, 16 Cal.3d at p. 292.) "Although the court in *Duran* emphasized the adverse effect that visible restraints might have upon a jury, it also relied upon the circumstance ... that the imposition of such a restraint upon a defendant during a criminal trial 'inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense.'" (*People v. Mar, supra*, 28 Cal.4th at p. 1219, quoting *People v. Duran, supra*, 16 Cal.3d at p. 288.) As also noted by the Court: "*Even when the jury is not aware* that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury -- especially while on the witness stand. In view of this potential adverse effect, we conclude that before the compelled use of such a belt can be justified for security purposes, the general standard and procedural requirements set forth in *Duran* must be met." (*People v. Mar, supra*, 28 Cal.4th at pp. 1219-1220 [italics added].)

Here, the escape cited by the prosecutor on which the trial court relied to justify both leg shackles and the stun belt occurred over 20 years before trial in the remote past when appellant was in his youth. Although the prosecutor also relied on appellant's efforts to flee from the scene of the Makris incident, that event also occurred many years before trial. Indeed, there was no showing or any assertion

made that in his prior trial appellant had ever tried to escape, manifested an intent to escape, or ever behaved improperly or inappropriately during that trial. There was nothing in the record and nothing was offered showing or even inferring that similar leg shackles and a stun belt had been previously used or required in any prior proceeding.

Moreover, after the 1982 incident, appellant had been imprisoned for several years. There was no mention either by the court, jail personnel, or the prosecutor of appellant's prison record after appellant's 1982 conviction showing that he ever attempted another escape, ever posed any sort of behavioral problem, or ever manifested any desire or intent to escape. There was no testimony by bailiffs or other court personnel showing that extraordinary security measures -- the use of both shackles and a stun belt -- were required in this case. Finally, there was absolutely no current or contemporaneous evidence of improper conduct, inappropriate behavior or outbursts by appellant, or any indication of an intent or plan to escape during the time he had been in custody awaiting trial in this case. Indeed, the record in this case was completely barren of any courtroom violence, threats of violence, any announced or manifest intent to escape, any nonconforming conduct or planned nonconforming conduct, or any type of nonconforming conduct establishing a manifest need for either or both leg shackles and a stun belt as required by *Duran*, *Hill*, *Cox,* or *Mar.*

/ / /

### C. The Court Failed to Consider Whether Use of Both Leg Shackles and a Stun Belt Constituted the Least Obtrusive or Restrictive Security Measure

As indicated by the Court in *Duran*, even when the record in an individual case establishes that it is appropriate to impose some restraint on a defendant as a security measure, a trial court must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purposes. (*People v. Duran, supra,* 16 Cal.3d 282, 291; accord, *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712.) Although the use of leg shackles and a stun belt may reduce the likelihood that the jury will be aware that the defendant has been forcibly restrained, their combined use, as here, may prevent the defendant from fully participating in his defense. Even the use of a stun belt alone does not signify that it is less onerous or less restrictive than the use of more traditional security measures, such as shackling. (*People v. Mar, supra*, 28 Cal.4th at p. 1228.)

In *Mar*, the Court stressed that the trial court must take into consideration the potential adverse psychological consequences in determining which type of restraint system constitutes the least intrusive or restrictive alternative. (*Id.*) As noted by the Court in *Mar* with respect to use of the stun belt alone, "[t]he psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the

particular defendant, and in many instances 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." (*People v. Mar, supra*, 28 Cal.4th at p. 1226.)

In this case, appellant was acutely aware that a stun belt might be accidentally discharged, because the trial court stressed that such an accident had occurred in a recent case involving another defendant in the same courthouse. Although he did not object to the use of a stun belt alone, appellant objected to the combined use of physical restraints and a stun belt. Appellant was personally aware of the effects of a stun belt. While still a child at age 13, appellant had been forcibly administered a series of electroshock or convulsive therapy treatments in Nebraska after he had been transferred to the Nebraska State Hospital from the Whitehall Orphanage. He had also been forced to wear or drag around some type of heavy restraint system before and after the shock therapy -- forcibly chained to heavy wooden blocks which apparently constituted Nebraska's more enlightened version of the ball and chain for mental patients. (See RT 4496; see also Statement of Facts, *supra*.) Appellant also witnessed other mental patients both before and after they had been administered electroshock therapy and thus was acutely aware of the effects on the body and mind that would result from even an accidental discharge of a stun belt.

Thus, before granting the prosecutor's motion to use both physical

restraints and a stun belt, the trial court should have considered the psychological impact of both types of restraints and whether the combined use of restraints would in any way compromise appellant's anticipated testimony at trial, his interaction with counsel, or his comprehension at trial. Moreover, the trial court also failed to consider whether one type of restraint -- not both -- would have sufficed to protect court safety and prevent the possibility of escape. None of those factors was considered by the trial court in this case. Had the court appropriately considered less intrusive methods of restraint, its decision to use both physical restraints and a stun belt might have been justified as necessary or appropriate in this case. Because the trial court failed to make findings adequate to support the combined use of both physical restraints and a stun belt, principles of due process require reversal of appellant's conviction. (*People v. Mar, supra*, 28 Cal.4th at pp. 1227-1228, citing with approval *Riggins v. Nevada* (1992) 504 U.S. 127, 129.)

### D. The Use of Both Shackles and a Stun Belt Violated Appellant's Rights to Due Process, Fair Trial, and Right to Counsel Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; the Error Was Not Harmless Beyond a Reasonable Doubt; Use of Both Leg Shackles and a Stun Belt Rendered the Guilt and Penalty Determinations Unreliable in Violation of the Eighth Amendment to the United States Constitution

Where a defendant's physical restraints were not visible to the jury, trial court error in requiring the use of unobtrusive shackling may be subject to the

*Watson* prejudicial error standard. (See, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Majors, supra,* 18 Cal.4th at p. 406; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584, affd. sub nom. *Tuilaepa v. California* (1994) 512 U.S. 967.) Brief glimpses of a defendant in restraints may not be prejudicial. (*People v. Tuilaepa, supra*, 4 Cal.4th 569, 584-585; *People v. Coddington* (2000) 23 Cal.4th 529, 651.)

However, this Court in *Mar* held that other constitutional factors arise on the improper use of a stun belt, or as in this case the combined use of both a stun belt and physical shackling, over the defendant's objections, where the greatest danger of prejudice arises from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury. (*People v. Mar, supra*, 28 Cal.4th at p. 1225, fn. 7.)

In *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, the Court of Appeals for the Eleventh Circuit discussed that stun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways. Although stun belts are less visible than other restraining devices such as shackles, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence, the use of a stun belt imposes a substantial burden on the ability of a defendant to participate in his own defense and confer with his attorney during a trial. If activated, the device also poses a serious threat to the dignity and decorum of the courtroom. Therefore, a decision to use a stun

belt must be subjected to at least the same "close judicial scrutiny" required for the imposition of other physical restraints. (*Id.* at p. 1306.) The *Durham* court concluded that when a trial court without making adequate findings improperly requires a defendant to wear a stun belt, the error is of federal constitutional dimension requiring reversal unless the State proves the error was harmless beyond a reasonable doubt. (*Id.* at p. 1308.)

. In *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1450-1452, the Court of Appeals rejected a case-by-case evaluation of prejudice and adopted a reversal per se rule when a defendant's shackles, unjustifiably ordered by the trial court, are visible to the jury at the penalty phase of a capital trial.

In this case, for the reasons previously advanced in Subsection C, *supra*, the trial court's error in ordering the use of both shackles and a stun belt and in failing to evaluate whether the restraints used constituted the least obtrusive or restrictive security measure could not have been harmless beyond a reasonable doubt. Appellant was acutely aware at all times during trial, including during his guilt and penalty trial testimony, that the stun belt might be accidentally discharged. Such an accident had occurred in a recent case in the same courthouse. The trial court also failed to consider that, as discussed more fully in the Statement of Facts, *supra*, appellant himself had been forcibly subjected to electroshock in the past and was thus, more than most, acutely aware of a stun belt's power and effect. Surely, appellant's testimony and demeanor while

testifying at trial were thereby affected by his own past personal experiences and his present knowledge that at any time he could be shocked or stunned again.

It is also important to stress that at all stages of the trial, the jury observed appellant, including, most importantly, his demeanor, behavior, and attitude while testifying during both the guilt and penalty phases of trial. The jury was explicitly instructed by the trial court in the language of CALJIC No. 2.20 that in determining appellant's believability as a witness and the truthfulness of his testimony, it could consider appellant's demeanor, manner while testifying, his attitude toward the giving of testimony, and the character of his testimony. (See CT 405.) It is presumed that the jury followed the trial court's instructions. (*People v. Bonin* (1988) 46 Cal.3d 659, 699; *People v. Hardy* (1992) 2 Cal.4th 86, 208.)

Possibly (but not necessarily) unaware of the stun belt that appellant was forced to wear and possibly unaware that appellant's demeanor while testifying would likely be affected because of his previous electroshock experiences and knowledge of accidental stun-belt discharges in the same courthouse, the jury's evaluation and consideration of appellant's testimony under those circumstances were most likely affected to his detriment. Given that reality, it is also likely that both appellant's appearance and demeanor at trial and while on the stand, and the jury's own evaluation of his appearance and demeanor, and more importantly his believability, would have been adversely affected or artificially skewed toward

guilt and death because of the stun belt and shackles that appellant was forced to wear. And if one or more jurors personally had been aware of the shackles, but not necessarily the stun belt, appellant would have been doubly prejudiced, because he would additionally have been perceived as violent or escape-prone and, thereby, even more deserving of death.

In view of the harm to appellant, the improper use of both shackles and a stun belt also violated his rights to due process, fair trial, and to a reliable determination of both guilt and penalty guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The trial court's order requiring appellant to use both shackles and the stun belt interfered with other fundamental rights including the presumption of innocence, his right to counsel, and right of confrontation and cross-examination, all of which were impaired by the use of shackles and a stun belt. Any change or modification of appellant's demeanor at trial and during his testimony attributable to the stun belt impermissibly tainted the jury's evaluation and consideration of his guilt, contrition, remorse, future dangerousness, and culpability for purposes of penalty, thereby rendering both the guilt and penalty determinations unreliable under the Eighth Amendment to the United States Constitution. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Under the circumstances of this case, therefore, considering particularly appellant's own history of forcible electroshock treatment while a child, and his

awareness during trial of the very real and ever-present possibility that the stun belt he wore might be accidentally activated and discharged, howsoever he behaved, could not have been harmless beyond a reasonable doubt under the *Chapman* standard.

## VI

## THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY SUA SPONTE ON TRESPASS AS A LESSER INCLUDED OFFENSE OF BURGLARY; THE ERROR ALSO VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, FAIR TRIAL, AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

Both the original information (CT 144) and amended information charged appellant in count 2 with one count of burglary (§ 459). (CT 296). In addition to alleging deliberate and premeditated murder, the amended information alleged that the murder was committed during the commission of a burglary. (CT 294-296.) As to the special circumstances, both the original information and amended information alleged that the count 1 murder was committed while appellant was engaged in the commission or attempted commission of burglary in violation of §§ 459/460 within the meaning of § 190.2, subdivision (a)(17)(vii). (CT 143, 295.)

The trial court instructed the jury on burglary. Appellant did not request an instruction on trespass as a lesser included crime of burglary, although he did request, and the court gave, an instruction on theft as a lesser included crime of robbery charged in count 3. However, defense counsel on appellant's behalf explicitly told the court that appellant had no objection to any other instructions on other lesser included crimes if the trial court decided sua sponte that such instructions were required or should be given. (See RT 3567.) The prosecutor

objected to any other instructions on lesser included crimes of robbery or burglary. (See RT 3565-3566.)

By failing to instruct the jury sua sponte on trespass as a lesser offense of the charged burglary, the trial court erred and violated appellant's rights to due process, fair trial, and to a reliable determination of guilt and penalty guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

**B. Standard of Review**

An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense. Whether or not to give a particular instruction in a particular case entails the resolution of a mixed question of law and fact that is, however, predominantly legal. As such, it is examined without deference. (*People v. Waidla, supra,* 22 Cal.4th at p. 733.)

**C. Sua Sponte Obligations, Generally**

The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense. (*People v. Hardy, supra,* 2 Cal.4th at p. 184.) The trial court's instructional obligation involves all lesser offenses substantially supported

by evidence. (*People v. Barton* (1995) 12 Cal.4th at 186, 195.) Stated another way, to warrant an instruction, there must be substantial evidence of the lesser included offense, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant committed the lesser offense. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081.) Speculation is insufficient to require the giving of an instruction on a lesser included offense, and a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

An instruction or instructions on lesser included offenses shown by the evidence avoids the impermissible situation of forcing the jury into an unwarranted all-or-nothing choice (*People v. Wickersham* (1982) 32 Cal.3d 307, 323-324, overruled on other grounds in *People v. Barton, supra,* 12 Cal.4th 186) that could lead to an unwarranted conviction in violation of due process of law under the Fourteenth Amendment to the United States Constitution. (*Beck v. Alabama, supra,* 447 U.S. at pp. 633-638 ; *Keeble v. United States* (1973) 412 U.S. 205, 212-213 [defendant entitled to a lesser offense instruction because he should not be exposed to substantial risk that jury's practice will diverge from theory. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."].)

A lesser offense is necessarily included in a greater offense if either the

statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Hagen* (1998) 19 Cal.4th 652, 667; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) Under the crime definition test, the court must determine whether the perpetrator can commit the greater including offense without necessarily committing the lesser included offense as a matter of law in view of the elements. (See, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 117.) Under the accusatory pleading test, the court must determine whether the perpetrator can commit the greater offense without necessarily committing the lesser included offense as a matter of fact in view of the allegations. (See, e.g., *Id.* at p. 117.)

### D. The Trial Court Erred in Failing Sua Sponte to Instruct the Jury on Trespass as a Lesser Included Offense of Burglary

Burglary is the entry of any of the statutorily enumerated premises, including certain inhabited dwelling places, shops, stores, and "other building[s]," "with intent to commit grand or petit larceny or any felony." (§ 459.) Burglary of specified inhabited dwelling places is burglary of the first degree (*id.*, § 460, subd. (a)); all other kinds of burglary are of the second degree (*id.*, subd. (b)). The elements of burglary to commit larceny are further defined in CALJIC No. 14.50 (1990 Revision) with which the jury was instructed in this case. (CT 414.) As defined in CALJIC No. 14.50 (1990 Revision), the commission of burglary

consists of (1) entry into a building or room, (2) a specific intent to steal, take, and carry away the personal property of another of any value, and (3) the further specific intent to deprive the owner permanently of such property. As defined in CALJIC No. 16.340, trespass consists of (1) entry upon the land or into buildings of another without the consent of the owner, and (2) with the specific intent to dispossess those lawfully entitled to possession of the property from that portion of the property so occupied.

Burglary requires proof beyond a reasonable doubt of entry into a building or room with the intent to commit theft or a felony. Where there is a lack of intent to commit the underlying felony or theft, the evidence fails to establish a burglary; the crime committed is rather at most a trespass which does not require proof of a preexisting intent to steal.

In *People v. Gauze* (1975) 15 Cal.3d 709, 714, while observing that a burglary consists of "an entry which invades a possessory right in a building," the Court reviewed the broad underlying basis for the criminal sanction against the particular act and intent constituting burglary. The Court noted that burglary laws are primarily designed, not to deter trespass and an intended crime so much, as to forestall the germination of a situation dangerous to personal safety. Burglary, in short, "is aimed at the danger caused by the unauthorized entry itself "(*Id.* at p. 715), signifying, therefore, that a trespass invariably will be subsumed in a burglary.

The case of *People v. Lopez* (1967) 249 Cal.App.2d 93, which holds to the contrary, is both distinguishable and not well reasoned. The defendant in *Lopez* was convicted of burglary but argued on appeal that the trial court erred in refusing to give a requested instruction on a lesser included offense. Unlike the present case, the only instruction requested by the defendant in *Lopez* at the time of trial was loitering in violation of § 647, subdivision (g), not trespass. Later, in his motion for new trial, the defendant first raised the issue of trespass as a lesser included offense. Ruling on the defendant's motion, the trial court effectively ignored the issue, holding that if the jury felt that the defendant did not have the intent to commit theft at the time he entered the home, it should have found the defendant not guilty. (*Id.* at p. 103.) Finding, without further reasoning, that burglary and trespass involved different intents, the Court of Appeal upheld the trial court's ruling. (*Ibid.*)

In so ruling, the *Lopez* court erred by ignoring the alternatively applicable tests for determining whether trespass should have been deemed a lesser included offense of burglary. The reasoning in *Lopez* is thus unsound, and the decision should now be disapproved. Under the accusatory pleading test, if not the legal elements test,[32] trespass is a lesser included offense of the charged count 2

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[32]/ In *People v. Birks, supra,* 19 Cal.4th at p. 118, fn. 8, the Court noted in dicta that under the legal elements test trespass is not a lesser necessarily included offense of burglary because burglary, the entry of specified places with intent to steal or commit a felony, can be perpetrated without committing any form of criminal trespass. Here, of course, the building was a church open to the public;

burglary. (See also *People v. Cash, supra,* 28 Cal.4th at p. 727 [where Court referred to theft "as a necessarily lesser included offense of robbery"].)

A burglary is based on larceny comprised of elements embracing intent to steal (e.g., *People v. Thompson, supra,* 27 Cal.3d at pp. 303, 313 & fn. 5), whereas trespass comprises the same elements with the exception of such intent (see, e.g., §§ 602, subd. (l), 602.5). While burglary by its statutory definition alone may not necessarily include trespass, where, as here, the burglary was alleged to have been effectuated by an entry both "willful and unlawful," the lesser offense of trespass is necessarily included in the accusation of the greater crime, i.e., burglary. (See *People v. Barrick* (1982) 33 Cal.3d 115, 133-135 [lesser offense is within conjunctively pled greater charge if either of the conjunctively pled elements satisfies lesser offense].)

In this case, the mental state with which appellant purportedly committed the charged burglary was crucial. (See *People v. Barnett, supra,* 17 Cal.4th at p. 1145; *People v. Romo* (1990) 220 Cal.App.3d 514, 519.) More precisely, what

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only the minister's office was private. Thus, an unlawful trespass (into the minister's officer) would not have been inconsistent with an initial lawful entry into the public areas of the church accomplished without the intent to steal or commit a felony.

mattered for the burglary was appellant's alleged state of mind when he entered the church, because burglary based on larceny requires intent to steal on entry, not a later-formed intent (see, e.g., *People v. Holt, supra*, 15 Cal.4th at p. 669; *People v. Collins* (1878) 53 Cal. 185, 186-187.)

While the intent required for burglary is infrequently established with direct evidence, but may be inferred from all the facts and circumstances surrounding the crime, here the evidence was also consistent with the theory or factual scenario that any taking, or attempted taking, occurred and was formed only after an unlawful trespass or during or immediately after the killing. The perpetrator entered a church, a public place open to and accessible by the public. The very essence of a church permitted access and initial lawful entry by the public. However, even though the church was thus open to the public, the minister's office where the murder occurred was not so open for the purpose of trespass. There was no evidence that appellant was aware of the church schedule or knew that any money or property would be found in the church office or in possession of someone at the church when he entered the premises. There was no strong or credible evidence of any sort, direct or circumstantial, that appellant planned or prepared to commit a burglary or other theft crime or initially entered the church with the specific intent to steal, take, or carry away property. The manner of the victim's death in this case and the absence of strong evidence that the perpetrator attempted to take property from the victim before the killing also tended to show

that an intent to steal had not existed or had been formed at the time of entry into the church. In sum, rather than offer substantial evidence of an intent to steal at time of entry, all the evidence showed the opposite -- the absence of an intent to steal and the absence of an intent to take any property by force or fear at the time of the initial entry into the church.

### E. Even if Trespass is a Lesser Related Offense, the Trial Court Was Still Obligated to Give Such an Instruction, Since at the Time of Appellant's Trial the Court Was Obligated to Instruct Sua Sponte on All Such Lesser Related Offenses

Even if trespass were not a lesser included offense of burglary, it would be a lesser related crime. When the crimes were committed in this case and at the time of appellant's trial, the trial court was obligated by virtue of *People v. Geiger* (1984) 35 Cal.3d 510 to instruct the jury sua sponte on such lesser related crimes. In 1998, after appellant's trial, in *People v. Birks, supra,* 19 Cal.4th 108, the Court overruled *People* v. *Geiger, supra*, which until then had required courts to give such instructions. After *Birks*, trial courts were no longer obligated to instruct juries on related, but not included, offenses without the prosecutor's permission.

In *Birks,* as here, the defendant was charged with burglary. Unlike the present case, the defendant in *Birks* also admitted that he was inside the victim's home, but denied that he intended to commit a theft. The Court held that the trial court did not err in denying a defense request to instruct on trespass as a lesser related offense. (*Id.* at p. 137.) The Court concluded that a trespass instruction, as

a lesser related offense to burglary, did not have to be given absent a stipulation by the parties. (*Id.*, at p. 136, fn. 19; see also *People v. Steele* (2000) 83 Cal.App.4th 212, 217.)

Although the Court also held that *Birks* was fully retroactive, the retroactivity of *Birks* does not apply to the present case. As the Court noted in *Birks*, due process does not preclude retrospective application of a new rule unless it broadens or expands criminal liability or enhances punishment for conduct previously committed. (*People v. Birks, supra*, 19 Cal.4th at p. 136; see also *People v. Martinez* (1999) 20 Cal.4th 225, 238.) The bar against retroactivity applies to judicial decisions whose *effect* is to increase punishment for criminal conduct after its commission. (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1707.)

Here, because appellant was charged with special circumstances in this case and potentially faced increased punishment in a penalty trial based on the jury's verdicts during the guilt trial, the retrospective application of *Birks* to this case did not merely withdraw "the procedural opportunity for conviction of a reduced offense," as in *Birks*. Because the rule of *Geiger* otherwise applied during appellant's trial, and because appellant faced both increased criminal liability and increased punishment for a crime previously committed that might have been deemed less than burglary had the jury been appropriately instructed, due process precluded the retrospective application of *Birks* to this case. (*People v. Cuevas*

(1995) 12 Cal.4th 252, 275; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-354.)

Finally, all of the circumstances previously identified by the Court (see *People v. Geiger, supra*, 35 Cal.3d at p. 530), entitling a defendant to jury instructions on related but not necessarily included offenses, were present in this case. The evidence introduced by the prosecution did not strongly support the element of preexisting specific intent to steal or take property by force or fear at the time of the initial entry. As demonstrated by the victim's wounds and pathologist's testimony, the evidence showed that the murder occurred during an explosion of violence. Indeed, the evidence in this case was fully consistent with an initial lawful entry into the church and subsequent trespass into the minister's office without the specific intent to steal or take property required for burglary and robbery.

Appellant entered a church, a public place open to and accessible by the public. The church by its very nature permitted public access. Only the minister's office where the murder occurred was not so open. There was no evidence that appellant was aware of the church schedule, knew that any money or property would be found in the church office, or knew that money or other property would be in possession of someone in the office on entering the church. There was no strong or credible evidence that appellant planned or prepared to commit a burglary or other theft crime before he entered the church or that he

entered the church with the specific intent to steal, take, or carry away property. The manner of the victim's death, the wounds, and the absence of strong evidence that appellant attempted to take property from the victim before the killing all tended to show that an intent to steal did not exist or had not been formed at the time of entry into the church. Based on all the evidence at trial, even if trespass were not thus a lesser included crime of burglary, the trial court was obligated to instruct the jury sua sponte on trespass as a lesser related crime of burglary.

### F. An Instruction on Trespass Was Also Required to Satisfy Heightened Due Process and Guilt Determination Safeguards Applicable to Capital Cases and Required by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

Due process of law and reliable guilt determination safeguards guaranteed by the Fifth, Eighth, and Fourteenth Amendments require that the jury be instructed on a lesser offense when warranted by the evidence at trial. (See, for example, *Hopper v. Evans* (1982) 456 U.S. 605, 611.) In *Beck v. Alabama, supra*, 447 U.S. 625, the United States Supreme Court held unconstitutional a state statute that prohibited lesser offense instructions in capital cases, when lesser offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases. The goal of the *Beck* rule, as stated in *Spaziano v. Florida* (1984) 468 U.S. 447, 455, and as stated again in *Schad v. Arizona* (1991) 501 U.S. 624, 646-647, "is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice

between capital murder and innocence." (*Beck v. Alabama, supra*, 447 U.S. at p. 629).

Here, assuming that *Birks* (and not *Geiger)* applied retroactively and that trespass is a lesser related, not included, crime of burglary, the conclusion is unavoidable that California law at the time of trial in this case allowed the court to avoid instructions on a lesser offense in a capital case. If given, an instruction on trespass would have deprived the jury of the "all-or-nothing choice" that it was otherwise required to make between burglary, and hence felony-murder, and acquittal on counts 1 and 2. To paraphrase *Hopkins v. Reeves* (1998) 524 U.S. 88, California thus erected an "artificial barrier" that restricted the jury in this case to a choice between conviction for a capital offense and acquittal. (*Id.* at p. 96.) Because the jury was not provided as to counts 1 and 2 with a non-capital third option between the capital felony-murder charge and acquittal, appellant's rights to due process of law, fair trial, and to a reliable guilt determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated by the instructional error in this case.

### G. The Error Was Reversible Per Se; The Error Was Not Harmless Beyond a Reasonable Doubt

Error in failing to instruct the jury on a lesser offense that does not implicate United States constitutional rights or guarantees may be deemed harmless when the jury necessarily decides the factual questions posed by the

omitted instruction or instructions adversely to the defendant under other properly given instructions. Under the state law standard of prejudice, the defendant must show a reasonable probability that the omitted instruction affected the outcome. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) However, because the instructional error in this case is of constitutional dimensions, the harmless error standard announced in *People v. Watson, supra,* 46 Cal.2d at p. 836, does not apply. Rather, appellant must be deemed to have been prejudiced unless the error can be considered harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Here, it cannot.

Although the jury was instructed in the language of CALJIC No. 14.50 (1990 Revision) that to prove burglary it was necessary to establish that appellant had the specific intent to steal and take away another's property at the time of entry (see CT 414) and although the jury convicted appellant of burglary, the jury cannot be deemed to have resolved against appellant the question whether he formed the intent to steal only after entry. An all-or-nothing choice in the capital context is essentially *Hobbesian* -- it constitutes no choice at all where the jury is forced either to convict or let go a defendant who is nevertheless strongly suspected of murder. Since no jury would ever acquit a defendant under those circumstances, appropriate lesser instructions must be given.

As discussed in Subsection D, *supra*, the issues of specific intent and mental state at the time of entry were crucial in evaluating the charged burglary.

A burglary based on larceny required an intent to steal on entry, not an a later-formed intent. The evidence in this case pertaining to the initial entry was equivocal and equally consistent with an intent to steal formed only after entry, not before, or during or immediately after the killing. Similarly, there was no strong or overwhelming evidence of any sort, direct or circumstantial, that appellant planned or prepared to commit a burglary or other theft crime or entered the church with the specific intent to steal, take, or carry away property. At the same time, the jury was not given any alternative option by the court's instructions, permitting a middle choice justified by the evidence between outright conviction and acquittal. In the absence of an instruction on trespass as a lesser crime, the jury's burglary verdict only signified that the requisite specific intent was resolved adversely to appellant under a single scenario presented to the jury. Under that scenario, the only alternative for the jury was acquittal if appellant's specific intent or mental state were in doubt. Clearly, it was highly unlikely for the jury to vote for acquittal when given an all-or-nothing choice. Based on the instructions as a whole, the jury undoubtedly found that appellant formed the intent to steal before or at the time of entry only because no other option was presented to the jury. Because the evidence was also insufficient to support appellant's first degree murder conviction and the special circumstances based on any theory of premeditation and deliberation or felony-murder (see Arguments IX, XI, and XIII, *infra*), the instructional error could not have been harmless beyond a

reasonable doubt under the federal standard of *Chapman v. California, supra*, 386 U.S. at p. 24. (*See also*, *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054 [reversing judgment of conviction in capital case for failure to conduct proper harmless error analysis after Court invalidated one of three special circumstance findings].)

## VII

## BY EXPLICITLY ELIMINATING THE BURDEN OF PROOF AS TO IDENTITY, THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL BY JURY, DUE PROCESS OF LAW, AND TO RELIABLE GUILT AND PENALTY DETERMINATIONS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

Identity was a central and contested issue in this case, yet the trial court expressly instructed the jury that identity was not an element of the charged crimes. Absent proof of identity, appellant's involvement in the charged crimes could not have been established. Because appellant denied that he committed the charged crimes, much, if not most, of the prosecution's case pertained to the crucial issue of identity. For example, as more fully discussed in Argument II, *supra*, the prosecutor justified admission of the prior crimes testimony of Johnnie Clark in Idaho and Cindy Makris in Victorville on the ground that their testimony was relevant to establish appellant's identity. As further demonstrated in Argument II, *supra*, the prosecutor also tried to justify the testimony of Richard Nestor, over appellant's objections, as "necessary to identify" appellant. (See RT 1828-1829.) The jury was instructed in the language of CALJIC No. 2.50 (1994 Revision) that the evidence of prior crimes had been admitted to establish identity. (See CT 412.) The jury was also instructed in the language of CALJIC No. 2.50.1 that the evidence of other crimes had to be proved by a preponderance of the

evidence,[33] which the court defined for the jury in the language of CALJIC No. 2.50.2.[34] (CT 413.)

Furthermore, the blood and DNA evidence were used to identify appellant as the perpetrator. The testimony of other witnesses, including the Rev. Irma Plate during the prosecution's case-in-chief and Nina Pittsford, during rebuttal, also pertained exclusively to the contested issue of identity.

The trial court gave the standard instruction on the burden of proof beyond a reasonable doubt in the language of CALJIC No. 2.90 (1994 Revision).[35] (See CT 400.) In the court's instructions on murder, burglary, and robbery of which appellant was convicted, and the special circumstances found true by the jury, identity was not specified as an element of those crimes. (See, for example, CALJIC No. 8.10 (1994 Revision) [elements of murder], CALJIC No. 8.81.17 (1991 Revision) [elements of murder in the commission of burglary or robbery],

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[33]/ See footnote 28, *supra*, and page 204, *infra*, for text of instruction given.
[34]/ See page 205, *infra*, for text of instruction given.
[35]/ CALJIC No. 2.90 (1994 Revision) provided as follows:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

CALJIC No. 9.40 [elements of robbery], and CALJIC No. 14.50 (1990 Revision) [elements of burglary].) (CT 421, 433-434, 438, 443.) In its only instruction on point in the language of CALJIC No. 2.72 (1989 Revision), the court explicitly told the jury that "[n]o person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission but, more importantly, "[t]he identity of the person who is alleged to have committed a crime is not an element of the crime .... "[36] (CT 462.)

### B. The Trial Court's Combined Instructions Eliminated the Burden of Proof as to Identity and Thereby Violated Appellant's Rights to a Fair Trial and Due Process, and Rendered the Guilt and Penalty Verdicts Unreliable Under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A defendant charged with crimes is presumed innocent until the contrary is established. (§ 1096.) The prosecution bears the burden of proving every fact essential to conviction and all elements of the offense, including identity when at

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[36]/ In its totality, CALJIC No. 2.72 (1989 Revision), given only at the conclusion of the trial court's other instructions, provided as follows:

> "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 462.)

issue (see CALJIC No. 2.91)[37], and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements. (*In re Winship* (1970) 397 U.S. 358, 364; *Cool v. United States* (1972) 409 U.S. 100, 104.) Having the burden of proof in criminal cases, the prosecution has the burden of producing evidence. (Evid. Code § 550, subd. (b).)

The beyond-a-reasonable-doubt requirement applies in all state and federal criminal proceedings. (*In re Winship, supra*; *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278.) Here, although the jury was generally instructed in respect to the burden of proof beyond a reasonable doubt, the trial court did not instruct the jury in the language of CALJIC No. 2.91 and actually informed the jury to the contrary in the language of CALJIC No. 2.72 that there was no burden of proof at all as to identity.

Whether or not the trial court was obligated to instruct the jury sua sponte in the language of CALJIC No. 2.91 (see, for example, *People v. Richardson* (1978) 83 Cal.App.3d 853, 863 [considering both photographic and in-court

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[37]/ CALJIC No. 2.91 provides as follows:

> "The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged.
>
> "If, after considering the circumstances of the identification [and any other evidence in this case], you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty."

identifications of defendant, as well as other corroborating evidence, no sua sponte obligation to give CALJIC No. 2.91]), the trial court certainly should not have given an instruction, as in this case, that eliminated the burden of proof on any essential issue, fact, or element that the jury otherwise was required to find beyond a reasonable doubt. (See, for example, *People v. Flood, supra,* 18 Cal.4th at pp. 479-480 [instructional error relieving prosecution of burden to prove every element of the crime charged violates defendant's rights under both United States and California Constitutions].) Here, the use of CALJIC No. 2.72 in the present case, coupled with the omission of any instruction on the burden of proof as to the key issue of identity, eliminated the stringent burden of proof standard embodied in Penal Code § 1096, CALJIC No. 2.90, and as required in all criminal cases by the Fourteenth Amendment to the United States Constitution.

In *People v. Frye* (1998) 18 Cal.4th 894, the defendant was convicted, inter alia, of two counts of first degree murder, first degree robbery, and residential burglary. Having found true special circumstance allegations that the defendant committed multiple murders and that the murders were committed while the defendant was engaged in robbery and burglary, the jury set the penalty at death.

On appeal, the defendant asserted that the trial court's use of CALJIC No. 2.72 stating that "identity of the person who is alleged to have committed a crime is not an element of the crime," relieved the People of all burden in the case because the principal issue before the jury was identity. Although noting that the

trial court did not instruct the jury in the language of CALJIC No. 2.91 that "[t]he burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged," the Court nonetheless ruled that "the challenged instruction did not relieve the prosecution from proving that defendant committed the charged crimes. It provided only that the prosecution could rely on extrajudicial admissions to prove identity once the corpus delicti had been established." (*Id.* at p. 960.)

The Court should revisit its decision in *Frye* as the holding in that case is suspect for two principal reasons. First, CALJIC No. 2.72 clearly and unambiguously informed the jury that identity was not an element of any charged crime and did not have to be proved. Even though the instruction also involved the use of an extrajudicial confession or admission, the improper identity language had significance and meaning independent of the other corpus deliciti language contained in that instruction, especially without the benefit of CALJIC No. 2.91.

The trial court's instruction explicitly operated to eliminate the People's burden of proof as to identity. In other circumstances, when a trial court has instructed a jury to apply, for example, an unconstitutional presumption, a reviewing court can hardly infer that the jurors failed to consider it, a conclusion that would be factually untenable in most cases, and would run counter to the governing principle of appellate law that jurors are reasonable and generally follow the instructions they are given. (See *Richardson v. Marsh* (1987) 481 U.S.

200, 211.) To say that the jury in the present case relied on the trial court's general instruction on reasonable doubt on considering the key issue of identity when it was also told by the trial court's other, more pertinent and explicit instruction that there was no burden of proof as to identity, conflicts with common sense and the presumption that juries generally follow the instructions given.

Second, the Court in *Frye* applied an incorrect standard of review to the instructional error involved. Noting "the parties' steadfast focus on the issue of identity at trial, including the consistent position by the defense that defendant did not kill the [victims] and the extensive evidence presented by the People connecting him to the crimes," (*People v. Frye, supra,* 18 Cal.4th at p. 960), the Court concluded that there was "no reasonable likelihood the jury would have understood the prosecution had no obligation to prove defendant was the person who committed the offenses." (*Id.*)

The Court's error analysis was wrong. Because the challenged instruction both impaired and eliminated the constitutionally-rooted burden of proof, the harmless error standard invoked by the Court in *Frye* did not apply. Rather, the error was prejudicial per se and not subject to any type of prejudice or harmless error analysis as employed by the Court in *Frye.*

In *Sullivan v. Louisiana, supra,* 508 U.S. 275, the United States Supreme Court emphatically stated that the question, posed by *Chapman v. California, supra,* 386 U.S. 18, e.g., whether the same verdict of guilty-beyond-a-reasonable-

doubt would have been rendered absent the constitutional error "is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found [defendant] guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 280.] Thus, by virtue of *Sullivan*, the fact that evidence existed, which the jury could have considered on the issue, had the issue been submitted to the jury under an appropriate instruction, is of no significance, contrary to the Court's incorrect harmless error analysis in *Frye*.

**C. The Error Was Prejudicial Per Se**

The use of CALJIC No. 2.72, coupled with the omission of CALJIC No. 2.91, totally relieved the prosecution from its burden of proof as to the identity of the perpetrator of the charged crimes. In such a situation, neither the *Watson* (*People v. Watson, supra,* 46 Cal.2d at p. 836 nor *Chapman* (*Chapman v. California, supra,* 386 U.S. 18) standard of error applies. Rather, denial of the right to a jury verdict of guilt beyond a reasonable doubt is considered a structural defect in the constitution of the trial mechanism to which a harmless-error standard does not apply. "The deprivation of that right, with the consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as a structural error" governed by the standard of reversible error per se. (*Sullivan v.*

*Louisiana, supra*, 508 U.S. at p. 280.)

In the words of the High Court: "It is self-evident, we think, that the [Fourteenth] Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury find that the defendant is *probably* guilty, .... [A]n instruction [misdefining the burden of proof beyond a reasonable doubt by effectively lowering its threshold] ... does not produce such a verdict." (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278.) In addition, erroneous instructions on the applicable or governing burden of proof also constitutes a deprivation of the right to a reliable jury verdict under the Eighth Amendment to the United States Constitution. (*Edmund v. Florida, supra,* 458 U.S. at p. 784.) Here, the trial court not only misdefined but eliminated any burden of proof as to identity. Therefore, the trial court's instructional error compels reversal of the judgment of conviction on all counts, enhancements, special circumstance findings, and penalty.

## VIII

## THE USE OF CALJIC NOS. 2.50, 2.50.1, AND 2.50.2 VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY JURY GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY GUARANTEED BY THE EIGHTH AMENDMENT, WHERE THE BASIC FACTS PERMITTED TO BE FOUND BY A PREPONDERANCE OF THE EVIDENCE ALSO CONSTITUTED ULTIMATE FACTS OF THE CRIMES CHARGED IN COUNTS 1, 2, AND 3

### A. Factual and Procedural Background

Identity and intent were contested key issues or elements in this case as to all three counts, including both premeditated murder and felony-murder (count 1), burglary (count 2), and robbery (count 3). Absent proof of identity, appellant's involvement in the charged crimes could not have been established. Because appellant denied that he committed the charged crimes, much, if not most, of the prosecution's case pertained to the contested issue of identity. For example, the prosecutor justified admission of the prior crimes testimony of Johnnie Clark in Idaho and Cindy Makris in Victorville on the ground that their testimony was relevant to establish appellant's identity. The prosecutor also justified the testimony of Richard Nestor, over appellant's objections, as "necessary to identify" appellant. (See RT 1828-1829; see also Argument II, *supra*.)

The jury was instructed in the language of CALJIC No. 2.50 (1994 Revision) in part as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial, to wit: the crimes against Cindy Makris and

Johnnie Clark.

Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.

Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case.

You are not permitted to consider such evidence for any other purpose

(CT 412.)

The jury was also instructed pursuant to CALJIC No. 2.50.1 as follows that the evidence of other crimes had to be proved by a preponderance of the evidence:

Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by the defendant, Richard Don Foster, against Cindy Makris and Johnnie Clark must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the defendant committed such other crime or crimes.

The prosecution has the burden of proving these facts by a preponderance of the evidence.

(CT 413.)

The trial court defined preponderance of the evidence for the jury in the language of CALJIC No. 2.50.2 as follows:

> "Preponderance of the evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> You should consider all of the evidence bearing upon every issue regardless of who produced it.
>
> (CT 414.)

The trial court instructed the jury on the presumption of innocence and the burden of proof in the language of CALJIC No. 2.90 (1994 Revision) stating that "this presumption places upon the People the burden of proving [appellant] guilty beyond a reasonable doubt." (See CT 400.)

### B. The Trial Court's Instructions Erroneously Permitted the Jury to Find Elemental and Ultimate Facts by a Preponderance of the Evidence

It is axiomatic that every element of a criminal offense must be proved beyond a reasonable doubt. (CALJIC No. 2.90; *In re Winship, supra,* 397 U.S. at p. 364; *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278; *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) At the same time, it is also settled that the admissibility of evidence which may be relevant to a jury's factual determination is dependent upon a different standard: proof by a preponderance of the evidence. (CALJIC Nos. 2.50, 2.50.1, 2.50.2; *People v. Carpenter, supra*, 15 Cal.4th at p. 382.)

In *People v. Medina* (1995) 11 Cal.4th 694, 763, the Court discussed the

distinction between the use of other crimes evidence to prove basic or evidentiary facts as opposed to elemental facts. The Court noted that it had long held that "evidence of other crimes may be proved by a preponderance of the evidence." (*Id.*) The Court discussed that the facts tending to prove a defendant's other crimes for purposes of establishing his or her criminal knowledge or intent are deemed mere "evidentiary facts" that need not be proved beyond a reasonable doubt as long as the jury is convicted, beyond such doubt, of the truth of the "ultimate fact" of the defendant's knowledge or intent. (*Ibid*; see also *People v. Lisenba* (1939) 14 Cal.2d 403, 430-431; and see *People v. Meyes* (1961) 198 Cal.App.2d 484, 497 [discussing "evidentiary" or "basic" facts as "not an essential link in the chain" leading to the ultimate fact of guilt].) However, in *People v. Thompson, supra,* 27 Cal.3d 303, the Court stressed that "[b]oth the identity of the perpetrator and the elements of the charged crime are ultimate facts" in a criminal case. (*Id.* at p. 314, fn. 13.) As the Court in *Thompson* further noted, since intent to steal was an element of the crimes charged against the defendant in that case, it was also an ultimate fact in his trial. (*Id.*)

In *People v. Van Winkle* (1999) 75 Cal.App.4th 133, the Court of Appeal recognized that an instruction permitting the jury to draw an inference of guilt from basic facts violated due process if it undermines the jury's responsibility to find the ultimate facts beyond a reasonable doubt. (*Id.* at p. 142.) And in *People v. James* (2000) 81 Cal.App.4th 1343, where prior acts were admitted into evidence,

the appellate court considered the claim that the prosecution's burden of proving each element of the charged offense was unconstitutionally reduced by instructions given to the jury, including CALJIC No. 2.50.1, which permitted the jury to find by a preponderance of the evidence that the defendant had abused the victim in the past and to infer from his past conduct that he had actually committed the charged crime.

The defendant in *James* argued on appeal that the jury was provided with an "alternate pathway for the prosecution to establish its case without necessarily proving each element of [the] offense," permitting the ultimate issue of guilt to be determined based on prior misconduct established by a preponderance of the evidence. The Court of Appeal ruled that when the use of other crimes evidence serves as proof of the ultimate fact that the defendant committed the charged offense, "[w]e believe [the burden of proof] is substantially eroded by instructions suggesting that a defendant's prior offenses may be sufficient to convict him of the charged crime." (*Id.* at p. 1353.)

In *Ulster County Court v. Allen* (1979) 442 U.S. 140, the United States Supreme Court also discussed the distinction between basic or evidentiary facts, on the one hand, and elemental or ultimate facts, on the other, as well as the distinct burdens of proof that apply to each. The High Court explained that ultimate or elemental facts prove the elements of the crime. By contrast, evidentiary or basic facts do not necessarily prove the elements of the crime.

(*Ibid.*) In language apposite to the present case, the High Court explained as follows:

> It is often necessary for the trier of fact to determine the existence of an element of the crime -- that is, an "ultimate" or "elemental" fact -- from the existence of one or more "evidentiary" or "basic" facts .... The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt ....
>
> (*Ulster County Court v. Allen, supra*, 442 U.S. at pp. 156-157.)

The preponderance-of-the-evidence standard adopted and applied by the trial court in the present case in respect to the prior crimes failed to meet the due process standards articulated by this Court in such cases as *Thompson* and by the United States Supreme Court in *Ulster County* and *Sullivan v. Louisiana*. Key elements of the crimes charged -- including appellant's intent to steal and identity -- were both basic and ultimate facts in the crimes charged in counts 1, 2, and 3, yet the trial court's instructions permitted the prosecution to prove those key aspects of the cases against appellant by a preponderance of the evidence. The prosecutor attempted to prove both appellant's intent and identity by highly inflammatory

evidence of his prior crimes. (See Argument II, *supra.*) All of the constitutional defects mentioned by the High Court in *Ulster County* and *Sullivan v. Louisiana* were thus present in the trial court's preponderance of the evidence instructions in this case.

The jury was permitted to find appellant's intent to steal by a preponderance of the evidence. By the trial court's very same instructions, and by the other instructions on the crimes of burglary and robbery (on which appellant's count 1 felony-murder liability was alternatively predicated), appellant's intent was an element of the crimes charged. The jury was also permitted to establish appellant's identity by a preponderance of the evidence. Identity was a contested and ultimate issue common to all of the charged crimes.

This Court has clearly stated that since intent always remains an issue of fact (*People v. McCoy* (1944) 25 Cal.2d 177, 192; *In re Jose R.* (1982) 137 Cal.App.3d 269, 277), the jury must clearly understand its responsibility to resolve that question beyond a reasonable doubt, uninfluenced and unassisted by any other principle of law. (See *People v. Colantuono* (1994) 7 Cal.4th 206, 221.)

As permitted by the trial court's instructions -- CALJIC Nos. 2.50, 2.50.1, and 2.50.2 -- the jury reasonably could have believed that its findings as to certain key elemental or ultimate facts and issues might be based simply on a preponderance of the evidence and not on proof beyond a reasonable doubt, contrary to due process of law and appellant's rights to a fair jury trial guaranteed

by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

### C. The Instructional Error Was Prejudicial Per Se

An error that relieves the prosecution of the burden of proving each element of the charge offense beyond a reasonable doubt violates a defendant's rights under both the California and United States Constitution. (*People v. Flood, supra,* 18 Cal.4th at pp. 479-480.)

In *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 278-282, the United States Supreme Court unanimously held that misdirection or instructional misdefinition of the prosecution's burden of proof beyond a reasonable doubt, while a trial error, nevertheless requires automatic reversal. The Court in *Sullivan* based its analysis on the interrelationship between the Fifth Amendment's requirement that the People prove a criminal case beyond a reasonable doubt, and the Sixth Amendment's guarantee that a defendant is entitled to a jury trial. "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Id.* at p. 278.) As further noted by the High Court, "the essential connection to a 'beyond-a-reasonable-doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage is pure speculation -- its view of what a reasonable jury would have done." (*Ibid.*)

The basic principle of law discussed by the High Court in *Sullivan* requiring proof of all elements of a charged crime beyond a reasonable doubt is

obviously rooted in the United States Constitution, including the Fifth, Sixth, and Fourteenth Amendments. (See also Pen. Code § 1096.) As explicitly held by the High Court, such instructional misdirection involving the burden of proof requires automatic reversal. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320, fn. 14; see also *People v. Cornett* (1948) 33 Cal.2d 33, 41 [inconsistent instructions constitute reversible error if it is impossible to determine which instructions jury followed].)

In *Sullivan*, the jury was given a constitutionally defective reasonable doubt instructions which equated "reasonable doubt" with "grave uncertainty" and "actual substantial doubt," and required a "moral certainty" of guilt. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 277; see also *Cage v. Louisiana* (1990) 498 U.S. 39, 41.) The High Court reasoned that as a result of the instruction, there was no jury verdict of guilty beyond a reasonable doubt. Any attempt to review for harmless error could only hypothesize a guilty verdict conforming to the constitutionally required standard of proof. Such an exercise by an appellate court would deprive the defendant of his Sixth Amendment right to have a jury decide his fate. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 279-280.) The instructional error in *Sullivan* thus qualified as a "structural error" of the kind that defies analysis by harmless-error standards. (*Id.* at pp. 281-282.)

Here, there is a reasonable likelihood that the jury in this case was similarly misled by the use of CALJIC Nos. 2.50, 2.50.1, and 2.50.2. Since there was no way of knowing whether the jury applied the correct burden of proof to the key

elements of intent and identity in counts 1, 2, and 3, appellant's convictions on those counts must be reversed. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281.)

Even if the trial court's instructions in the case were subject to a lesser harmless error analysis as set forth in *Chapman v. California, supra*, 386 U.S. 18, and the instructional error were not reversible per se under *Sullivan*, the error by any measure certainly contributed to the jury's verdicts on counts 1, 2, and 3. In *Yates v. Evatt* (1991) 500 U.S. 391, the High Court explained: "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Id.* at p. 403.)

In *People v. Mounsaveng* (2001) 87 Cal.App.4th 1253, the trial court applied an incorrect burden of proof to the defendant's duress defense in a murder prosecution tried to the court. Concluding that the error was akin to improperly instructing the jury on that issue, the Court of Appeal reviewed the error under *Chapman* and held that the defendant's conviction would not be set aside only if it could confidently be said on the entire record that the constitutional error was harmless beyond a reasonable doubt, i.e., the error did not contribute to the verdict. (*Id.* at p. 1262.)

Here, the basic facts established by the other crimes also constituted elemental or ultimate facts in all three alleged counts in this case. The basic fact of appellant's intent also constitution an ultimate fact. Other than the erroneously-

admitted evidence of prior crimes (see Argument II, *supra*), there was no other solid or credible evidence that also established the ultimate intent elements in counts 1, 2, or 3. There were no eyewitnesses to the charged crimes. As elsewhere discussed in Argument II, *supra*, the prosecution's case was largely based on circumstantial evidence and tenuous inferences drawn from that evidence. Appellant himself testified that he did not visit the church on the day of the murder. In light of other testimony that the blood evidence, when gathered or tested may, have been contaminated, the testimony of both criminalist David Stockwell and Dr. Robin Cotton of Cellmark Diagnostics were subject to reasonable doubt. Further defense-elicited testimony that Cellmark Diagnostics failed to engage in proper, independent proficiency testing also undermined the strength of the blood and DNA evidence on which the prosecution heavily relied. The prior crimes testimony by Johnnie Clark and Cindy Makris did not tie appellant directly to the charged crimes. Appellant's identity was permitted to be proved by a lesser burden of proof through the prior crimes.

Under the circumstances of this case, therefore, the facts established by a preponderance of the evidence could not have been unimportant in relation to everything else the jury considered and must have contributed to the verdicts on all counts. Apart from the inflammatory prior crimes evidence, there was no strong or credible evidence presented at trial to prove key elements or issues of the People's case that appellant intended to steal or deprive the victim of personal

property at the time he entered the church. The evidence of the prior crimes, and the elemental facts derived therefrom by a preponderance of the evidence, were crucial to the prosecution's case. Beyond cavil, the facts established by a preponderance of the evidence could not have been unimportant in the jury's consideration of, and verdicts on, counts 1, 2, and 3.

As observed by the United States Supreme Court in *In re Winship, supra*, 397 U.S. at p. 364, the courts must be ever diligent to guard against dilution of the principle that guilt is established by probative evidence and beyond a reasonable doubt. Whether viewed through the prism of the reversible per se standard articulated in *Sullivan* or the lesser, constitutional *Chapman* standard, the instructional error in this case through the use of CALJIC Nos. 2.50, 2.50.1, and 2.50.2 by which the jury was permitted to find elemental or ultimate facts by a preponderance of the evidence and not beyond a reasonable doubt, requires reversal of the judgment on all counts and the special circumstance findings.

### D. The Instructional Error Also Deprived Appellant of a Reliable Determination of Guilt and Penalty in Violation of the Eighth and Fourteenth Amendments to the United States Constitution

For the above reasons and under the circumstances of this case, the court's error in instructing the jury in the language of CALJIC Nos. 2.50, 2.50.1, and 2.50.2 also deprived appellant of a reliable determination of guilt and penalty in violation of the Eighth Amendment to the United States Constitution. (*Caldwell v. Mississippi, supra*, 472 U.S. 320; *Johnson v. Mississippi* (1988) 486 U.S. 578.)

## IX

## THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT APPELLANT'S CONVICTION OF SECOND DEGREE ROBBERY ON COUNT 3 (§ 211) AND FIRST DEGREE FELONY-MURDER ON COUNT 1 (§ 187) TO THE EXTENT THAT THE FELONY-MURDER MAY HAVE BEEN PREDICATED ON THE COMMISSION OF A ROBBERY; THE INSUFFICIENCY OF THE EVIDENCE OF ROBBERY ALSO RENDERED THE DETERMINATION OF APPELLANT'S GUILT UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

Both the original information (CT 144) and amended information charged appellant in count 3 with one count of robbery (§ 211) (CT 296. ) In addition to alleging deliberate and premeditated murder, the amended information newly alleged that the murder was committed, inter alia, during the commission of robbery. (CT 294-296.) Appellant was not charged with attempted robbery, and the jury was not instructed on the crime of attempted robbery. The court, however, instructed the jury on felony-murder during the commission or attempted commission of a robbery, but gave no other instructions on attempt in the context of felony-murder. (See CT 432, 434.)

The jury found appellant guilty on count 1 of first degree murder and on count 3 of second degree robbery. (CT 378-379, 466-475.) The jury was not required to specify the theory of first degree murder on which its verdict was predicated or to agree unanimously whether the first degree murder was deliberate

and premeditated or whether the murder was committed during the commission or attempted commission of a robbery.

**B. Insufficiency of the Evidence**

1. Robbery

Substantial evidence must support each essential element of an offense. If the circumstances reasonably justify the jury's verdict, the reviewing court will not interfere with the jury's determination. However, if evidence or testimony is lacking in indicia of reliability, an appellate court must not hesitate to reverse the judgment of conviction. (*People v. Lang* (1974) 11 Cal.3d 134, 139.)

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The element of force or fear is satisfied if the force or fear caused the victim to give up his or her property. (*People v. Briton* (1991) 232 Cal.App.3d 316, 325.)

In reviewing the sufficiency of the evidence of a robbery conviction, all inferences must be drawn in support of the verdict that can reasonably be deduced from the evidence. A judgment should be upheld if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Miranda* (1987) 44 Cal.3d 57, 86.) The judgment must be supported by "substantial evidence" which has been defined as evidence that reasonably inspires confidence

and is of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 139; *People v. Javier A.* (1985) 38 Cal.3d 811, 819.)

In the present case, review of the entire record is not sufficiently persuasive to permit the conclusion that any rational trier of fact could have found either the requisite specific intent or concurrence of intent and act before the killing occurred. There was no solid or substantial direct or circumstantial evidence that appellant formed an intent to commit robbery or deprive the victim of her purse or any other property by force or fear before the killing in this case. To the contrary, the physical evidence in this case plainly showed a killing independent of any other motive or crime, or theft of property after the victim had been killed.

The manner in which the victim was killed was inconsistent with robbery. The victim's wounds and the amount of blood deposited around the church indicated at most that it occurred during a brief moment of rage and struggle, not during a preplanned incident conceived to take personal or church property. The depth and number of the wounds, the presence of defensive wounds on the victim's hands and arms about which Dr. Frank Sheridan testified extensively (see RT 2729-2760), and the position of the body, all indicated that the victim was not fending off an attack motivated by robbery. Indeed, Dr. Sheridan testified that all wounds occurred in quick succession, at about the same time within a minute or two at most, and most likely while the victim was lying on the floor. (See RT 2753-2760.) The brutal manner of the killing was far more consistent with a

sudden, random explosion of violence than a calculated murder during the commission or attempted commission of a robbery.

There were no signs that any personal property belonging to the victim had been touched or moved before the killing which would have been consistent with a robbery theory or concurrence of intent and act before the killing. The blood evidence in this case in contrast was totally inconsistent with an intent to rob or a robbery before the killing, since blood found on the victim's purse -- which was shown by DNA and other analyses, if not the result of later contamination or improper testing, not to have been the victim's blood -- could only have been deposited on the purse after, not before, the killing. The blood evidence thus was also inconsistent with the concurrence of intent and act before the killing, which was required to prove robbery beyond a reasonable doubt.

The fact that the victim's car was taken or driven away after the killing did not permit an inference by the trier of fact that the killer even knew that the victim owned a car, parked her car in the church parking lot, or intended before the killing to deprive the victim permanently of her car. Unlike the circumstances in *People v. Jennings* (1991) 53 Cal.3d 334, for example, the theft of the victim's car in the present case could not have occurred prior to or during the killing. In contrast to *Jennings*, there was no evidence, through statements, admissions, or other evidence, showing that appellant intended to obtain the victim's car prior to the murder. In this case, there was no evidence of prior intent to commit robbery

independent of the killing.

The fact that property belonging to the victim was found within two miles of appellant's residence also did not shed light on his intent, since the physical evidence tended to show that the victim's property was taken only after the killing, not before. Under § 20, a defendant's wrongful intent and physical act must concur in the sense that the act must be motivated by the intent. The fact that the victim's car was moved or that her property was recovered after her death carries little weight in proving prior intent. (See *People v. Beeman* (1984) 35 Cal.3d 547, 557-558 [intent is what must be proved; inferences of intent may be regarded as established only in absence of evidence to the contrary; where there is room for doubt, inference will not sufficient to prove intent].)

In *People v. Webb* (1993) 6 Cal.4th 494, 529-530, there were several prominent, independent evidentiary facts indicating that the defendant planned to commit robbery. Those facts included specific knowledge by the defendant about the victims and an awareness of the dates on which the victims were likely to be in possession of rent receipts that were stolen during the robbery. Moreover, prior to the crimes in *Webb*, the defendant obtained a gun and duct tape later used to subdue the victims. Finally, the evidence showed that there was no legitimate reason for the defendant to be at the victims' residence at the time the crimes were committed.

In the present case, unlike *Webb*, there was no evidence that appellant

personally had ever encountered the victim or even knew that she would be alone in the church. There was no evidence that appellant had ever been in the church office or was aware that the victim or the church were in possession of any property that might motivate one to plan or commit a robbery. There was no independent evidence that appellant planned or prepared to commit a robbery at the church. Finally, and unlike the situation in *Webb*, appellant even had a legitimate reason to enter the church premises to check on the status of his prayer request for his mother. Consequently, the requirements of a concurrence of wrongful intent and physical act and that the act must be motivated by the intent embodied in § 20 were not satisfied in this case as to the count 3 robbery.

Certainly, the Court may speculate, just as the jury was urged to do by the prosecutor, that appellant intended to commit a robbery prior to the killing or that money or property were in fact taken from the victim by force or fear while she was alive. A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, conjecture, or so forth. "A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence." (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 45, quoting *Brautigam v. Brooks* (1964) 227 Cal.App.2d 547, 556-557.)

In the absence of any substantial or solid evidence that appellant formed an intent to commit robbery or deprived the victim of her purse or any other property

by force or fear while she was alive, appellant's conviction of robbery in count 3 (as well as the weapon enhancement pursuant to § 12022, subdivision (b) found true by the jury) must fall. (*People v. Kelly* (1992) 1 Cal.4th 495, 531 [reversal of underlying conviction requires reversal of enhancement as well].) No rational trier of fact could have found of all the elements of robbery beyond a reasonable doubt. (*People v. Miranda, supra*, 44 Cal.3d at p. 86.)

2. Robbery Felony-Murder

Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences, and determines whether guilt has been established beyond a reasonable doubt. (*People v. Millwee* (1988) 18 Cal.4th 96, 132.) When examination of the whole record discloses evidence that is sufficiently reasonable, credible and of such solid value as to permit a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, the judgment of conviction must be affirmed. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Here, the entire record in this case does not disclose sufficient evidence to support a felony-murder conviction predicated on a robbery by force or fear.

Generally, liability for first degree murder based on a felony-murder theory is proper when the defendant kills in the commission of robbery, burglary, or any of the other felonies listed in § 189. For conviction, the prosecution must establish

that the defendant, either before or during the commission of the acts that caused the victim's death, had the specific intent to commit one of the listed felonies. (*People v. Anderson* (1968) 70 Cal.2d 15, 34; *People v. Proctor* (1992) 4 Cal.4th 499, 532.) To find a defendant guilty of first degree murder based specifically on a killing perpetrated during a robbery, the evidence must show the defendant intended to steal the victim's property either before or during the fatal assault. (§ 211; *People v. Sakarias, supra,* 22 Cal.4th at p. 619; *People v. Marshall, supra*, 15 Cal.4th at p. 34.)

When a killer forms the intent to commit an independent felony only after the killing or delivering fatal blows to the victim, the felony-murder doctrine does not apply. (*People v. Jeter* (1964) 60 Cal.2d 671, 676-677; see also *People v. Gonzales* (1967) 66 Cal.2d 482, 486 [jury properly instructed that intent to rob formed after infliction of mortal wounds is insufficient to support finding of first degree felony murder].)

In *People v. Green* (1980) 27 Cal.3d 1, the defendant husband killed his wife, apparently out of jealousy or for revenge. The defendant and an accomplice then took her purse, clothing, and rings, apparently to hinder identification of the victim. Setting aside the robbery-murder special-circumstance finding, this Court concluded that the evidence was insufficient to establish that the murder had been committed during the commission of a robbery; the taking was merely incidental to the murder. (*Id.* at pp. 59-62.)

While the intent required for robbery is seldom established with direct evidence, but may be inferred from all the facts and circumstances surrounding the crime, here the evidence, as discussed above, at most shows the taking was merely incidental to the killing and thus is insufficient to support a felony-murder verdict predicated on robbery under the rule of *People v. Green, supra*. There was no evidence that appellant had previously met the victim or even knew that she would be alone in the church. There was no evidence that appellant was aware of the church schedule or that any money or property would be found in the church office or in possession of someone at the church at the time of the killing. There was no strong or credible evidence of any sort, direct or circumstantial, that appellant planned or prepared to commit a robbery or entered the church with the intent to rob. Even assuming that appellant entered the church on that fatal day, appellant otherwise had a legitimate reason to enter the premises to check on the status of his prayer request for his mother.

Moreover, the entire record does not support the conclusion that any rational trier of fact could have found concurrence of intent and act before the killing occurred, a necessary element of felony-murder. There was no solid, direct or circumstantial evidence that appellant formed an intent to commit robbery or deprived the victim of her purse or any other personal property by force or fear before the killing in this case. To the contrary, the physical evidence in this case showed a killing independent of theft or robbery. The blood evidence in this case

was entirely inconsistent with the formation of an intent to rob or a robbery before the killing. The blood found on the victim's purse that was shown not to have been deposited by the victim could only have dropped on the purse after, not before, the killing. Based on the evidence adduced at trial, therefore, any rational trier of fact could not find beyond a reasonable doubt that appellant formed the intent to commit or attempt to commit robbery before entering the church or took, or attempted to take, any property from the victim by force or fear while the victim was alive.

### C. Appellant's Convictions of Robbery and Felony-Murder Predicated on Robbery Violated His Rights to Due Process of Law Under the Fourteenth Amendment and to a Reliable Determination of Guilt Under the Eighth Amendment to the United States Constitution and their California Constitutional Counterparts

In *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319, the United States Supreme Court held, with regard to the standard on review of the sufficiency of the evidence supporting a criminal conviction, that "[t]he critical inquiry . . . [is] . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]his inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." An identical standard applies under the California Constitution. (*People v. Johnson, supra,* 26 Cal.3d at p. 576.)

Robbery and felony-murder convictions based on insufficient evidence violated appellant's right to due process under both the United States and California Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15). As revealed by the entire trial record, the evidence was insufficient to support the verdicts finding appellant guilty of robbery and hence felony-murder predicated on the commission or attempted commission of robbery. In particular, there was insufficient evidence of a preexisting intent, concurrent intent and act, and insufficient evidence that property was taken from victim's immediate presence by force or fear or while she was alive.

The prosecution bears the burden of proving every element of the crime or crimes charged. Where the requisite burden of proof has not been met or the evidence is otherwise deemed insufficient to support a judgment of conviction, a reliable determination of guilt -- and derivatively penalty -- required by the Eighth Amendment to the United States Constitution has not been made. Here, in the absence of sufficient evidence of robbery and felony-murder predicated on a theory of robbery, as well as insufficient evidence of burglary, felony-murder predicated on a theory of burglary, and premeditated murder (see Arguments X-XIII, *infra*), the jury's determination of guilt on counts 1 and 3 violated the Eighth Amendment to the United States Constitution. (*Caldwell v. Mississippi, supra.*)

## X

## THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT THE SPECIAL CIRCUMSTANCE FINDING IN COUNT 3 OF ROBBERY-MURDER PURSUANT TO § 190.2, SUBDIVISION (a)(17)(vii); INSUFFICIENCY OF THE EVIDENCE ALSO RENDERED THE SPECIAL CIRCUMSTANCE FINDING UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

The original information and amended information alleged, inter alia, that the count 1 murder was committed while appellant was engaged in the commission or attempted commission of robbery in violation of § 211 within the meaning § 190.2, subdivision (a)(17)(i). (CT 143, 295.) In addition to robbery and felony-murder instructions, the jury was instructed on the special circumstance of murder in the commission or attempted commission of a robbery in the language of CALJIC No. 8.80.1 (1993 Revision) [special circumstances -- introductory] and CALJIC No. 8.81.17 (1991 Revision) [murder in commission of a robbery]. (CT 432, 434.)

The jury found true the special circumstance that the murder was committed while appellant was engaged in the commission or attempted commission of robbery within the meaning of 190.2, subdivision (a)(17)(i). (CT 471.)

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### B. Sufficiency of Evidence, Generally

Substantial evidence must support a special circumstance finding. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1022.) In reviewing the sufficiency of evidence for a special circumstance, a reviewing court asks whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt. (*People v. Mickey* (1991) 54 Cal.3d 612, 678.) Here, the record does not contain substantial evidence that appellant murdered Gayle Johnson while engaged in the commission or attempted commission of a robbery. Specifically there is no indication in the entire record that the perpetrator formed an intent to steal from the victim before attacking and killing her.

### C. Insufficiency of the Evidence to Support the Special Circumstance Finding that the Murder Occurred in the Commission or Attempted Commission of a Robbery

The evidence is not sufficient to support the special circumstance finding that the murder occurred in the commission or attempted commission of robbery. More particularly, the guilt phase evidence is insufficient to establish that robbery was not merely incidental to the killing in the sense that the evidence shows that the perpetrator's primary criminal goal was to kill rather than to steal. The evidence is also insufficient to establish that the intent to steal arose prior to the use of force.

To prove a felony-murder special circumstance, such as murder in the

commission or attempted commission of a robbery, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder. (*People v. Mendoza, supra,* 24 Cal.4th 130.) While concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance (*People v. Raley* (1992) 2 Cal.4th 870, 903), when the underlying felony is merely incidental to the murder the felony-murder special circumstance does not apply. (*Id.*) When the intent to steal arises only after force was used, the offense is theft, not robbery. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351; *People v. Green, supra,* 27 Cal.3d at p. 54.) Moreover, an inference or presumption that a killing was for purposes of robbery arises when only one kills another and takes *substantial* property from the victim. (*People v. Turner* (1990) 50 Cal.3d 668, 688; *People v. Yeoman, supra,* 31 Cal.4th at p. 127.).)

Here, there was strong and credible evidence of motive and intent apart from accomplishing robbery or a theft-related crime, as well as evidence that an intent to steal and the taking of the victim's property occurred after the killing and was simply to conceal the killing. (See *People v. Zapien* (1993) 4 Cal.4th 929, 984.) The depth and number of the wounds, and the brutal manner of the killing, were far more consistent with a sudden, random explosion of violence than a calculated murder during the commission or attempted commission of a robbery. Absent other evidence in the record that any property was taken before the killing

and for the further reasons discussed in Argument IX, *supra*, the evidence as a whole was neither strong nor convincing that appellant harbored an intent to steal from the outset. Consequently, the evidence is not sufficient to permit the jury to conclude that the killing was motivated by robbery, to facilitate a robbery, or to prevent identification of the robber required to support the robbery-murder special circumstance. Based on the evidence adduced at trial, no rational trier of fact could find beyond a reasonable doubt that appellant formed the intent to commit or attempted to commit robbery before entering the church or took, or attempted to take, any property from the victim by force or fear while the victim was alive.

Finally, because the evidence was also insufficient to support appellant's first degree murder conviction and special circumstances based on any theory of premeditation and deliberation or burglary felony-murder (see Arguments IX, *supra*, and XI, XII, and XIII, *infra*), insufficiency of the evidence of robbery and felony-murder predicated on a theory of robbery, and insufficiency of the evidence to support the special circumstance finding that the murder occurred in the commission or attempted commission of a robbery, cannot simply be dismissed as harmless in respect to guilt or penalty. (See *Sanders v. Woodford, supra,* 373 F.3d 1054 [reversing judgment of conviction in capital case for failure to conduct proper harmless error analysis after this Court invalidated one of three special circumstance findings].)

## XI

## THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT APPELLANT'S CONVICTION OF SECOND DEGREE BURGLARY ON COUNT 2 (§ 459) AND FIRST DEGREE FELONY-MURDER ON COUNT 1 (§ 187) PREDICATED ON THE COMMISSION OR ATTEMPTED COMMISSION OF A BURGLARY

### A. Factual and Procedural Background

Both the original information (CT 143) and amended information charged appellant in count 2 with one count of burglary. (§ 459.) (CT 295) In addition to deliberate and premeditated murder, the amended information filed on the eve of trial newly alleged that the murder was committed during the commission of a burglary. (CT 294.)

The jury found appellant guilty on count 1 of first degree murder and on count 2 of second degree burglary. (CT 378-379, 466-475.) The jury was not required to specify in the verdicts the theory of first degree murder on which its verdict was predicated or to agree unanimously whether the first degree murder was deliberate and premeditated or whether it was committed during the commission or attempted commission of a burglary or robbery.

Appellant contends that the evidence, in several respects, was insufficient to support the judgment of conviction of both the count 2 burglary and the count 1 murder to the extent that it was predicated in whole or in part on a burglary felony-murder theory alternatively submitted to the jury.

**B. Standard of Review; Burglary, Generally**

In evaluating a criminal conviction challenged as lacking evidentiary support, a reviewing court must consider the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) A judgment should be upheld if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Miranda, supra,* 44 Cal.3d at p. 86.)

The same standard of review applies to cases in which the prosecution has relied mainly on circumstantial evidence (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) In addition, the reviewing court must accept logical inferences that the jury might have drawn from the circumstantial evidence. (*Id.* at p. 11.) However, the judgment must be supported by "substantial evidence," which has been defined as evidence that reasonably inspires confidence and is of solid value. (*People v. Bassett, supra,* 69 Cal.2d at p. 139; *People v. Javier A., supra,* 38 Cal.3d at p. 819.)

**C. Constitutional Due Process Standards**

A conviction or other finding which is not supported by sufficient evidence constitutes not just an error of California law, but also a denial of due process and

a violation of federal constitutional rights, particularly the Fourteenth Amendment to the United States Constitution. (*Jackson v. Virginia, supra*, 443 U.S. at p. 309.) The federal constitutional standard for determining the sufficiency of the evidence is identical to the standard under California law. (*People v. Staten* (2000) 24 Cal.4th 434, 460.) Under both, reversal is required if one of the essential elements of the crime is not supported by substantial evidence. (*People v. Hernandez* (1988) 47 Cal.3d 315, 345-346.)

**D. Insufficiency of the Evidence of Burglary and Felony-Murder**

The elements of burglary to commit larceny are defined in CALJIC No. 14.50 (1990 Revision) with which the jury was instructed in this case. (CT 414.) As defined in CALJIC No. 14.50 (1990 Revision), the commission of burglary consists of (1) entry into a building or room, (2) a specific intent to steal, take, and carry away the personal property of another of any value, and (3) the further specific intent to deprive the owner permanently of such property.

Burglary requires proof of entry into a building or room with the intent to commit theft or a felony. If there is evidence of the requisite intent to commit theft or a felony, the offense is deemed completed whether or not the underlying act is committed. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.) However, where there is a lack of intent to commit the underlying felony or theft, the evidence fails to establish a burglary. The evidence in this case was insufficient to support the underlying burglary.

A charge of first degree murder based on a felony-murder theory requires proof of an independent felonious intent separate from the intent to commit homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) In other words, although the intent to commit theft or any felony, including the intent to unlawfully kill or to commit felonious assault, would support a burglary conviction, the felony-murder rule does not apply to a burglary committed for the sole purpose of assaulting or killing the homicide victim. (*People v. Garrison* (1989) 47 Cal.3d 746, 788-789; *People v. Wilson* (1969) 1 Cal.3d 431, 442.) There must be an independent intent to commit another felony (e.g., theft) underlying the burglary for it to serve as the basis for a felony-murder conviction. (See *People v. Sears* (1970) 2 Cal.3d 180, 188 [first degree murder conviction reversed on basis of *Ireland* and *Wilson*]; *People v. Sanders* (1990) 51 Cal.3d 471, 509 [burglary based on intent to assault cannot support-felony murder instruction, following *Ireland* and *Wilson*].)

Here, a killing obviously occurred, but the evidence was insufficient to support the jury's conclusion that it was committed in the course of a burglary. The evidence offered at trial in respect to count 2 demonstrates that the perpetrator's intent fell within the *Ireland* merger doctrine, that is, an intent to commit murder, rather than a separate, primary intent to commit theft. While the intent required for burglary is seldom established with direct evidence, but may be inferred from all of the facts and circumstances surrounding the crime, here, as

discussed in prior assignments of error (Arguments IX and X, *supra*), the evidence shows the taking was merely incidental the killing and thus is insufficient to support a felony-murder verdict predicated on burglary.

There was no evidence that appellant was aware of the church schedule or that any money or property would be found in the church office or in possession of someone at the church at the time of the killing. There was no strong or credible evidence of any sort, direct or circumstantial, that appellant planned or prepared to commit a burglary or other theft crime or entered the church with the intent to burglarize the premises.

No property was shown to have been acquired or taken before the killing. The evidence at trial more reasonably supported the alternative scenario that the entry was merely incidental to a killing. There were no signs that any personal property belonging to the victim had been touched or moved before the killing which also would have been consistent with a burglary theory or concurrence of intent and act before the killing. The blood evidence in this case was totally inconsistent with an intent to commit theft before the killing. Blood found on the victim's purse could only have been deposited after, not before, the killing.

The manner of the victim's death and the absence of evidence that appellant attempted to take property from the victim before the killing -- the blood evidence conclusively showing that both the handling of the victim's purse and the dumping of its contents could only have occurred after the killing -- thus failed to

support a finding of first degree felony-murder.

Although reasonable inferences must be drawn in support of the judgment, an appellate court may not "go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Memro* (1985) 38 Cal.3d 658, 695-696.) Considered as a whole, the evidence of burglary and felony-murder predicated on the commission of a burglary is nether strong nor substantial. No rational trier of fact could have found that appellant perpetrated a burglary with the intent to commit theft.

Consequently, appellant's burglary conviction in count 2 cannot be sustained. Moreover, the evidence failed to support the jury's verdict in count 1 of first degree murder to the extent that it was predicated on a burglary felony-murder theory of liability. Because the jury considered legally insufficient evidence in rendering its verdicts, appellant's rights to due process of law and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were also violated. (*Estelle v. McGuire* (1991) 502 U.S. 62; *Jackson v. Virginia, supra*, 443 U.S. at p. 307.) Absent sufficient evidence, appellant's convictions on counts 1 and 2 also violated the Eighth Amendment requirement of a reliable determination of both guilt and penalty. (*Caldwell v. Mississippi, supra,* 472 U.S. 320.)

Finally, because the evidence was also insufficient to support appellant's

first degree murder conviction and special circumstances based on any theory of premeditation and deliberation or robbery felony-murder (see Arguments IX and X, *supra*, and XII and XIII, *infra*), insufficiency of the evidence of burglary and felony-murder predicated on a theory of burglary, and insufficiency of the evidence to support the special circumstance finding that the murder occurred in the commission or attempted commission of a burglary, cannot simply be dismissed as harmless in respect to guilt or penalty. (See *Sanders v. Woodford, supra,* 373 F.3d 1054 [reversing judgment of conviction in capital case for failure to conduct proper harmless error analysis after this Court invalidated one of three special circumstance findings].)

## XII

## THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT THE SPECIAL CIRCUMSTANCE FINDING IN COUNT 1 OF BURGLARY-MURDER PURSUANT TO § 190.2, SUBDIVISION (a)(17)(vii)

### A. Factual and Procedural Background

The amended information filed on the eve of trial alleged that the count 1 murder was committed while appellant was engaged in the commission or attempted commission of burglary in violation of §§ 459/460 within the meaning of § 190.2, subdivision (a)(17)(vii). (CT 295.) In addition to burglary and felony-murder instructions, the jury was instructed on the special circumstance of murder in the commission of a burglary in the language of CALJIC No. 8.80.1 (1993 Revision) [special circumstances -- introductory] and CALJIC No. 8.81.17 (1991 Revision) [murder in commission of a burglary]. (CT 432-433.) The jury found appellant guilty on count 2 of second degree burglary. (CT 467.) The jury also found true the special circumstance that the murder was committed while appellant was engaged in the commission or attempted commission of burglary within the meaning of 190.2, subdivision (a)(17)(vii). (CT 470.)

### B. Insufficiency of the Evidence

In reviewing the sufficiency of the evidence for a special circumstance, the question to be addressed on appeal is whether, after viewing the evidence in the

light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt. (*People v. Rowland* (1992) 4 Cal.4th 238, 271.)

To prove a felony-murder special circumstance like murder in the commission of a burglary, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder. (*People v. Mendoza, supra,* 24 Cal.4th at p. 182.) "Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Raley, supra,* 2 Cal.4th at p. 903.) It is only when the underlying felony is merely incidental to the murder that the felony-murder special circumstance does not apply. (*Id.*) For the same reasons set forth in Argument XI, *supra*, the evidence in this case was also insufficient under the due process clause of the Fourteenth Amendment to the United States Constitution and the comparable due process clause of the California Constitution (Art. I, § 14) to support the burglary-murder special circumstance within the meaning of § 190.2, subdivision (a)(17)(vii). If the evidence is insufficient as to the underlying burglary and first degree felony-murder convictions (as discussed in Argument XI, *supra*), the finding of the felony-murder special circumstance must automatically be set aside. (*People v. Green, supra,* 27 Cal.3d at p. 52.)

Finally, because the evidence was also insufficient to support appellant's

first degree murder conviction and special circumstances based on any theory of robbery felony-murder or premeditation and deliberation (see Arguments IX and X, *supra*, and XII and XIII, *infra*), insufficiency of the evidence of burglary and felony-murder predicated on a theory of burglary, and insufficiency of the evidence to support the special circumstance finding that the murder occurred in the commission or attempted commission of a burglary, cannot simply be dismissed as harmless in respect to guilt or penalty. (See *Sanders v. Woodford, supra,* 373 F.3d 1054 [reversing judgment of conviction in capital case for failure to conduct proper harmless error analysis after this Court invalidated one of three special circumstance findings].)

## XIII

## THE EVIDENCE OF PREMEDITATION AND DELIBERATION WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF FIRST DEGREE MURDER ON A PREMEDITATION THEORY UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14)

### A. Factual and Procedural Background

Both the original information and amended information alleged one count of deliberate and premeditated murder in violation of § 187, subdivision (a). (CT 142, 294.) The jury was instructed on premeditated murder in the language of CALJIC No. 8.10 (1994 Revision) [murder defined], CALJIC No. 8.11 [malice and malice aforethought], CALJIC No. 8.20 [deliberate and premeditated murder], and on the requisite specific intent for deliberate and premeditated murder using the combined language of CALJIC No 3.31 and No. 3.31.5 [concurrence of act and mental state or specific intent]. (See CT 420-424.) In particular, as part of its instruction in the language of CALJIC No. 8.20, the court told the jury as follows:

> [A] mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.
>
> (CT 423-424.)

The jury was instructed that unanimity was required to find appellant guilty

of either first degree or second degree murder in the language of CALJIC No. 8.74 (CT 431.) The jury was also required to agree unanimously in order to find each of the special circumstances to be true in the language of CALJIC No. 8.80.1 (1993 Revision). (CT 432.) The jury was not required, however, unanimously to agree that the first degree murder was deliberate and premeditated or was committed while appellant was engaged in the commission or attempted commission of a burglary or during immediate flight after the commission or attempted commission of a burglary (CALJIC No. 8.81.17 (1991 Revision) or during the commission or attempted commission of a robbery or during immediate flight after the commission or attempted commission of a robbery (CALJIC No. 8.81.17 (1991 Revision). (CT 434.) In short, the jury was not instructed that it had to agree unanimously whether appellant committed willful, deliberate, and premeditated murder or felony-murder. As noted by the prosecutor during closing argument:

> Now, when you get your verdict forms, they aren't going to say -- you are only going to have one verdict form -- well, on your murder verdict forms, you'll have verdict forms that say 1A, guilty of first degree murder; 1B, guilty of second degree murder; 1C, not guilty. You will not have verdict forms that says guilty of first degree murder using the first degree felony murder burglary analysis. You're not going to have that. It's not going to distinguish between it. You are not going to have a verdict form that says -- well, it's first degree murder based on willful, deliberate, premeditated analysis or theory. It's not going to say that. It's not going to say it's first degree murder based on the robbery -- first degree felony murder in the robbery. All it says is first degree murder.
>
> The law basically says you don't have to state in your verdict

> form that is the legal basis for the first degree murder. It could be any one of those three and it's sufficient. You don't have to put it -- it's not -- there is no requirement that you even agree on which theory as long as you all believe it is first degree murder under one of these three first degree murder rules and that qualifies as a first degree murder.
>
> (RT 3681-3682.)

The jury found appellant guilty on count 1 of first degree murder but did not specify whether the murder was premeditated and deliberate or felony-murder. (See CT 466.)

**B. Insufficiency of the Evidence, Generally**

A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. (§ 189 ["willful, deliberate and premeditated killing" as first degree murder].) In this context, "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (CALJIC No. 8.20, quoted with approval in *People v. Perez* (1992) 2 Cal.4th 1117, 1123.) The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly " (*People v. Thomas* (1945) 25 Cal.2d 880, 900; accord, *People v. Perez, supra*, 2 Cal.4th at p. 1127.)

In assessing the sufficiency of the evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the Court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson, supra,* 26 Cal.3d at p. 578; see also *Jackson v. Virginia, supra*, 443 U.S. at pp. 319-320.) The reviewing court must determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Berryman, supra,* 6 Cal.4th at p.1083.) The same standard of review applies to cases in which the prosecution has relied mainly on circumstantial evidence (*People v. Rodriguez, supra,* 20 Cal.4th at p.11.) Any judgment based on circumstantial evidence must still be supported by substantial evidence which has been defined as evidence that reasonably inspires confidence and is of solid value. (*People v. Bassett, supra,* 69 Cal.2d at p. 139; *People v. Javier A., supra,* 38 Cal.3d at p. 819.)

**C. Insufficiency of the Evidence of Premeditation and Deliberation**

Based on the entire record in this case, no rational trier of fact could have concluded from the evidence that appellant made a cold and calculated decision to take Gayle Johnson's life after weighing considerations for and against. The evidence in this case fails to establish a preexisting intent to kill consistent with a

premeditated and deliberate homicide with malice aforethought; at best, the evidence of the killing was consistent with a lesser grade of homicide than first degree murder. To the contrary, and as more fully demonstrated in Arguments IX and X, *supra*, the physical evidence and expert medical testimony compel the conclusion that the killing occurred during an explosion of rage and violence, hastily executed and certainly not premeditated with deliberation or malice aforethought.

In *People v. Anderson, supra,* 70 Cal.2d 15, the Court identified three types of evidence that are indicative of premeditation and deliberation: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as planning activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a motive to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of a pre-existing reflection and careful thought and weighing of considerations rather than "mere unconsidered or rash impulse hastily executed"; and (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design to take his victim's life in a particular way for a reason which the jury can reasonably infer

from facts of type (1) or (2). (*Id.* at pp. 26-27; see also *People v. Silva, supra,* 25 Cal.4th at p. 368 [evidence concerning planning, motive, and manner of killing are pertinent to determination whether killing was premeditated and deliberate; these factors are not exclusive nor are they invariably determinative].)

In the present case, none of the three types of evidence identified by the Court in *Anderson* was present in any degree. There was no evidence of planning or any statements or admissions by appellant made to third parties or to the police after his arrest that appellant was planning or planned to kill the victim in this case. There was no evidence that appellant sought out or obtained a weapon to be used in the killing. While the perpetrator used a knife, appellant was shown only to have carried a knife for "scrapping" and recycling work with Art Jennings. Appellant made no incriminating admissions that shed any light on the nature of or motive for the killing in this case. The evidence of appellant's prior crimes also undermined the notion that the killing in this case was deliberate or premeditated, since, if anything else, those crimes showed a sudden explosion of violence during the commission other crimes.

There was no evidence of a preexisting or planned motive to kill, since by all accounts appellant had never before met the victim, and the killing was inconsistent with any other motive, if any, that appellant may have harbored on entering the church. Since there was no strong or credible evidence that appellant took any property belonging to the victim or the church before the killing, the

desire to prevent Gayle Johnson from identifying him or later from testifying against him could not have motivated the killing in this case.

As for the manner of killing, all of the physical and blood evidence at the scene inside the church were inconsistent with a deliberate, thoughtful, or systematic killing. Certainly, as this Court has previously stated, a violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation. (*People v. Pride* (1992) 3 Cal.4th 195, 247.) Here, however, the victim's wounds and the amount of blood deposited around the church indicated at most that the killing occurred during a brief moment of rage and struggle, not during a preplanned incident conceived to take personal or church property.

The depth and number of the wounds, the presence of defensive wounds on the victim's hands and arms about which Dr. Frank Sheridan testified extensively (See RT 2729-2760), and the position of the body, all indicated that the victim was not fending off an attack motivated by robbery. Indeed, Dr. Sheridan testified that all wounds occurred in quick succession, at about the same time within a minute or two at most, and most likely while the victim was lying on the floor. (See RT 2753-2760, 2765-2766, 2789-2798.) The brutal manner of the killing was thus far more consistent with a sudden, random explosion of violence than a calculated murder during the commission or attempted commission of a robbery.

Thus, unlike *Pride*, where there were no defensive wounds on one of the

two victims and the evidence tended to show that the defendant in a deliberate and premeditated manner pinned the victim down, here, the combination of both defensive and fatal wounds sustained by the victim showed that the killing occurred rapidly and during a brief, violent outburst. The existence of defensive wounds, as well as the amount of blood deposited around the church office, were overwhelmingly at odds with any notion of premeditation or deliberation yet wholly consistent with a killing during an unconsidered explosion of violence.

The hasty efforts made by the perpetrator after the killing to dilute the blood evidence and thereby prevent identification did not indicate in any manner that the killing was particularly thoughtful or deliberate. Indeed, the subsequent and hurried use of lotion (which was ready at hand inside the church) rather suggests that there was no planning consistent with a premeditated and deliberate killing. If anything, the behavior of the killer after the crime showed that the crime was ill-planned, ill-conceived, and spontaneous. Here again, rather than premeditated and deliberate, the crime appears by the evidence to have been an impromptu outburst, an unthinking reaction triggered by something that the victim said or did on being confronted inside the church office. Even the prosecutor offered corroborating evidence that the victim was strong-willed and would have resisted. (RT 2965-2966.)

In some cases, the Court has relied on evidence pertaining to the state of the

victim's clothing to support inferences or findings pertaining to the nature of the crime. (See *People v. Johnson, supra,* 6 Cal.4th at pp.39-40.) Here, the victim was found fully clothed. Only her shoes had been removed which certainly could have occurred at any time while the victim worked alone inside the church office, well before the killer entered the church, or after she had died when the several emergency workers arrived, moved her body, and removed her clothing and possibly her shoes. (See RT 2049-2050, 2054, 2057-2058.)

Although this Court has previously emphasized that the *Anderson* guidelines are descriptive and that the *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that a killing resulted from preexisting reflection and weighing of considerations (*People v. Thomas* (1992) 2 Cal.4th 489, 517; *People v. Perez, supra*, 2 Cal.4th at p. 1125), nothing in the record in this case reveals any strong or credible evidence in support of a finding that the killing was premeditated and deliberate murder. Although reasonable inferences may be drawn in support of the judgment, the Court should not go beyond inference and into the realm of speculation and guesswork in order to find support for the judgment. Applying the *Anderson* guidelines to this case, one searches in vain for any evidence of planning, motive, and a manner of killing indicative of a deliberate intent to kill. The facts and evidence revealed by the entire record do not suffice to support a verdict on count 1 that the killing was premeditated and deliberate first degree

murder.

Premeditation and deliberation must result from careful thought and weighing of considerations. Typically, verdicts of first degree murder have been sustained when there is evidence of planning, motive and method; when evidence of all three types is not present, the Court has required either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing. (*People v. Edwards* (1991) 54 Cal.3d 787, 813-814.) Here, the evidence manifests neither careful thought nor a weighing of considerations required for the process of premeditation and deliberation. The prosecutor made much of the fact that the victim was strong-willed (see RT 2965-2966) signifying that she may well have "provoked" the violent and murderous outburst. (See *People v. Raley, supra,* 2 Cal.4th at p. 888 [where Court observed the absence of evidence "that the victims provoked defendant" that would have negated premeditation and deliberation].) Here, there was neither evidence of planning, motive, nor method consistent with a deliberate and premeditated killing. A finding of first degree murder predicated on a theory of premeditation and deliberation that is at best the product of conjecture and surmise should not be affirmed. (*People v. Memro, supra,* 38 Cal.3d at pp. 695-696.) Considered as a whole, the evidence of premeditation and deliberation is neither strong nor substantial. No rational trier of fact could have found on count 1 that appellant perpetrated a premeditated and deliberate killing with malice aforethought.

Because the jury considered legally insufficient evidence in rendering its verdicts, appellant's rights to due process of law and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were also violated. (*Estelle v. McGuire, supra,* 502 U.S. 62; *Jackson v. Virginia, supra*, 443 U.S. at p. 307.) Absent sufficient evidence, appellant's convictions on count 1 also violated the Eighth Amendment requirement of a reliable determination of both guilt and penalty. (*Caldwell v. Mississippi, supra,* 472 U.S. 320.)

Finally, because the evidence was also insufficient to support appellant's first degree murder conviction and special circumstances based on theories of robbery or burglary felony-murder (see Arguments IX through XII, *supra*), insufficiency of the evidence of robbery, burglary, and felony-murder predicated on theories of robbery and burglary, and insufficiency of the evidence to support the special circumstances findings that the murder occurred in the commission or attempted commission of a robbery or burglary, cannot simply be dismissed as harmless in respect to guilt or penalty. (See *Sanders v. Woodford, supra,* 373 F.3d 1054 [reversing judgment of conviction in capital case for failure to conduct proper harmless error analysis after this Court invalidated one of three special circumstance findings].)

## XIV

## THE PROSECUTOR REPEATEDLY COMMITTED MISCONDUCT DURING THE GUILT TRIAL; THE PROSECUTOR'S MISCONDUCT DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, AND DUE PROCESS, AND RENDERED THE GUILT AND PENALTY DETERMINATIONS UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Introduction

During trial, the prosecutor repeatedly committed serious and prejudicial acts of misconduct. Among other misconduct, the prosecutor repeatedly sought to elicit inadmissible testimony and evidence contrary to the trial court's rulings. The prosecutor repeatedly argued penalty during the guilt trial and repeatedly insinuated during the guilt trial that appellant might be released from prison if convicted and sentenced to anything less than death. The prosecutor repeatedly argued that appellant was guilty of other, uncharged crimes that were neither germane nor pertinent to the present case. The prosecutor erroneously insinuated that appellant changed his appearance after arrest and that he was thereby guilty because his appearance had changed. The prosecutor impermissibly insinuated that appellant was concealing evidence and thereby guilty. The prosecutor's numerous acts of misconduct during the guilt trial not only impermissibly inflamed the jury against appellant but undermined appellant's rights to a fair trial, impartial jury, due process of law, assistance of counsel, and to a reliable determination of guilt guaranteed by the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. The misconduct was not harmless beyond a reasonable doubt, and reversal of the judgment of conviction is therefore required.

### B. The Prosecutor Repeatedly Committed Misconduct

#### 1. The Prosecutor Repeatedly Referred to, and Sought to Elicit, Inadmissible Testimony and Evidence Contrary to the Trial Court's Rulings

The role of a prosecutor is to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction ... ." (*People v. Andrews* (1970) 14 Cal.App.3d 40, 48.) As noted by the United States Supreme Court, it "is as much [the prosecutor's] duty to retrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 778.)

It is thus misconduct for a prosecutor to make remarks in opening statements or closing arguments that refer to evidence determined to be inadmissible in previous rulings of the trial court. The prosecutor commenced his opening argument by referring to the testimony of Richard Nestor about appellant's flight from the scene of the 1982 crime. The prosecutor then spent more time discussing Nestor's testimony about appellant's flight from the 1982 crime scene than he did in discussing Makris' anticipated testimony about the incident itself. (See RT 1752-1755.) During the case-in-chief, the prosecutor

again violated the trial court's ruling by introducing the testimony of Richard Nestor and by having him testify expansively about appellant's flight after the 1982 incident. (See Argument II, Subsection D, *supra.*)

It is also misconduct for the prosecutor to violate a trial court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. (*People v. Silva, supra,* 25 Cal.4th at p. 373; *People v. Price, supra*, 1 Cal. 4th 324, 451.) The prosecutor repeatedly did so here. Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected. (*People v. Bell* (1989) 49 Cal. 3d 502, 532.) The prosecutor repeatedly attempted to elicit testimony after appellant's objections were sustained. For example, as discussed more fully in Argument II, *supra*, the prosecutor sought rulings on the admissibility of evidence or testimony and then repeatedly ignored and circumvented the court's rulings both during argument to the jury and at trial. Repeatedly, over appellant's objections, the prosecutor referred to and tried to admit otherwise inadmissible evidence -- even in the face of explicit trial court rulings to the contrary. During the guilt trial, the prosecutor repeatedly referred to evidence or testimony that the court had ruled inadmissible.

It is misconduct for a prosecutor intentionally to elicit inadmissible testimony. (*People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Bonin, supra,* 46 Cal.3d at p. 689, overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.) For example, the following patently objectionable and improper

questions were asked of appellant by the prosecutor during cross-examination:

> Q. Are you trying to leave the impression that if you commit a crime, you just admit it?
>
> (RT 3251.)

Appellant's objection was sustained. (RT 3251.)

> Q. You don't like prison --
>
> (RT 3252.)

Appellant's objection was sustained. (RT 3252.)

> Q. After you were released from prison in 1982, did you -- had you gotten any insight as to why you committed those crimes that landed you in prison back in 1972?
>
> (RT 3258.)

Appellant's objection was sustained; the question and appellant's answer were ordered stricken. (RT 3258-3259.)

> Q. Did you do something at your 1982 trial to try to disguise your appearance?
>
> (RT 3360.)

Appellant's objection was sustained. (RT 3360.)

> Q. So when you were released on December 12th, 1990, you had spent about 18 years in prison for the 1972 crime and 1982 crimes, is that correct, approximately?
>
> (RT 3373.)

Appellant's objection was sustained. (RT 3373.)

> Q. Well, during that period of time, isn't it true that you spent this time in prison all because victims had come into court and identified you as their attacker
>
> (RT 3373.)

Appellant's objection was sustained. (RT 3373.)

> Q. You knew if you committed the crime of murder, you could get the death penalty?
>
> (RT 3379.)

Appellant's objection was sustained pursuant to Evidence Code § 352. (RT 3377-3379.) Defense counsel again reiterated his continuing objection to the prosecutor's questions. (RT 3379-3380.)

Before appellant testified, the court limited the scope of permissible cross-examination to preclude details of appellant's prior crimes. At the commencement of appellant's cross-examination, the prosecutor ignored the trial court's ruling and thereafter intentionally sought to inflame the jury through improper questioning. Over appellant's objections (RT 3221, 3361), the prosecutor continued to elicit from appellant inadmissible details of the prior 1972 and 1982 crimes and, over appellant's repeated objections, cross-examined appellant extensively not only about the 1972 crime, but also about his 1973 prison escape, as well as the details of the 1982 Makris incident and details of his flight and car chase involving Richard Nestor. Over 150 pages of trial transcript were consumed

in cross-examining appellant about the details of his prior crimes and other extraneous matters purportedly involving those crimes contrary to the trial court's ruling limiting such evidence and testimony.

Here, by repeatedly ignoring the trial court's evidentiary rulings, by repeatedly seeking to elicit inadmissible testimony, by circumventing the trial court's rulings on the admissibility of evidence both during argument to the jury and at trial, the prosecutor committed serious and abusive acts of misconduct. As further demonstrated in Subsection B, *infra*, appellant was prejudiced by the misconduct, compelling reversal of the judgment of conviction on all counts.

2. The Prosecutor Repeatedly Argued Penalty During the Guilt Trial and Repeatedly Insinuated that Appellant Might Be Released from Prison if Convicted and Sentenced to Life Imprisonment Without Parole

The prosecutor commenced opening argument at trial with a discussion of the prior 1972 Clark rape in Idaho of which appellant had been convicted in 1973. The prosecutor stated that appellant "was sentenced to life in prison in Idaho" for that crime. (RT 1750.) In the very next breath, the prosecutor told the jury: "Now, in Idaho at that time life in prison didn't mean life in prison. At some point [appellant] was paroled ... from Idaho prison." (RT 1750.)

After discussing the details of the 1972 Johnnie Clark incident, the prosecutor then turned to the 1982 prior robbery and assault with intent to commit rape committed by appellant after his release from prison in Idaho. (See RT 1750-

1754.) First discussing the details of the 1982 crimes,[38] the prosecutor again explicitly told the jury that the sentence imposed for a period of years actually constituted a lesser sentence:

> [Appellant] had a trial and was convicted of robbing Cindy Makris, assaulting her with intent to rape and with intentionally inflicting great bodily injury upon her and he was sentenced to prison. He was sentenced to the maximum the law allows at the time which was 13 years.
>
> Now, in California at that time 13 years didn't mean 13 years. A person would serve a portion of that time and then they had to be released on parole if they behaved themselves in prison.
>
> (RT 1755.)

The purpose of the opening statement generally is to inform the jury of the evidence the prosecution intends to present." (*People v. Millwee, supra,* 18 Cal.4th at p. 137.) Although he did not object to these statements or request a jury admonition to disregard the impropriety (see *People v. Fierro* (1991) 1 Cal.4th 173, 207), appellant should not be precluded from raising the misconduct on appeal. First, regardless whether appellant failed to object, the prosecutor's comments disclose an improper pattern of prosecutorial behavior that infected the trial with fundamental unfairness and deprived appellant of due process of law and

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[38]/ Contrary to his in limine motion and argument in support of that motion, the prosecutor presented more than the testimony of victim Cindy Makris during the guilt trial. As discussed in Argument II, *supra*, and Subsection (A)(1), *supra*, the prosecutor at length, and erroneously, focused on the testimony to be elicited from Richard Nestor as to appellant's flight after the crime and efforts to avoid apprehension, issues that were not in any way germane to the question of appellant's guilt.

a fair trial under the United States Constitution. (*People v. Hill, supra,* 17 Cal.4th at p. 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Second, this Court stressed in *Fierro* that if an objection would not have cured the harm, the Court may look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments. (*People v. Fierro, supra*, 1 Cal.4th at p. 207; see also *People v. Miller* (1990) 50 Cal.3d 954, 996.)

Here, neither an objection nor admonition would have cured the harm. A contemporaneous objection would only have highlighted the improper comments and have further inserted into the guilt phase improper considerations of penalty. Since, as further discussed in Subsection C, *infra,* the prosecutor's comments also constituted federal constitutional error, not subject to the contemporaneous objection or curative admonition rule, under the governing *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24), the error is nonetheless reversible because the repeated and cumulative acts of misconduct were not harmless beyond a reasonable doubt. (See *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Next, during his examination of parole agent Steven Slaten (RT 1968), ostensibly called to establish the fact of appellant's prior conviction, the substantive question asked by the prosecutor focused not on the fact of appellant's prior 1973 conviction but whether he had been sentenced to life imprisonment.

(RT 1969.) Appellant objected to the prosecutor's inquiry on foundational grounds; the objection was sustained by the court. (RT 1969.) The prosecutor then asked Slaten again whether appellant pled guilty to rape and had been sentenced to life imprisonment in Idaho. Appellant again objected; the trial court sustained the objection. (RT 1970.) The prosecutor asked Slaten when appellant was paroled (RT 1970), further indicating that the purpose of the prosecution's examination was not to establish appellant's prior conviction but rather to show not only that appellant had been paroled although previously sentenced to life imprisonment but also that a sentence of life imprisonment did not mean life imprisonment. Appellant repeatedly objected to the prosecutor's line of questioning; many of his objections were sustained. (See, e.g., RT 1970-1973.)

The subject and consideration of the death penalty should not be injected into the guilt phase of trial, directly or indirectly. (See *People v. Carrera* (1989) 49 Cal.3d 291, 318-319 & fn. 21.) Although CALJIC Nos. 17.42[39] (CT 456) and 8.83.2[40] (CT 437), which embody that principle and which, when given as here, serve the "obvious purpose of preventing discussion of a defendant's punishment at the guilt phase of the trial" (*People v. Jones* (2003) 30 Cal.4th 1084, 1114), the

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[39]/ In the language of CALJIC No. 17.42, the court instructed the jury: "In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict." (CT 456.)

[40]/ CALJIC No. 8.83.2, also given to the jury, provided: "In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. This is a matter which must not in any way affect your verdict or affect your finding as to the special circumstances alleged in this case." (CT 437.)

prosecutor's references to and discussion of life imprisonment were not simply passing or uncalculated remarks. The prosecutor's remarks were part of an overall strategy, commencing during the guilt trial, to encourage the jury improperly to consider penalty and the propriety of death in this case. The prosecutor obviously intended that the jury improperly consider during the guilt trial that appellant's previous sentence of life imprisonment was insufficient, that it permitted his release, and allowed him the opportunity to commit murder. By repeatedly injecting improper considerations of penalty, the prosecutor's remarks amounted to serious misconduct and infected the guilt trial with fundamental unfairness.

3. The Prosecutor Argued That Appellant Was Also Guilty of Other Uncharged Crimes

During opening argument, the prosecutor first discussed the prior 1972 rape of Johnnie Clark in Idaho and the 1982 robbery and attempted rape of Cindy Makris. (See RT 1748-1759.) Turning to the current case, the prosecutor repeatedly stressed that Gayle Johnson was a "strong woman." (See RT 1758, 1759.) The prosecutor then focused on the details of the charged crimes, arguing in part as follows:

> At around noon on August 26th, that Monday, 1991 while Gayle [Johnson] was alone there in the church Richard Foster walked in. Just like in 1982 when he walked into Cindy Makris' office, Richard Foster had a knife. Just like he had done before, Richard Foster confronted Gayle, made her get her purse and brought her back there into the minister's office in another room of the church. Just like he had before with Cindy Makris, the contents of Gayle [Johnson]'s purse were

> dumped on the floor at her feet and her purse was put on the floor, and he robbed Gayle Johnson.
>
> Now, I mentioned that Gayle was a strong-willed woman, a strong-willed woman, and at some point when Mr. Foster had plans for her, at some point she said no. At some point she, too, resisted just like Johnnie Clark resisted, just like Cindy Makris resisted. At some point Gayle resisted but, unfortunately, there was no Dick Nestor there to walk right in the middle of it and save her. ...
>
> * * *
>
> She struggled with Mr. Foster. ... Only she didn't stop resisting like Johnnie Clark stopped and was okay. Cindy Makris didn't quite stop but she was saved. ...
>
> (RT 1759-1760.)

Conduct by a prosecutor may render a criminal trial fundamentally unfair if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Espinoza, supra,* 3 Cal.4th at p. 820; *People v. Price, supra,* 1 Cal.4th at p. 447.) A prosecutor may commit misconduct by referring in argument to matters outside the record. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.)

Although he did not object to the prosecutor's statements or request a curative admonition (see *People v. Fierro, supra,* 1 Cal.4th at p. 207), appellant should not be precluded from raising the misconduct on appeal. First, regardless whether appellant failed to object, the prosecutor's comments disclose a continuing, improper pattern of prosecutorial behavior that infected the trial with fundamental unfairness in violation of due process of law and a appellant's right to

a fair trial under the United States Constitution. (*People v. Hill, supra,* 17 Cal.4th at p. 819; *People v. Espinoza, supra,* 3 Cal.4th at p. 820.) Second, this Court stressed in *Fierro* that if an objection would not have cured the harm, the court may look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments. (*People v. Fierro, supra*, 1 Cal.4th at p. 207; see also *People v. Miller, supra,* 50 Cal.3d at p. 996.)

As with the other prosecutorial acts of misconduct in this case, neither an objection nor admonition would have cured the harm. A contemporaneous objection would only have highlighted the insinuation that appellant committed, or attempted to commit, other, uncharged sex crimes in this case. In addition, the prosecutor's comments also constituted federal constitutional error, not subject to the contemporaneous objection or curative admonition rule, under the governing *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24). The repeated and cumulative acts of misconduct were not harmless beyond a reasonable doubt. (See *People v. Bolton, supra,* 23 Cal.3d at p. 214.)

Here, the prosecutor used his opening statement to appeal improperly to the jurors' emotions by repeatedly suggesting that appellant was also guilty in the present case of attempted sex crimes, although uncharged, as in 1972 and 1982. There was no evidence in this case that appellant intended or attempted to commit rape or any other sex crime. The prosecutor's references were inaccurate, lacked

any support in the evidence, and fraudulently promised evidence that could not be admitted in the prosecution's case-in-chief. Certainly, prosecutors have wide latitude to discuss and draw inferences from the evidence to be adduced at trial. (*People v. Dennis* (1999) 17 Cal.4th 468, 522.) At the same time, however, a prosecutor's comments must be reasonably warranted by the evidence (*People v. Terry* (1962) 57 Cal.2d 538, 561) and not unduly inflammatory or principally aimed at arousing the passions or prejudice of the jury. (*People v. Sanders* (1995) 11 Cal.4th 475, 527.) Here, the prosecutor's statements during opening argument were more than fair comment on what he anticipated the evidence would show. Insinuating uncharged crimes, the comments were simply deceptive and, in light of the charging document and anticipated evidence, reprehensible. (See *People v. Pinholster, supra,* 1 Cal.4th at p. 948 [referring to matters outside the record clearly is prosecutorial misconduct]; *People v. Earp, supra*, 20 Cal.4th at p. 858.)

4. The Prosecutor Erroneously Insinuated That Appellant Was Guilty Because He Changed His Appearance at Trial

During his examination of Richard Nestor about appellant's flight in 1982 from Makris' office, the prosecutor inquired whether appellant's appearance had changed at the time of the preliminary examination. Nestor testified that while appellant's hair appeared fluffy, dirty, or possibly "just big" (RT 1876), at the time of the preliminary hearing, appellant's appearance had changed in that his hair was newly "slicked back." (RT 1876.) The prosecutor then elicited the following

testimony from Nestor:

> Q. All right. And at the [1982) trial when -- and when you first saw him at the preliminary hearing, did that kind of throw you off, here is a person with a beard that didn't exist at the time you had him arrested that you apprehended him, did that throw you off a little bit?
>
> A. Made him look different, yes.
>
> Q. Did that kind of throw you off, you thought, how could this kind of thing be allowed to happen, a person can try to disguise their appearance and be allowed to do that?
>
> A. Yes, it did.
>
> (RT 1876.)

Appellant's defense counsel objected to the prosecutor's question, asserting it was leading and suggestive. The trial court sustained the objection. (RT 1876.) Immediately, however, the prosecutor elicited further testimony whether appellant's shaved his beard at the time of trial in the Makris case. (RT 1876.)

It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist. (*People v. Warren* (1988) 45 Cal.3d 471, 480; see also *United States v. Elizondo* (7th Cir. 1990) 920 F.2d 1308, 1313.) It is also a well-established principle of due process that the prosecution cannot present evidence known to be false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted. (*Giles v. Maryland* (1967) 386 U.S. 66; *Napue v. Illinois* (1959) 360 U.S. 264; *People v. Sakarias, supra.* 22 Cal.4th at p. 633.)

Under similar circumstances, this Court held that a prosecutor commits misconduct by asking "a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means." (*People v. Price, supra*, 1 Cal.4th at p. 481.) Such a question implying facts harmful to the defendant is misconduct when it puts before the jury information that falls outside the evidence and that, but for the improper question, the jury would not have otherwise heard. (See *People v. Warren, supra,* 45 Cal.3d at p. 481 [describing the gist of the misconduct as implying in the question "facts [the prosecutor] could not prove"].)

Moreover, unlike *People v. Cunningham, supra,* 25 Cal.4th 926, where the prosecutor apparently wished to explain that the defendant's appearance had changed between the time of the murder and the time of trial, and therefore witnesses would describe him differently from his appearance at trial (*id.* at pp. 1001-1002), here the clear import of the prosecutor's question was to encourage the jury to infer that appellant was guilty in this case because he had in the past changed his appearance in other cases ostensibly to prevent identification. (See also *People v. Ashmus* (1991) 54 Cal. 3d 932, 974 [where defendant's alteration of appearance between the time of incident and the time of trial was relevant to issue of identity].)

In this case, the prosecutor apparently wished to convey, and it is

reasonably likely the jury apprehended, that appellant on a former occasion deliberately altered his appearance in order to raise a doubt as to identity, even though there was no issue of personal identification in this case as there were no eyewitnesses to the current crimes charged. The prosecutor's questions were particularly insidious because they related to prior issues of identity for the purpose of inferring current consciousness of guilt.

Surely, the prosecutor was aware that jail grooming requirements alone could have accounted for appellant's change in appearance. The specific suggestion that appellant changed his appearance was thus particularly insidious because the prosecutor also knew that appellant, in this case, when he first visited the church appeared disheveled and unkempt -- consistent with mental illness, not necessarily consciousness of guilt -- but by the time of trial certainly looked different because of jail grooming rules and a standard, institutional diet.

In addition, the prosecutor's insinuations of guilt because appellant previously changed his appearance cannot be dismissed as harmless. Although the jury was instructed that statements of counsel are not evidence, and not to assume as true insinuations suggested by a question, and that questions are not evidence in the language of CALJIC No. 1.02, the jury was also instructed on permissible inferences and circumstantial evidence (CALJIC No. 2.00). More significantly, the prosecutor's questions related to the key issue of identity for which there was, unlike appellant's prior crimes, no eyewitness testimony, and the jury was urged

to infer appellant's present consciousness of guilt on the basis of past conduct.

### 5. The Prosecutor Impermissibly Insinuated that Appellant Was Concealing Evidence

During his redirect examination of David Stockwell, the criminalist who processed the church for blood evidence and who testified about the results of his blood analyses, the prosecutor asked the following question:

> Q. Okay. I'd like to go through here and list which stains you released portions of to the defense for re-analysis, the defense criminalist -- the request from this criminalist requested starting at item A-10a.
>
> (RT 2437.)

Defense counsel immediately objected on relevance grounds, Evidence Code § 352, and on the ground that the prosecutor was violating the confidentiality of defense trial preparation. (RT 2437-2438.)

During his cross-examination of Dr. Mueller, appellant's DNA expert witness, the prosecutor asked a series of questions regarding whether he tested or analyzed any of the blood samples originally analyzed by Cellmark Laboratory about which Dr. Cotton had previously testified during the prosecution's case-in-chief. The prosecutor conducted the following examination:

> Q. You're familiar with a lot of DNA labs, aren't you?
> A . Yes.
>
> Q. And if I had a blood sample and I thought somebody screwed up and didn't do it right, I could call anyone of those DNA labs and say, would you reanalyze this, couldn't I?
> A. Not necessarily, no,

Q. How many DNA labs do you know of that anybody could pick up the phone, any attorney, and say, hey, I think they screwed up, I want this reanalyzed right now? How many do you know of?

A. Those would have to be private labs and there are probably, the ones that I'm familiar with, six, seven different private labs that would do some type of DNA test.

Q. Now, did you -- you were hired by the defense in this case to give them some advice on DNA analysis, is that correct?

A. On the population genetic issues, that's correct.

Did you tell them here's a lab, send that blood over there and reanalyze it?

(RT 3090-3091.)

At this point, defense counsel objected and stated he would "like to be able to express that outside the jury." (RT 3091.) The court sustained appellant's objection. (RT 3091.)

It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist. (*People v. Warren, supra,* 45 Cal.3d at p. 480.) Here, by his questions, the prosecutor urged the inference that the defense was intentionally hiding from the jury the results of blood analyses consistent with guilt. He insinuated improperly that appellant, in some manner, had the duty or burden to offer evidence of innocence in order to be acquitted of the charged crimes. Appellant, of course, had no such burden to offer evidence of or establish his innocence, yet that was the clear import of the prosecutor's questions. (See *In re Winship, supra*, 397 U.S. at p. 364; *People v. Osuna* (1969) 70 Cal.2d 759, 767-768.) By his questions, the

prosecutor also violated the rule against argumentative questions -- that is, questions designed to engage the witness in an argument rather than to elicit facts within the witness's knowledge. (See *People v. White* (1954) 43 Cal.2d 740, 747.)

Moreover, a witness may not be examined on matters that are irrelevant to the issues in the case. (Evid. Code, § 350; *People v. Gloria* (1975) 47 Cal.App.3d 1, 4.) That appellant's expert requested analysis of blood evidence was simply irrelevant to his testimony because the subject matter of his testimony, as the prosecutor well knew, did not pertain to the methodology or accuracy of the DNA analysis performed. Dr. Mueller's testimony concerned and focused on the interpretation of DNA results -- statistical analysis and probabilities -- not the propriety of the blood analysis.

**C. Appellant Was Prejudiced by the Prosecutor's Misconduct**

Prosecutorial misconduct implies the use of deceptive methods to attempt to persuade the trier of fact. (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) Crucial to a claim of prosecutorial misconduct is not the good faith of the prosecutor but the potential injury to the defendant. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Indeed, appellant need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of the conduct, nor is his claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith. (*People v. Bolton, supra,* 23 Cal.3d at p. 214; *People v. Price, supra,* 1 Cal.4th at p. 447.)

Because the misconduct in this case necessarily impacted appellant's rights to due process, assistance of counsel, fair trial, and to a reliable determination of guilt and penalty guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as discussed in Subsection C, *infra*, the *Watson* harmless error standard does not apply.

In *Chapman v. Califonria, supra,* 386 U.S. 18, the United State Supreme Court made it clear that before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. The *Chapman* test also requires the reviewing court to consider the entire record as a whole. (*United States v. Hasting* (1983) 461 U.S. 499, 509.) In *People v. Barnett, supra,* 17 Cal.4th at p. 1133, this Court held that a defendant's conviction will not be reversed for prosecutorial misconduct unless it is "reasonably probable" that a result more favorable to the defendant would have been reached without the misconduct. (See also *People v. Cummings* (1993) 4 Cal.4th 1233, 1303.)

In this case, not only was there a "reasonable probability" that the jury construed or applied the prosecutor's improper argument, questions, insinuations, and comments in an objectionable manner, the error could not have been harmless beyond a reasonable doubt. The several instances of improper misconduct to which appellant objected, revealed a prosecutor bent on conviction and imposition of death at all costs. Although a partisan advocated for a particular point of view,

(see *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585), the prosecutor here committed a range of misconduct designed to affect both the jury's determination of guilt and the penalty imposed. The prosecutor repeatedly asked improper questions, repeatedly sought to elicit inadmissible evidence and testimony, repeatedly argued penalty during the guilt trial, repeatedly argued and insinuated that appellant's was guilty of other, uncharged crimes, and repeatedly accused appellant and, indirectly, defense counsel of concealing evidence. The instances of misconduct cited by appellant did not occur sporadically during the trial. Rather, throughout the course of the trial as a whole -- during both the examination and cross-examination of prosecution and defense witnesses -- the prosecutor intentionally engaged in improper tactics, the very purpose of which was to influence the jury above and beyond the evidence of guilt and to skew the jury's determination of penalty toward death.

In the present case, when viewed separately or cumulatively, the prosecutor's improper conduct, insinuations, and accusations against appellant and appellant's key witnesses, directly affected appellant. The several acts of misconduct could only have been understood by the jury to mean that appellant, through counsel, through his testimony, and through his witnesses, sought to deceive the jury and was thereby guilty and deserving of death. The prosecutor's misconduct did not constitute but isolated instances in a lengthy and otherwise well-conducted trial. (See *People v. Bonin, supra*, 46 Cal.3d at p. 690.) When the

entire range of misconduct is considered in light of the record as a whole, there was a reasonable likelihood that the jury and its guilt and penalty deliberations were affected by the prosecutor's misconduct. At the very least, the prosecutor's misconduct during the guilt trial contributed to the jury's verdict in the subsequent penalty trial.

Even under the traditional *Watson* test, which asks whether the misconduct "helped secure [the] convictions" (*People v. Hayes, supra,* 49 Cal.3d at p.1270), or, whether it is reasonably probable the verdict was thereby affected (*People v. Watson, supra*, 46 Cal.2d at p. 836), surely the answer must be in the affirmative and the misconduct deemed prejudicial in this case. There were no eyewitnesses to the charged crimes. The prosecution's case was largely based on circumstantial evidence and tenuous inferences drawn from that evidence. Appellant himself testified that he did not visit the church on the day the victim was killed. In light of testimony that the blood evidence when gathered or tested may have been contaminated, the testimony of both criminalist David Stockwell and Dr. Robin Cotton of Cellmark Diagnostics were subject to doubt. Indeed, defense-elicited testimony that Cellmark Diagnostics failed to engage in proper, independent proficiency testing further undermined the strength of the blood and DNA evidence on which the prosecution heavily relied. Even if admissible, the other crimes testimony by Johnnie Clark and Cindy Makris did not tie appellant directly to the charged crimes. Nestor's testimony had marginal or no probative value in

proving any of the essential elements or key issues of the crimes with which appellant was charged. Through his repeated acts of misconduct, the prosecutor elicited and introduced inadmissible and inflammatory evidence, repeatedly argued penalty during the guilt trial, and repeatedly argued that appellant was guilty because of uncharged crimes and because of the existence of evidence outside of the record. The prosecutor undermined the burden of proof. The prosecutor urged the jury to punish appellant for his prior crimes and other criminal conduct even if the jury had a reasonable doubt about his guilt. By any measure, the several and cumulative acts of misconduct committed by the prosecutor cannot be deemed harmless even under *Watson*.

The reversal of a criminal judgment based on prosecutorial misconduct is not designed to punish prosecutors but to protect the fair trial, due process, and other constitutional and statutory rights of defendants. (*People v. Bolton, supra,* 23 Cal.3d at p. 214; see also *People v. Turner* (1983) 145 Cal.App.3d 658, 678.) The actions of the prosecutor in this case undermined appellant's fundamental constitutional rights and prejudiced him in the eyes of the jury. Considering the nature and substance of the prosecution's case against appellant and the reasons advanced for death, there was more than a reasonable possibility the misconduct influenced the verdicts in this case. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1240; *People v. Cain, supra*, 10 Cal.4th 1, 79.)

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### D. The Prosecutor's Misconduct Also Violated Appellant's Rights to Due Process, Fair Trial, Assistance of Counsel, and to Reliable Determinations of Guilt and Penalty Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

As noted by the United States Supreme Court, improper conduct by a prosecutor can "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642; *People v. Morales* (2001) 25 Cal.4th 34, 44.) By intentionally ignoring the trial court's rulings limiting evidence of prior crimes and limiting the permissible scope of appellant's cross-examination, and by eliciting evidence and testimony contrary to the trial court's rulings, the prosecutor engaged in a pattern of misconduct so pervasive that it infected the integrity of the guilt and the reliability of the penalty proceedings. For the reasons discussed above, the prosecutor's conduct and questions amounted to an egregious pattern of conduct that rendered appellant's trial fundamentally unfair in violation of appellant's constitutional rights to a fair trial, due process, and a reliable determination of guilt guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

## B. Penalty Phase Issues and Assignments of Error

### XV

### THE TRIAL COURT'S PREINSTRUCTION TO ALL JURORS ENCOURAGED THE JURY TO IMPOSE THE DEATH PENALTY, REDUCED THEIR PERSONAL RESPONSIBILITY TO DETERMINE PENALTY, AND UNDERMINED APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND RENDERED THE PENALTY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTEH AMENDMENTS TO THE UNITED STATES CONSTITUTION

#### A. Factual and Procedural Background

After each group of prospective jurors was called during jury selection, the court read an explanation summarizing the information, the nature of the charges, and other details about this case. (See RT 612-615, 1023-1027, 1068-1071, 1192-1195, 1275-1279, 1416-1420.) After its initial explanation, the court read a further explanation to the jury about scheduling and hardship; the jurors were then sworn. (See, for example, 615-617, 1027-1029, 1072-1074, 1196-1197, 1279-1281, 1420-1422.) After all hardships had been excused for cause, the court preinstructed the prospective jurors. (See, for example, RT 641-649, 1049-1059, 1218-1226, 1313-1321, 1455-1464.) This instruction was ultimately given to every seated and alternate juror. (See RT 656, 661, 699-707 [Juror No.10 and Alternate Jurors Nos. 2 and 5][41]; RT 723, 758-767 [Juror No. 2]; RT 1019-1022,

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[41]/ Alternate Juror No. 5 has been erroneously designated "Juror No. 5" in portions of the record on appeal. (See, for example, RT 656.) Alternate Juror No. 5 was examined on voir dire immediately after prospective Juror Lupe Barrera who did not become a sworn juror in this case; both were in the same group of

1049-1059 [Jurors Nos. 3, 5, 12, and Alternate No. 4]; RT 1063, 1066, 1102-1111 [Juror No. 9 and Alternate Juror No. 6]; RT 1187-1188, 1190-1191, 1218-1226 [Jurors Nos. 1, 4, 7, and 11]; RT 1273-1274, 1313-1321 [Alternate Jurors Nos. 1 and 3]; RT 1409, 1414 [Jurors Nos. 6 and 8 ].)

Among the statements made by the court in its preinstruction to prospective jurors were the following:

> In 1970, the death penalty law in California and in many other states was found to be unconstitutional by the United States Supreme Court. The court concluded that the law was too arbitrary and that there was no way to determine in advance which people convicted of murder should face the death penalty and which should not.
>
> *At that time, there were many people on death row in California, and because the law under which they had been sentenced was invalidated, their sentences were commuted to life in prison.*
>
> At that time there was no punishment in California known as life imprisonment without parole so all those people received a sentence of life with parole possibility. *And it's because of those circumstances that men like Charles Manson and Sirhan Sirhan keep coming up for parole review.*
>
> *I know that it makes many of our citizens very nervous to think that these men might be paroled*, but what you need to know is that their cases are unique and they are considered for parole only because of that change in the law that occurred.

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prospective jurors. (See RT 825.) Thus, the reference to "Juror No. 5" in that group (RT 656) is incorrect. Juror No. 5 was actually part of a group later called and examined. (See, for example, RT 1022.)

> In 1978, California passed a new death penalty law *and it was an initiative on the ballot passed by the voters.* ...
>
> * * *
>
> Now, *this new law was tested, which took some years, and was found by both the California Supreme Court and the United States Supreme Court to be constitutional.* Many people have now been convicted under this new law, *and as you may be aware, many years passed before anyone was actually executed in California.*
>
> Much of that time was consumed in testing the new law and the appellate review of those Defendants' cases. However, there have been two executions in California in the recent past *and I anticipate that there will be many more executions in the near future.* ...
>
> (RT 641-649 [italics added].)

As to 11 of the seated and four alternate jurors,[42] the court additionally preinstructed the jury that "[i]n determining which penalty is to be imposed on the defendant, *you shall consider all of the evidence which has been received during any part of the trial of this case.*" (See RT 765 (Juror No. 2), 1054 (Jurors Nos. 3, 5, 12 and Alternate No. 4), 1107 (Juror No. 9 and Alternate Juror No. 6), 1223 (Jurors Nos. 1, 4, 7, and 11), 1318 (Alternate Jurors Nos. 1 and 3), 1460-1461 (Jurors Nos. 6 and 8) [italics added].)

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[42]/ Thus, at the beginning of trial, 11 of 12 seated jurors were instructed to consider all of the evidence received during any part of the trial; only Juror No. 10 and Alternate Jurors Nos. 2 and 5 were properly instructed "to consider all of the evidence which has been received during any part of this case except as you may hear after [sic] being [sic] instructed." (See RT 705.)

**B. Preinstructions, Generally**

Section 1093, subdivision (f), provides in part: "At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case." As the Court of Appeal noted in *People v. Frazier* (1948) 88 Cal.App.2d 99, 105, "[c]alling the attention of the jury at the commencement of the trial, to legal problems to be met, if fairly done, may be of great value in enabling the jury to understand the purpose and thus properly evaluate various bits of the evidence. The law authorizes it."

In *People v. Williams* (1981) 29 Cal.3d 392, the Court discussed that voir dire is generally designed to assist in the selection of the jury and to assist in the intelligent exercise of peremptory challenges. It is not appropriate during jury selection to instruct the jury on the law. Certainly, it is impermissible to indoctrinate the jury or to prejudice the jury for or against the defendant. (*Id.* at p. 408.) When they are given, the purpose of preinstructions is to give the jury some advance understanding of the applicable principles of law so they will not receive the evidence and arguments in a vacuum. (*People v. Valenzuela* (1977) 76 Cal.App.3d 218, 223.)

In *People v. Campbell* (1987) 193 Cal.App.3d 1653, the trial court told the jury in its preinstructions that the term "homicide" includes the crimes of murder

and voluntary or involuntary manslaughter, as well as excusable killings such as those in self-defense, and that the People were contending and had to prove beyond a reasonable doubt that the defendant committed first degree murder. The trial court outlined the elements of first degree murder and proceeded to define for the jury the various theories of first degree murder on which the case would be submitted.

On appeal, the defendant in *Campbell* asserted that the trial court's preinstructions were erroneous. The Court of Appeal disagreed, holding that the trial court's instructions were framed in terms of what the prosecution had to prove and did not suggest that the trial court believed the evidence would show first degree murder. The appellate court pointedly stressed that although it would be prudent for a trial court fully to instruct on lesser offenses when it chooses to preinstruct on the greater offenses charged by the People, the instructions were not unfairly slanted in favor of the People. (*Id.* at p. 1674.)

Here, the trial court's preinstructions to all prospective jurors went far beyond the original purpose of such instructions. The instructions here were neither fair nor accurate. Indeed, the prospective jurors -- including all seated and alternate jurors -- were grossly misled as to the legal principles at the foundation of this capital prosecution both as to the guilt and penalty phases. As more fully discussed *infra*, the trial court undermined the burden of proof, permitted the jury improperly to speculate on penalty during both the guilt and penalty phases of

trial, encouraged the jury to find appellant guilty and impose the death penalty, diminished the jury's decision-making responsibilities, and prejudiced the jury against appellant through improper and inflammatory references to other convicted criminals in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

### C. The Trial Court Encouraged the Jury to Speculate that Life Without Parole Did Not Mean Life Without Parole and Failed to Define in its Preinstructions the Meaning of Life Without Parole in Violation of Appellant's Fundamental Rights to a Fair Trial, Due Process, and to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A trial court may not give an instruction that is incorrect. (*People v. Ashmus, supra,* 54 Cal.3d at p. 994.) While a prosecutor in argument may argue that life imprisonment is an insufficient penalty given an individualized assessment of the defendant (*People v. Smithey, supra,* 20 Cal.4th at pp. 997-999; *People v. Lucas, supra,* 12 Cal.4th at p. 496), a trial court may not make statements at the beginning of jury selection about the nature of the penalty to be imposed or whether it is or was appropriate in this or other cases. (See, for example, *People v. Quartermain* (1997) 16 Cal.4th 600, 632 [conditions of confinement in other cases are irrelevant to a jury's penalty determination].)

The trial court was also obligated to instruct sua sponte on all principles of law closely or openly connected with the case. (*People v. Wilson* (1967) 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing

proceedings, and it is commonly misunderstood by jurors. The trial court's gratuitous references to notorious criminals who were given life sentences, the likelihood of future executions, and life with parole, coupled with the absence of other appropriate preinstructions at the beginning of trial defining for the jury what was meant by "life without possibility of parole" affirmatively misled the jury as to the meaning of that sentencing option. The court's preinstructions thus resulted in an unfair, capricious, and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi*, *supra*, 472 U.S. 320.)[43]

Specifically, the trial court's preinstructions misled the jury and failed to comport with recent United States Supreme Court decisions requiring trial courts to explain or define the meaning and significance of life imprisonment without possibility of parole. In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where, as here, the defendant's future dangerousness is a factor in determining whether a penalty jury should sentence a defendant to death or life imprisonment, and state law prohibits the

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[43]/ Although this Court has previously rejected the argument that the trial court must define the meaning of life imprisonment without possibility of parole (see, e.g., *People v. Gordon, supra,* 50 Cal.3d at p.1277; *People v. Thompson* (1988) 45 Cal.3d 86, 130-131), the Court should nevertheless reconsider the issue based on recent United States Supreme Court rulings, discussed *infra*, that undermine the Court's reasoning in those cases (*see Kelly v. South Carolina* (2002) 534 U.S. 246 and *Shafer v. South Carolina* (2001) 532 U.S. 36).

defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality in *Simmons* relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9.)

The *Simmons* rule has been reaffirmed repeatedly by the United States Supreme Court. In 2001, the Supreme Court reversed a South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Supreme Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52 [citation omitted].) More recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the Supreme Court again reversed a South Carolina death sentence in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Id.* at p. 256.)

In the present case, the trial court's preinstructions were more prejudicial

than the instructions in *Simmons, Shafer,* and *Kelly*. The court preinstructed the jury in such a manner as to create doubt that life without possibility of parole really meant life without possibility of parole and did not by its preinstructions clearly inform the jury that life without the possibility of parole means that appellant would never be released. The trial court's remarks about life without parole simply did not address the common misunderstanding among some prospective jurors that were appellant sentenced to life without the possibility of parole, he would not be eligible for release from prison. Indeed, the court's references to parole eligibility and other remarks affirmatively misled the jury by creating the erroneous illusion that appellant, as other notorious criminals, might some day be eligible for parole. The trial court's preinstructions and its efforts to explain the sentence of life without parole were thus inadequate under *Simmons, Shafer,* and *Kelly*.

In *Kelly*, the Supreme Court acknowledged that counsel had argued that the sentence would actually be carried out and stressed that the defendant would be in prison for the rest of his life. The Supreme Court also recognized that the trial court elsewhere told the jury that the term "life imprisonment" should be understood in its "plain and ordinary" meaning. (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 257.) Nevertheless, the High Court found those efforts inadequate to explain the defendant's parole ineligibility.

Similarly, in *Shafer*, the defense argued that Shafer would "die in prison"

after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer v. South Carolina*, *supra*, 532 U.S. at p. 52.) Again, the Supreme Court found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at pp. 52-54.) Moreover, in *Simmons*, the Supreme Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 170.)[44] In this case, the court's preinstructions taken as a whole did not adequately inform appellant's jurors that a life sentence for appellant would make him ineligible for release on parole from prison. In fact, the preinstructions clearly suggested otherwise and were thus more prejudicial than the instructions decried in *Simmons, Shafer*, and *Kelly*.

In addition, the trial court violated the principles of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, as interpreted in *Darden v. Wainwright*, *supra,* 477 U.S. at p. 183, fn.15, because the preinstructions "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it

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[44]/ The reliance in *Simmons* on *Gardner v. Florida* (1977) 430 U.S. 349 to reject the state's "plain and ordinary meaning" argument further indicates that the United States Constitution will not countenance, as in the present case, a false perception, whether resulting from incorrect instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. (See *Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 164-165.)

should for the sentencing decision." With its misleading and ad hoc preinstructional guidance on the meaning of life without possibility of parole, there was a reasonable likelihood that the jurors deliberated under the mistaken, but common misperception, that the choice they were asked to make was between two inherently different alternatives: death and a limited period of incarceration. (See *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," deepened by the court's preinstructions, the decision of the jury was erroneously simplified -- they felt compelled to return a safer death verdict.

The prejudicial effect of the preinstructions' failure to clarify the sentencing options is clear. Here, there is a substantial likelihood that at least one of appellant's jurors[45] concluded that the non-death option offered was neither real nor sufficiently severe and chose a death sentence because of the fear that appellant, like Charles Manson or Sirhan Sirhan, to whom the court referred as parole eligible, would someday either have his sentence commuted, gain parole eligibility, or be regularly considered for parole if given any sentence other than

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[45]/ See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.) ("in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence,'" quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692).

death.[46] The focus in a penalty trial of a capital case is on the character and record of the individual offender. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1249.) Sentences received by notorious defendants in other cases, based on different facts and evidence not before the jurors, are of dubious relevance. (*People v. Roybal* (1998) 19 Cal.4th 481, 529.) As the Court also explained in *People v. Marshall, supra,* 13 Cal.4th at p. 855, comparisons with other well-publicized crimes cannot be made without consideration of the specific aggravating and mitigating circumstances present or absent in the case then before the jury.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) Had the jury been correctly and fully preinstructed concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) ___ U.S. ___, 123 S.Ct. 2527, 2543; *Chapman v. California, supra*, 386 U.S. at p. 24.) It certainly cannot be

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[46]/ California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (See C. Haney, L. Sontag, & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994), 170-71.)

established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

### D. The Trial Court's Preinstructions Impermissibly Suggested That the Responsibility for Determining the Appropriateness of Appellant's Death Sentence Rested with the Courts and Not the Jury and Further Vouched for the Appropriateness of a Death Sentence in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

In its preinstructions, the trial court referred explicitly to appellate review of death sentences and conveyed to the jury the certainty that appellant's sentence would and must be approved by the appellate courts before it is carried out. Accordingly, this Court's clear decisions in *People v. Milner* (1988) 45 Cal.3d 227 and *People v. Farmer (*1989) 47 Cal.3d 888, mandate that appellant's sentence must be reversed under the Eighth Amendment principles articulated in *Caldwell v. Mississippi, supra*.

In *Caldwell*, the High Court ruled that a death sentence may not rest on a determination made by a sentencer who has been affirmatively misled to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere. (*Caldwell v. Mississippi, supra*, 472 U.S. at pp. 328-329; see also *Romano v. Oklahoma* (1994) 512 U.S. 1, 9.) "[S]tate-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court" violate the Eighth Amendment and invalidate a death sentence returned under

their influence. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 330.) So also do suggestions that "the law" in the abstract, and not the jurors themselves, determines whether the defendant receives the death penalty.

In *People v. Milner, supra,* 45 Cal.3d 227, the Court ruled that *Caldwell* error is committed when jurors are repeatedly told that that they did not have to "shoulder the burden of personal responsibility," the law "protects" them from deciding what is "just and right," and even encourages them to "hide" behind the law. (*Id.* at p. 257.) Even the fact that the defendant did not make a contemporaneous objection does not bar him from raising a claim of *Caldwell* error on appeal. (*People v. Bittaker, supra*, 48 Cal.3d at p. 1104.)

In *People v. Farmer, supra*, 47 Cal.3d 888, the prosecutor during argument to the jury declared "Whether or not Mr. Farmer should live or die was decided by the voters of this state when they passed this [death penalty] law, when they set the criteria. They decided who lives and who dies. You decide, does aggravating outweigh mitigating. That is your job. That is all you decide. The law does the rest. . . . You do not decide life or death. The law does that." (*Id.* at p. 929.) This Court concluded this erroneous statement required reversal of the death sentence. (*People v. Farmer, supra*, 47 Cal.3d at pp. 924-931.)

Here, not merely prosecutorial argument, but misleading and inadequate preinstructions are involved. Contrary to the holdings of both *Milner* and *Farmer*, the trial court's preinstructions both diffused the jury's sense of responsibility for

its verdict and permitted the jury in this case to shift responsibility for the death sentence to the appellate courts that would review and must approve appellant's sentence. Here, the trial court did not simply mention appellate review in the abstract. The trial court emphasized appellate review, thereby undermining the notion that each of the jurors had to come to a "personal decision." Under these circumstances, therefore, it is highly likely that the trial court's reference to appellate review led the jury to believe that it was relieved of responsibility for the verdict and that responsibility resided elsewhere in the appellate courts, contrary to *Caldwell, Milner*, and *Farmer*. (*See also People v. Hardy, supra,* 2 Cal.4th at pp. 211-212; *Jefferies v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1192.)

Finally, in its preinstructions, the court stressed that it anticipated that there would be many executions, implying that a sentence of death in appellant's case would neither be unanticipated nor unexpected. In so stressing its expectations, the court in essence both vouched for the propriety of imposing the death penalty generally and at least implicitly urged the jury to vote for death in this case. Just as a prosecutor may not vouch for the appropriateness of a verdict (*People v. Benson, supra,* 52 Cal.3d at p. 795), it is equally impermissible for the court at the outset of a capital case to endorse the propriety of death verdicts or to indicate in any manner that it anticipated more death verdicts. By such preinstructions, the jury would surely understand that the court was saying not only that appellant was guilty of the crime charged but that a death verdict would not be inappropriate in

this case. Thus, by telling the jury in advance of trial what its expectations were -- or what society expected -- in respect to the death penalty, the trial court violated appellant's Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial and unfairly skewed the guilt and penalty determinations in violation of the Eighth Amendment to the United States Constitution.

### E. The Preinstructional Error Was Not Harmless Beyond a Reasonable Doubt

The trial court's preinstruction in this case undermined several fundamental constitutional rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Because the preinstructions, as previously discussed and demonstrated, undermined appellant's fundamental constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the proper standard of review is the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension under *Chapman v. California, supra,* 386 U.S. at p. 24, not the harmless error standard announced in *People v. Watson, supra,* 46 Cal.2d at p. 836.

In *People v. Pena* (1972) 25 Cal.App.3d 414, 429, error in the use of trial court preinstructions to the jury was deemed to have been cured by subsequent correct jury instructions given at the conclusion of trial and, more importantly, a court admonition at the time of the preinstruction that the final instructions would govern in case of inconsistencies between the preinstructions and final

instructions. Unlike *Pena*, the trial court here did not so advise the jury. The trial court did not inform the jury that its final instructions would govern; for all the jury knew, the court's erroneous preinstructions constituted the governing law and official court position in respect to the expected result in this case. Under the circumstances of this case, the jury was not only unaware that the final instructions would govern in the case of inconsistencies but also was permitted to evaluate penalty largely through the lens of the uncorrected, improper, and erroneous preinstructions given by the trial court at the outset of this case.

While preinstruction of prospective jurors by the trial judge is not impermissible, and may in fact be desirable if the preinstructions are fair and accurate, here the preinstructions were neither fair nor accurate. The instructions were impermissibly slanted in favor of the People, grossly misled the jury as to the legal principles applicable in the penalty trial, diminished the individual responsibility of individual jurors to impose the sentence in this case, and actually suggested to the jury that a sentence of death would neither be inappropriate nor unexpected -- indeed, the court said that it expected that many more death sentences to be imposed. The court's preinstructions thus virtually guaranteed that the jury would start the penalty trial with a predisposition to sentence appellant to death. For these reasons, the error could not have been harmless beyond a reasonable doubt under the applicable *Chapman* standard.

Even under a lesser "reasonable probability" test, articulated by the Court

in *People v. Brown* (1988) 46 Cal.3d 432, 448, for the same reasons as discussed above, there is a reasonable probability that a "hypothetical 'reasonable juror' would have, or at least could have, been affected" by the trial court's preinstructions. (See *People v. Ashmus, supra,* 54 Cal.3d at pp. 965, 983-984 [where Court equated reasonable probability standard of *Brown* with federal harmless beyond a reasonable doubt standard].) Accordingly, the trial court's erroneous preinstructions thus compels reversal of the death sentence imposed in this case under both *Chapman* and *Brown*.

## XVI

## THE TRIAL COURT ABDICATED ITS RESPONSIBILITY TO CONDUCT MEANINGFUL DEATH QUALIFICATION OF THE JURY IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR PENALTY TRIAL, A FAIR AND IMPARTIAL PENALTY JURY, DUE PROCESS OF LAW, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FORUTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE ERROR WAS PREJUDICIAL PER SE

### A. Introduction

As discussed in Argument I, *supra*, before general voir dire, the trial court first conducted *Hovey* (*Hovey v. Superior Court, supra,* 28 Cal. 3d at p. 80) death qualification of each prospective juror individually and out of the presence of other prospective jurors. In addition to the statutorily and constitutionally defective general voir dire of prospective jurors demonstrated in Argument I, *supra,* for the separate and additional reasons discussed below, the death qualification of prospective jurors was equally inadequate, deficient, and defective. As further demonstrated in Argument XVII, *infra*, appellant's jury included jurors with actual bias in violation of appellant's rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

California courts have long held that insufficient voir dire is presumptively prejudicial because it undermines the entire trial structure. (*People v. Wheeler, supra,* 22 Cal.3d at p. 283; see also *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1397; *People v. Martinez* (1991) 228 Cal.App.3d 1456, 1460.) In this case, the

trial court did not ask even a single question of any seated juror *either* during death qualification or during general voir dire. The trial court's combined participation in the death and general voir dire of the 12 seated, regular jurors (not to mention the alternates) in this case was zero.

Beyond any doubt, the trial court abdicated its statutory and constitutional responsibilities and failed to participate in any meaningful manner in the death qualification process. The court's failure to participate in voir dire effectively aborted the basic trial process and rendered appellant's trial fundamentally unfair. Accordingly, the total failure of the voir dire process deprived appellant of the basic protection of an impartial jury without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." (*Rose v. Clark, supra,* 478 U.S. at p. 577; *see also*, *Neder v. United States* (1999) 527 U.S.1, 9.)

**B. Factual and Procedural Background**

The following is a summary of the *Hovey* death qualification in this case. As will be patently evident, although a standardized form questionnaire was used in this case as the starting-point, the court ignored juror responses, and utterly abdicated its constitutionally-mandated responsibilities to determine juror fitness, prejudice, or bias. Indeed, as shown below, of the 12 sworn jurors (to say nothing of the alternate jurors who are also discussed), the trial court did not ask a single question during death qualification even where the jury questionnaire responses or

responses to questions propounded by counsel and the prosecutor revealed likely bias, prejudice, penalty prejudgment, and penalty impartiality. Indeed, the court's oversight and conduct of death qualification in this case utterly failed to insure that meaningful or relevant information would be revealed or uncovered, that the jury would be fair and impartial, that the jury would be able to follow the trial court's penalty instructions, or that the penalty imposed by the jury would be constitutionally reliable in this case.

*a. Juror No. 1*

In her questionnaire, Juror No. 1 indicated that she favored the death penalty and would *not* be willing to weigh and consider all of the aggravating and mitigating factors presented before deciding the penalty. (Supp B -- Juror Questionnaires CT 1054.) She stated that "we need severe punishment for severe crimes" and that her beliefs had not changed in 10 years. (Supp B -- Juror Questionnaires CT 1055.) Although in response to defense counsel's questions whether she would have an "open mind" and would consider appellant's "whole life story" (RT 1553), Juror No. 1 was not asked, either by counsel, the prosecutor, or the court, how her strong views in favor of the death penalty and her previously expressed unwillingness to weigh and consider all aggravating and mitigating factors, squared with her newly-stated agreement to consider appellant's "whole life story." Remarkably, the trial court did not ask any questions. (RT 1550-1554.)

/ / /

*b. Juror No. 2*

Juror No. 2 indicated in her questionnaire that she was strongly in favor of the death penalty: "I have no trouble sending a murderer to the gas chamber." (Supp B -- Juror Questionnaires CT 1089.) "My own personal views of the death penalty are, I am in agreement with it." (Supp B -- Juror Questionnaires CT 1089.)

Juror No. 2 was asked 16 questions by defense counsel. She responded "Um-hum" 11 times, nodded her head twice, said "yeah" in response to one question, and substantively replied but to two questions. (RT 958-959.) In defense counsel's questioning of Juror No. 2, the only "factors" she explicitly mentioned that were to be considered during the penalty trial were: the facts of conviction, the killing of a woman in a church with a knife, multiple stab wounds, "that he's been previously convicted of rape and assault for intent to commit rape, all those factors." (RT 958.) In response to counsel's question whether Juror No. 2 would consider those "factors," Juror No. 2 stated as her only other substantive reply that she "would consider them." (RT 959-960.) Those, of course, were aggravating, not mitigating circumstances.

In response to the prosecutor's only substantive question whether she would have any problem voting for the death penalty, Juror No. 2 replied, "No, un-unh, un-unh, no problem." (RT 961.)

The trial court did not ask any questions, not even to clarify the "um-hums" and "un-unhs" of which the *Hovey* voir dire of Juror No. 2 almost totally

consisted. The court did not follow-up on Juror No. 2's responses that she was strongly in favor of the death penalty or inquire whether Juror No. 2 would consider mitigating circumstances other than mental illness to which Juror No. 2 exclusively referred. (See RT 956-961.) Even though she had not indicated that she was automatically pro-death, at the very least the court should have asked about how strongly she believed in the death penalty, particularly when Juror No. 2 was so categorical in replying to the prosecutor's question that she would have "no problem" in voting for death. (See RT 961.)

*c. Juror No. 3*

In his questionnaire, Juror No. 3, a former military (for four years) and civilian police officer (for over 20 years), indicated it would be difficult to follow the court's instruction that "a defendant in a criminal case is presumed innocent unless proven guilty beyond a reasonable doubt." (Supp B -- Juror Questionnaires CT 1116.) In respect to psychiatric or opinion testimony, Juror No. 3 stated "people can say anything for money." (Supp B -- Juror Questionnaires CT 1089.) Regarding the death penalty, Juror No. 3 indicated "if the death penalty was properly handled and not allowed felons to spend 10 or 15 years awaiting death, I think it would be the least severe until the moment of execution." (Supp B -- Juror Questionnaires CT 1120.) Juror No. 3 also indicated in response to a question about the purpose of the death penalty that "the courts and laws handling of it has nearly made a mockery of it." (Supp B -- Juror Questionnaires CT 1121.) He

indicated that the death penalty was used too seldom because of "too many pressure [sic] on the juries." (Supp B -- Juror Questionnaires CT 1121.) Juror No. 3 even questioned his own ability to be a fair and impartial juror: "Only that my background in police training may make it very difficult" and also questioned whether his "police atmosphere [sic] can be subdued." (Supp B -- Juror Questionnaires CT 1125.)

Juror No. 3 stated that he was strongly biased in favor the death penalty: "*I favor the death penalty no doubt about that.*" (RT 1386 [italics added].) Juror No. 3 explicitly stated that he had a real negative attitude about psychologists. Defense counsel observed that should a penalty trial be held, he would call psychologists and psychiatrists and other witnesses about appellant's childhood. Defense counsel asked Juror No. 3 "would you really be able to give any weight to the psychological or psychiatric testimony since -- " (RT 1386.) Juror No. 3, interrupted the question, stating: "*I would be extremely dubious of it* and I think the only reason is that from reading of cases that's been in papers before, I often wonder how two psychologists can even come in and find the same person either totally sane or totally insane . . .." (RT 1387 [italics added].)

In response to defense counsel's statement that he was "not talking about insanity here," Juror No. 3 replied "I'm not saying -- but I'm giving you a point of what I see." (RT 1387.) Additional colloquy revealed a strong bias of Juror No. 3 against psychological or psychiatric testimony. Juror No. 3 viewed conflicting

psychological or psychiatric testimony from the perspective that someone must be lying:

> Q. In understand what you are saying.
> A. I often wonder how a person can be sane and insane at the same time so --
>
> Q. Well --
> A. *Somebody has to be lying.*
>
> Q. Insanity is a legal concept?
> A. Well, I was using that as terminology. It has nothing to do with this, no.
>
> (RT 1387 [italics added].)

Defense counsel asked Juror No. 3 whether he would "really consider psychological or psychiatric testimony as evidence in mitigation "that might sway you from that [sic] death penalty to life without possibility of parole." (RT 1387.) Juror No. 3 answered with a question, further revealing his opposition to that type of mitigation evidence: "A. I would have to give some weight to it? *I wouldn't -- I don't think I would.*" (RT 1387-1388 [italics added].)

In response to defense counsel's question that he would "really have a hard road [row] to hoe to convince" him, Juror No. 3 agreed that he would. Although Juror No. 3 stated that he would *try* to be fair (RT 1388), he also stated that "I've had so many years in law enforcement that I know that it gives you a sort of attitude, you know, and *it's hard to get away from that attitude.*" (RT 1388 [italics added].) Defense counsel observed that "I just kind of have the feeling, to be honest with you, that in this case if you found him guilty of everything you'd want

him executed without even considering that stuff and that's just where I'm coming from and you are the only one --" (RT 1388.) Juror No. 3 interrupted counsel, stating with an unusual but revealing choice of words: "*I would give some prejudice to it*, but to scale it would be -- I don't know because I've never been in this situation. but I can't say that, yes, I would give 100 percent or, no, I wouldn't given zero percent and be wrong about it. You know what I'm saying? I don't know." (RT 1388.)

In response to further questioning and observations by defense counsel that the penalty trial would "involve a mental issue" (RT 1389), Juror No. 3 stated although there were "[m]itigating circumstances to everything (RT 1388), he questioned "[h]ow much that would sway me I don't know, I really don't. I'm not trying to beat around the bush. I'm trying to be very honest." (RT 1389.) He further acknowledged that he would "*have to be really convinced, I'd say.*" (RT 1389 [italics added].)

The prosecutor asked a single question, in essence whether Juror No. 3 would have "any problem in voting for the death penalty?" (RT 1390.) Juror No. 3 replied: "*Absolutely not.*" (RT 1390 [italics added].)

Juror No. 3 displayed actual bias (see Argument XVII, *infra*), and the trial court should have questioned him about his ability to serve as an impartial juror. For example, the court should have questioned Juror No. 3 about his inability to presume appellant innocent (Supp B -- Jury Questionnaires CT 1116); about his

frank admission that he would not be a fair juror because of his law enforcement background (Supp B -- Juror Questionnaires CT 1125); about his strong bias in favor of the death penalty (RT 1386, 1388); about his negative attitude toward psychologists and psychiatrists (RT 1387); and about his views imposing a penalty burden of proof on appellant. Incredibly, the trial court did not ask a single question. (RT 1385-1390.) Under the circumstances of this case, the court's failure to conduct any inquiry of this juror was grossly inadequate and insufficient.

*d. Juror No. 4*

Juror No. 4 indicated that his father-in-law and brother-in-law were district attorneys. (RT 1530.) In response to the prosecutor's question whether he would be able to vote for the death penalty in this case, Juror No. 4 eagerly stated: "I sure would. Yes, sir." (RT 1535.) Considering that his in-laws were prosecutors, as well as his expressed eagerness to vote for the death penalty, at a minimum the trial court should have asked some follow-up or probing questions to test the true impartiality or fairness of this juror. True to form, however, the trial court did not ask a single question. (RT 1530-1535.)

*e. Juror No. 5*

Juror No. 5 stated that the purpose of the death penalty was "to let society know that a person's life is valuable and has meaning." (Supp B -- Juror Questionnaires CT 1187.) She stated that the death penalty was "too seldom used due to constant appeals and prolonged procedure" (Supp B -- Juror Questionnaires

CT 1187) and that both she and her spouse "agree to having the death penalty." (Supp B -- Juror Questionnaires CT 1188.) The trial court did not ask any questions or probe the depth of the juror's repeatedly-expressed bias in favor of the death penalty. (RT 1396-1399.)

*f. Juror No. 6*

Juror No. 6 indicated he had previously sat as a juror on two recent murder cases -- one in San Bernardino and one in Victorville. (RT 1660.) He was not asked if because of his prior jury duty, he knew the prosecutor, trial counsel, or any of the police officers involved in this case. He was not asked whether he knew the judge or had ever been in the judge's courtroom.

The opinions and views about the death penalty expressed by Juror No. 6 in his questionnaire and during questioning by the prosecutor were at odds. (See RT 1665.) Juror No. 6 said it did not make any difference how many murder cases he participated in as a juror, thus strongly suggesting an unusual eagerness to serve on the jury in this case. He repeatedly stated that it was his "duty to serve." (See RT 1660; see also RT 1663.) However, there was no questioning whether his responses indicated unrevealed bias or inappropriate eagerness to serve on appellant's jury. As with every other juror, the trial court did not ask any questions. (RT 1660-1668.)

*g. Juror No. 7*

In response to questioning by the prosecutor regarding what he thought of

the death penalty, Juror No. 7 replied that "if it's proven without a shadow of a doubt and voted you [sic] on it -- and I agree with it because we're in a democratic society and I would have to go with the law of the land." (RT 1519.) Juror No. 7 also stated that voting for the death penalty "wouldn't go against any beliefs." (RT 1519.) Juror No. 7 stated that he would vote for the death penalty if appellant "did the crime." (RT 1519.) Even if the questionnaire and other responses of Juror No. 7 did not indicate that he would automatically vote for the death penalty in all cases, his verbal responses tended to be contradictory, first answering defense counsel's questions in such a manner as to indicate preference toward life imprisonment without possibility of parole (see RT 1517) but then responding inconsistently to the prosecutor in a far different manner, indicating deeper bias in favor of the death penalty. (See RT 11518-1519.) When Juror No. 7 also expressed a compulsion to "go with the law of the land"-- meaning the death penalty -- his answers at the very least demanded some probing follow-up questions to determine more precisely his attitudes and the extent of his apparent bias in favor of the death penalty. Not surprisingly, the trial court did not ask any questions. (RT 1516-1519.)

*h. Juror No. 8*

In his questionnaire, Juror No. 8 indicated that he and his wife had previously been witnesses in a murder case. His neighbor had been murdered, and he had been called by the victim's wife. Juror No. 8 said that he "discovered" his

neighbor's body. (Supp B -- Juror Questionnaires CT 1305.) Juror No. 8 indicated he remembered something about this case from the newspaper and recalled that defense counsel had been previously involved in the "Dean" murder trial in which he participated as a witness. (Supp B -- Juror Questionnaires CT 1318.) Juror No. 8 reported extensive dealings with district attorneys and law enforcement officers in his profession. (RT 1621-1622.)

Defense counsel Craig also said he recalled Juror No. 8. He said that he recognized him as a witness in the prior murder case and that Juror No. 8 had been on the witness stand on at least five occasions, apparently in defense counsel's presence. Juror No. 8 agreed. (RT 1621-1622.) Although Juror No. 8 stated he could be objective and possessed an open mind (RT 1622, 1626), he was not asked whether his experiences and role in the prior murder case affected his attitude about appellant or biased him in any way against appellant or his attorneys. He was not asked about the extent of his exposure to this case in the media or whether details that he may have learned about this case would trigger emotional reactions because of his experiences in the prior murder case. He was not asked whether in light of his experiences in the prior murder case, he could still presume appellant innocent as required by law. He was not asked whether his dealings and association with the prosecutor's office and other law enforcement officers stemming from his role as a witness in the prior murder case would bias him in any way against appellant. These and other similar questions that

obviously spring to mind were not asked. Again true to form, the trial court remained utterly silent and did not ask any questions. (RT 1621-1626.)

*i. Juror No. 9*

Juror No. 9 stated that he favored the death penalty but would not impose it in every case. (RT 1489.) The trial court did not ask any questions. (RT 1485-1495.)

*j. Juror No. 10*

Juror No. 10's beliefs about the death penalty were clearly stated. In response to questioning, she said, "I have to be honest with you, I would lean towards the death penalty." (RT 877.) She acknowledged she was "very pro-death as far as death penalty." (See RT 875, 877.) She said she would "lean towards the death penalty, probably, to be perfectly honest." (RT 879.) In response to the prosecutor's single question whether she could "listen to both sides" and be fair and make a proper decision, Juror No. 10 replied that she was "not sure. It would be very difficult, ... ." In light of Juror No. 10's obvious bias and prejudice,[47] as well as her repeated equivocation about whether she could be fair and impartial in respect to penalty, the trial was duty-bound to ask further questions to test the depth and extent of Juror No. 10's bias and her ability to serve as a juror in this case. Nevertheless, as with every other juror, the court did not ask any questions. (RT 880.)

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[47]/ See Argument XVII, *infra*.

*k. Juror No. 11*

Juror No. 11 did not think she would be able to weigh and consider any evidence or circumstances that "causes sympathy or extenuates the gravity of the crime," including a person's life history, terrible abuse as a young child, abandonment, and so forth, all of which were involved in this case. (RT 1565.) Juror No. 11 indicated that she did not know whether she would consider psychological evidence. (RT 1567.) The prosecutor asked two questions about whether Juror No. 11 would be able to vote for the death penalty. (RT 1568.) Juror No. 11 was asked about her attitude toward psychological evidence:

> Q. Well, if you sit on the jury, you would hear it and you would see it. Would you consider psychological evidence?
>
> A. I really don't know. I mean I really couldn't say yes or no.
>
> (RT 1567.)

The prosecutor asked Juror No. 11 if, after she heard the whole case, "you conclude for yourself that this case demands the death penalty, the death penalty is appropriate, would you be able to vote for the death penalty?" (RT 1568.) Juror No. 11 replied: "Oh, yes." (RT 1568.) She also stated that she would have no qualms about voting for the death penalty and that it would not "go against" her "beliefs or anything like that." (RT 1568.)

Because Juror No. 11 clearly and repeatedly stated that she did not think she would weigh and consider all of the various types of mitigating evidence in determining penalty, and because of her alacrity in responding to the prosecutor's

question about her ability to vote for the death penalty, some follow-up questioning by the trial court was required. At the very least, the trial court should have asked about the extent of her reluctance to consider mitigating evidence and whether that reluctance actually amounted to bias and prejudice sufficient to discharge her for cause or disqualify her from serving on the jury in this case. The trial court did not ask any questions. (See RT 1564-1567.)

*l. Juror No. 12*

Juror No. 12 indicated that to "kill another person should warrant the death penalty" and that a person serving live without the possibility of parole "sounds" like "being catered to for a crime committed." (Supp B -- Juror Questionnaires CT 1450.) She stated that the death penalty was imposed too seldom and although many people have been sent to death row, "only a few have been executed." (Supp B -- Juror Questionnaires CT 1451.) She also indicated that a "senseless killing warrants the death penalty." (Supp B -- Juror Questionnaires CT 1452.)

In light of Juror No. 12's responses indicating bias in favor of the death penalty in circumstances identical to the facts of the present case, at the very least, the trial court should have asked Juror No. 12 how should she reconcile her statement that she would not automatically vote for the death penalty with her other strongly-stated views in favor of the death penalty where a "senseless killing" was involved. Certainly, Juror No. 12's views about what she considered a "senseless killing" should have been explored, because her responses as a whole

indicated actual bias toward the death penalty in this case. Here, too, the trial court did not ask any questions. (RT 1260-1265.)

*m. Alternate Juror No. 1*

Alternate Juror No. 1 expressed the opinion that "criminals have more rights than the victims" and that there were an "excess amount of repeat offenders." (Supp B -- Juror Questionnaires CT 1476.) She advocated stricter penalties in response to crime. (Supp B -- Juror Questionnaires CT 1477.) In her opinion, the death penalty "rids society of a serious criminal" and makes the "person pay for their crime." (Supp B -- Juror Questionnaires CT 1482.) Alternate Juror No. 1 indicated that she had heard about the case on the radio in 1991 and remembered "basics." (RT 1606.) The court did not asked any follow-up questions whether Alternate Juror No. 1 may have been affected by pretrial publicity. Indeed, the trial court asked no substantive questions of Alternate Juror No. 1, other than to inquire about employment hardship. (See RT 1611.)

*n. Alternate Juror No. 2*

Alternate Juror No. 2 stated in her questionnaire that "I believe is [sic] those that are in prison for awful things like rape, murder, and they are let out just to commit the same crime." (Supp B -- Juror Questionnaires CT 1509.) She stated that the "system" and "the law" needs to get stricter." (Supp B -- Juror Questionnaires CT 15109, 1510, 1517.) Alternate Juror No. 2 also stated that if a defendant is found guilty of "a hideous crime, such as repeated sex offender, ...,

life without parole is a waste to taxpayers." (Supp B -- Juror Questionnaires CT 1515.) She stated that "too many severe crimes are committed without proper punishment" and that we "need hard punishment for hard crimes." (Supp B -- Juror Questionnaires CT 1516.) Alternate Juror No. 2 stated that there should be "less time on death row" and that she would support the death penalty if the defendant is convicted of first degree murder. (Supp B -- Juror Questionnaires CT 1518.)

Alternate Juror No. 2 explicitly stated she would vote for the death penalty in every circumstance in respect to this case. (RT 838.) She was then challenged for cause. During the entire voir dire, the trial court asked but one question, not of Alternate Juror No. 2, but of defense counsel to clarify his question that elicited from the alternate evidence of strong bias and prejudice, as shown by the following colloquy:

> THE COURT: Did you say [asking defense counsel whether his question sought an answer from Alternate Juror No. 2 that] in every such circumstance [you would vote to impose the death penalty]? I couldn't hear your question.
> MR. CRAIG: Yes.
>
> THE COURT: In every circumstance?
> MR. CRAIG: As regards this case.
>
> THE COURT: Okay.
>
> ALTERNATE JUROR NO. 2: Yes.
>
> MR. CRAIG: Okay. I challenge for cause.
>
> (RT 837-838.)

In response to attempted rehabilitation by the prosecutor, Alternate Juror No. 2 stated that she would be willing to "consider and look at the background, weigh the good things and bad things" and "weigh and consider the aggravating and mitigating factors that will be presented" before deciding on the penalty. (See RT 840, 841.) The prosecutor further questioned the prospective juror asking repeatedly whether she would be willing simply "to listen to" or "look at" both sides and at both the aggravating and mitigating evidence. (See RT 838-840.)

Although the prosecutor did ask as well whether the prospective juror would consider both the aggravating and mitigating factors, these questions were always phrased in the context of seeking the juror's agreement to listen and look at both the good and bad. Alternate Juror No. 2 stated: "I'm willing *to look at* the good and bad before I decide." (RT 840.) At the very least, the trial court should have asked Alternate Juror No. 2 about her categorical statement that she would impose the death penalty in every circumstance. However, the court did not ask Alternative Juror No. 2 any questions, but simply denied appellant's challenge for cause. (RT 841.)

*o. Alternate Juror No. 3*

Alternate Juror No. 3 believed that some crimes could only be punished by the death penalty. (Supp B -- Juror Questionnaires CT 1548.) The son of Alternate Juror No. 3 was murdered, and another relative was shot and killed. (RT 1600.) Alternate Juror No. 3 acknowledged that some of the facts of this case and

"the situation" might bring "some of that pain back and might cause [her] to react adversely to [appellant]." (RT1601.) The prosecutor asked but a single question whether Alternate Juror No. 3 would be able to vote for the death penalty. (RT 1604.) Although Alternate Juror No. 3 said that the trial would not be "too much" for her and that she would judge the case on the facts, at the very least the trial court should have inquired whether Alternate Juror No. 3 could be still fair and impartial in light of her personal background and life experiences, including the murder of her son. The murder of a child is such a traumatic and emotional event as to require at least a modicum of questioning by the court to test for residual bias or prejudice. As in every other instance, however, the trial court remained silent and failed to ask even a single question. (See RT 1600-1605.)

*p. Alternate Juror No. 4*

The court did not ask any questions. (RT 1367-1372.)

*q. Alternate Juror No. 5*

Defense counsel noted that Alternate Juror No. 5 might be the youngest person on the panel and asked whether he was "tough enough" to sit on the jury in this case. The prosecutor asked three questions -- whether he could be fair to both sides, whether he would be able to vote guilty, and whether he would be able to return a verdict of death. (RT 829.) The trial court did not ask any questions. (See RT 825-829.)

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*r. Alternate Juror No. 6*

Alternate Juror No. 6 repeatedly said that she was "pro-death penalty." (Supp B -- Juror Questionnaires CT 1613, 1615, 1616.) Indeed, Alternate Juror No. 6 stressed that "my feelings are that if that person can take another person's life, they should get the death penalty." (Supp B -- Juror Questionnaires CT 1252.) Alternate Juror No. 6 expressed doubt that mental problems during childhood had any effect on an adult: "I mean, I understood there's people that still have mental -- you know, when they were small, because even when I was small, too, right, but it has -- to me, it has no case when you are an adult." (RT 1500.) Alternate Juror No. 6 stated that if convinced after hearing all the evidence, she could say to herself that "this case demands the death penalty" and stated she would be able personally to vote for the death penalty. (RT 1502.) Despite the responses of Alternate Juror No. 6 manifesting clear bias in favor of imposing the death penalty in this case, true to form, the court did not ask any questions. (RT 1498-1502.)

### C. The Trial Court Erred by Failing to Conduct Any Meaningful Questioning of Prospective Seated and Alternate Jurors in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Voir dire is a critical stage of criminal proceedings. (*Gomez v. United States* (1989) 490 U.S. 858, 872.) Under both the United States and California Constitutions, a sentencing jury in a capital case must be impartial. (*People v. Williams, supra,* 16 Cal.4th at pp. 666-667.) In a capital case, a prospective juror

may be excluded if the juror's views on capital punishment would "prevent or substantially impair" the performance of the juror's duties. A prospective juror is properly excluded if he or she is unable conscientiously to consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Jenkins, supra,* 22 Cal.4th at p. 987.) "If the prospective juror's responses to voir dire questions are conflicting or equivocal, the trial court's determination of the juror's true state of mind is binding upon the reviewing court." (*People v. Bradford, supra,* 15 Cal.4th at p. 1319.)

The primary purpose of the death-qualifying phase of voir dire is to enable the trial court to assess each juror's state of mind and thereby make a meaningful evaluation of the juror's impartiality. (*People v. Cox, supra,* 53 Cal.3d at p. 646.) Indeed, it has been stated that the sole purpose of *Hovey* voir dire is to ascertain whether any prospective juror has such conscientious or religious scruples about capital punishment that his or her views would prevent or substantially impair adherence to the instructions and the juror's oath. "The inquiry seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote against the death penalty without regard to the evidence produced at trial. However, "[a] prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating

circumstances, is therefore subject to challenge for cause."' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444-445.)

The trial court has the primary responsibility to conduct voir dire so that bias can be ferreted out. As stressed previously by the Court, "[w]ithout adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*People v. Earp, supra,* 20 Cal.4th at p. 852, quoting *Rosales-Lopez v. United States, supra,* 451 U.S. at p. 188.) Prospective jurors "frequently give 'halting, equivocal, or even conflicting' voir dire responses in capital cases ... ." (*People v. Ervin* (2000) 22 Cal.4th 48, 69, quoting *People v. Fudge, supra,* 7 Cal.4th at p. 1094.) Thus, the trial court must determine whether the prospective juror will be able faithfully and impartially to apply the law in the case. (*Id.* at p. 1147.) In *People v. Heard , supra,* 31 Cal.4th 946, the Court stressed that:

> the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion. In California, numerous resources exist that assist trial courts in conducting voir dire in death penalty trials, ... . In view of the extremely serious consequence -- *an automatic reversal of any ensuing death penalty judgment* -- that results from a trial court's error in improperly excluding a prospective juror for cause during the death-qualification stage of jury selection, we expect a trial court to make a special effort to be apprised of and to follow the well-established principles and protocols pertaining to the death qualification of a capital jury. ... [A]n inadequate or incomplete examination of potential jurors can have disastrous consequences as to the validity of a judgment. The error that occurred in this case -- introducing a fatal flaw that tainted the outcome of the penalty phase even before the jury was sworn

> -- underscores the need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials.
>
> (*Id.* at p. 966-967 [emphasis added].)

Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) The real question is """whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror."""" (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, quoting *People v. Bradford, supra,* 15 Cal.4th at p. 1318, quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003.) The same legal standard governs the inclusion or exclusion of a prospective juror. (*People v. Mincey* (1992) 2 Cal.4th 408, 456.)

Assessing the qualifications of jurors whether or not challenged for cause is a matter falling within the broad discretion of the trial court. (*People v. Boyette* (2002) 29 Cal.4th 381, 416.) The trial court -- not counsel -- must determine whether the prospective juror will be unable faithfully and impartially to serve and apply the law in the case.

This Court has previously sanctioned the use of and reliance on standard form questionnaires in jury selection. (*People v. Waidla, supra,* 22 Cal.4th 690.) However, there are no reported decisions holding that a standard form questionnaire alone is sufficient to determine juror fitness, especially under

circumstances, as here, where the court-conducted questioning is non-existent or inadequate and juror responses facially reveal potential or actual bias or prejudice. Decisional law indicates to the contrary that the use of juror questionnaires is only a starting point for obtaining information and must be used in conjunction with thorough and probing voir dire. (*See, e.g.*, *People v. Sanchez* (1989) 208 Cal.App.3d 721, 732-733 [use of written jury questionnaires followed by probing questions by the court and counsel of jurors who indicated potential bias].)

In *People v. Stewart* (2004) 33 Cal.4th 425, the defendant was sentenced to death following conviction, inter alia, of three counts of first degree murder in violation of § 187. On automatic appeal, the Court affirmed the judgment as to guilt and the multiple murder special circumstance finding but was compelled by controlling United States Supreme Court decisions to reverse the judgment of death and remand the matter for a new penalty trial before a properly selected jury. Although the precise grounds for reversal in *Stewart* -- the erroneous excusal of prospective jurors for cause based solely upon written answers to a jury questionnaire and without any opportunity for follow-up questioning (*Id.* at p. 445) -- is somewhat different than the error urged in the present case involving the failure of the trial court to engage in any meaningful voir dire in the face of juror questionnaires that reveal serious issues of bias or prejudice, the Court's opinion is nevertheless highly instructive and compels reversal of the penalty in this case as well.

In *Stewart*, the trial court's determination to excuse jurors was based solely on no more information than "the cold record" of the prospective jurors' responses in their questionnaires. The Court ruled that that information was insufficient to support an assessment, as required by *Wainwright v. Witt, supra*, 469 U.S. at p. 424, that any of the prospective jurors who were dismissed would be unable faithfully to perform the duties required of a juror by the law. Accordingly, the Court concluded that the trial court erred in dismissing prospective jurors without first conducting any follow-up questioning. (*Id.* at p. 454.) In so holding, the Court stressed that use of a juror questionnaire does not obviate the need for oral voir dire. (*Id.* at p. 449, fn. 14.)

The defendant in *Stewart* additionally contended that the trial court deprived him of his state and federal constitutional rights to a fair and impartial jury because it failed to conduct an adequate voir dire inquiry. The Court rejected the assertion because, unlike here, in addition to the questionnaire responses, the trial court in *Stewart* did engage in some voir dire of jurors, including jurors who actually sat on the case. (*Id.* at p. 458.)

Here, the trial court abdicated its primary responsibility to conduct voir dire so that bias can be ferreted out. This Court has repeatedly underscored the "need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials." (*People v. Heard, supra*, 31 Cal.4th at p. 967.) Along with the more active role for trial courts envisioned by Code of Civil Procedure § 223

comes a heightened responsibility to insure that the voir dire process is meaningful and sufficient to discover the biases and prejudices that may be harbored by prospective jurors. (*People v. Wilborn, supra,* 70 Cal.App.4th at p. 347.) Yet, here, the court sat silent and said nothing in the face of repeated expressions of both potential and actual bias and prejudice by virtually all of the ultimately seated and alternate jurors.

Other decisions of this and other courts further compel the conclusion that the trial court in this case failed miserably to insure that the voir dire process in this case was meaningful and sufficient to discover the biases and prejudices of potential jurors and that, as a consequence, its conduct of death qualification voir dire was constitutionally inadequate. For example, in *People v. Avena, supra,* 13 Cal.4th at p. 413, the trial court followed the voir dire procedure recommended in *Hovey v. Superior Court, supra.* Unlike here, the trial court in *Avena* extensively questioned the jurors individually and in sequestration. After asking prospective jurors to describe their views on the death penalty, the court asked whether they would automatically convict defendant so they could get to the penalty stage or would automatically find the special circumstance allegations not true to avoid the question of penalty; whether they would in every case vote to impose the death penalty or would in every case vote to impose a sentence of life without possibility of parole; and whether they had moral, religious, or philosophical beliefs that would impair their ability to decide the case. Counsel were permitted to ask

follow-up questions. In sanctioning the selection process, the Court stressed that the record in *Avena* revealed that if a juror gave equivocal answers, follow-up questions were asked. (See *People v. Avena, supra,* 13 Cal.4th at p. 413.) Here, in contrast, the trial court did not ask any questions of any juror even when some follow-up was patently necessary in light of questionnaire or oral responses (discussed *supra*) that manifested, on their face, potential or actual bias or prejudice as to penalty.

In *People v. Lewis* (2001) 26 Cal.4th 334, a juror (Lloyd G.) stated during voir dire that the prosecution would have to convince him of the need for capital punishment -- not only under the particular facts of this case, but also as a general proposition -- before he would vote to impose it. The trial court found that the juror thus possessed a bias against the death penalty which prevented or substantially impaired his ability to perform his duty as a juror. Nevertheless, despite his bias against capital punishment, the juror stated he could apply the law according to the trial court's instructions. This Court found that at the very least juror Lloyd G's responses were conflicting or equivocal. (*People v. Lewis, supra*, 26 Cal.4th at p. 353.) The Court noted that in evaluating the qualifications of the challenged juror, the trial court relied not only on the juror questionnaire responses but also on thorough voir dire examination. (*Ibid.*) Here, of course, the trial court patently disregarded and ignored questionnaire responses and failed to conduct any questioning of any of the jurors in this case even when the questionnaire

responses so clearly needed further probing and explanation in order to insure the selection of a fair and impartial penalty jury.

This Court recently reversed a death judgment owing to inadequate voir dire in another capital case. (See *People v. Cash, supra,* 28 Cal.4th 703.) The limitation on voir dire in *Cash* was less comprehensive that the almost total lack of voir dire in appellant's case. In *Cash*, the penalty decision was reversed because the trial court neglected to voir dire the jury in one area which might have been outcome determinative in sentencing. The circumstances of appellant's case are even more problematic. Here, the trial court's voir dire was wholly ineffective, with the court asking not a single question. The single voir dire question omitted in *Cash* might have allowed a person who was biased in that one area to serve on the jury. The voir dire in appellant's case was deficient in almost every area. As a result, there is no assurance that any of the jurors were impartial, and as shown in Subsection B, *supra*, and in Argument XVII, *infra*, many were patently biased. Thus, appellant presents a stronger case for reversal than the defendant in *Cash*. He is entitled to reversal of both the guilt and the penalty verdicts because there can be no assurance of fairness in any phase of these proceedings.

In *State v. Williams, supra,* 113 N.J. 393, 550 A.2d 1172, the Supreme Court of New Jersey reversed a defendant's conviction and death sentence where, as in the present case, the trial court relied heavily on prospective juror responses to a form questionnaire but failed to conduct any meaningful voir dire to follow-up

on those responses. In language that could equally-well describe the trial court's conduct of voir dire in this case, the New Jersey Supreme Court found that the trial court's reliance on the questionnaires with minimal follow-up questioning was not constitutionally sufficient. The "lack of significant information regarding jurors' attitudes on a host of issues effectively denied both parties the ability to challenge jurors for cause, and perhaps most importantly left the trial court unable to fairly evaluate the fitness of many jurors to serve." (*Id.*; 550 A.2d at p. 1179.)

In *People v. Wright* (1990) 52 Cal.3d 367, the Court stressed that voir dire is a means to achieve the end of an impartial jury. Thus, while a judge may restrict examination of prospective jurors within reasonable bounds so as to expedite the trial (*People v. Crowe* (1973) 8 Cal.3d 815, 828, fn. 22), at the same time there is no support for a trial court's complete abdication of its voir dire responsibilities as occurred in the present case. Unlike the procedure followed by the trial court in *People v. Wright, supra*, 52 Cal.3d at p. 419, where the trial court's own questioning of prospective jurors was fairly thorough and lengthy, the trial court here did not ask any questions of the jurors who were ultimately seated and sworn either during general voir dire (see Argument I, *supra*) or during death qualification. On the contrary, the trial court totally failed to conduct any voir dire or in any manner follow-up on meaningless, unclear, pro-death, or ambiguous juror responses during death qualification.

As demonstrated in Subsection B, *supra,* virtually every seated and sworn

juror in this case, both regular and alternates, indicated in their questionnaires strong bias in favor of the death penalty; some of these also indicated that the death penalty should be imposed on defendants convicted of first degree murder and who had been previously convicted of sex crimes as had appellant. Some jurors even indicated that they had prejudged penalty, would ignore or improperly consider mitigating evidence, and would vote to impose death in circumstances identical to or less inflammatory than those involved in this case. Indeed, Juror No. 1 indicated in her questionnaire that she would not be willing to weigh and consider all the aggravating and mitigating factors presented before deciding the penalty; yet the trial court asked no questions.

Juror No. 2 indicated that she was strongly in favor of the death penalty. Although her oral responses to questioning by defense counsel and the prosecutor was characterized by a litany of unclear and ambiguous answers, the trial court asked no follow-up questions. The trial court did not ask any questions, not even to clarify the "um-hums" and "un-unhs" of which the *Hovey* voir dire of Juror No. 2 almost totally consisted.

Juror No. 3, a former military and civilian police officer, categorically stated it would be difficult for him to follow court's instruction that "a defendant in a criminal case is presumed innocent unless proven guilty beyond a reasonable doubt." Juror No. 3 appeared to reject psychiatric or opinion testimony of the sort that appellant would offer in mitigation. Juror No. 3 stressed that the courts and

the law made a "mockery" of the death penalty and repeatedly indicated it was used too seldom. In response to these and a host of other responses indicating bias, prejudice, and predisposition to impose the death penalty, the trial court did not ask a single question.

As to Juror No. 4, who indicated his in-laws were district attorneys, the court did not ask any questions. Although Juror No. 5 repeatedly stressed her strong bias in favor of the death penalty, the trial court did not ask any questions. Juror No. 6 seemed overly eager to serve on the jury. There was no questioning by the trial court to determine whether his responses indicated unrevealed bias or inappropriate eagerness to serve on the jury. In the face of repeated expressions by Juror No. 7 favoring the death penalty, the trial court did not ask any questions about bias against appellant and for law enforcement.

Juror No. 8 had been previously involved in a murder case, having discovered his neighbor's body under circumstances similar to the present case. Although he also reported extensive dealings with district attorneys and law enforcement officers in his profession, and had testified in the prior murder case in which defense counsel also participated, the trial court asked not a single question. Likewise, the trial court did not ask any questions of Juror No. 9. Juror No. 10, too, was very "pro-death," unsure whether she could listen to both sides. Although Juror No. 10 responded it would be difficult to be fair, the trial court did not ask a single question.

Among other responses indicating bias and prejudice, Juror No. 11 did not think she would be able to weigh and consider any evidence or circumstances that "causes sympathy or extenuates the gravity of the crime," including a person's life history, terrible abuse as a young child, abandonment, and so forth, all of which were involved in this case. Juror No. 11 was unable to state whether she would consider psychological evidence. The trial court did not ask any questions. Finally, Juror No. 12 also indicated strong bias toward the death penalty in murder cases. In her view, the death penalty was imposed too seldom and, although may people have been sent to death row, "only a few have been executed." She indicated that a "senseless killing," of the type potentially involved in this case, warrants the death penalty. As with every other seated and alternate juror, the trial court did not ask a single question.

Beyond any doubt, the record in this cases demonstrates that the trial court here fundamentally abdicated its responsibility to determine whether the seated and alternate jurors were able to remain impartial in determining penalty. This was not simply a case in which some of the jurors gave equivocal answers about their views on the death penalty. Over a range of pertinent subjects, indicating that virtually every seated and alternate juror responded in such a fashion as to demand further probing questioning, the trial court sat silent and did nothing. Because of the views expressed by virtually every seated and alternate juror during death qualification, the trial court should have, but totally failed, to further

question the jurors to determine whether the views they expressed would have prevented or substantially impaired the performance of their duties.

"The Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*Morgan v. Illinois, supra,* 504 U.S. at p. 729.) Here, the trial court's complete and utter failure to conduct any meaningful voir dire or ask prospective jurors any questions during *Hovey* death qualification rendered appellant's penalty trial fundamentally unfair. (*Mu'Min v. Virginia, supra*, 500 U.S. at pp. 424-425.)

What was said about the conduct of general voir dire in this case (see Argument I, *supra*) is equally applicable to the death qualification voir dire. While the juror questionnaires asked many questions, the court did not engage in any follow-up questioning based on the written answers provided. Form -- the use of a questionnaire -- was elevated over substance -- the probing of responses. The mere fact of written responses alone was deemed consequential to the trial court, not the answers given. The procedure adopted by the court -- completely ignoring the written and oral responses of every seated and alternate juror and failing to ask any follow-up voir dire questions during death qualification -- was not reasonably sufficient to test the jury for bias or partiality, thereby denying appellant his fundamental rights to a fair trial, trial by jury, due process, and to a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

### D. The Error Was Prejudicial Per Se

In Argument I, *supra*, and in Subsection C, *supra*, appellant demonstrated that he was prejudiced by the trial court's failure to conduct any voir dire or question any of the prospective jurors who were seated in this case about their responses in the juror questionnaires even when those responses were ambiguous or unclear or were strongly indicative of bias and prejudice. The trial court's failure to conduct meaningful or constitutionally adequate death qualification voir dire makes it impossible to determine precisely from the record whether any of the prospective jurors who were ultimately seated as jurors or alternates held disqualifying views. For these reasons, the court's error is structural and requires reversal per se of the penalty. (See *Morgan v. Illinois, supra*, 504 U.S. at p. 739.) The error -- which inevitably skewed the integrity of the entire voir dire process and adversely affected the manner in which the jurors would evaluate the evidence -- amounted to a defect affecting the framework within which the trial proceeds not subject to harmless error analysis. (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310; *People v. Flood, supra,* 18 Cal.4th at p. 500; *People v. Sarazzawski* (1945) 27 Cal.2d 7, 18-19.)

In *People v. Holt, supra,* 15 Cal.4th at p. 661, the Court held that reversal of judgment is required when voir dire was "so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair." As previously held by the Court in *People v. Wheeler, supra,* 22 Cal.3d at p. 283, "[t]he right to a fair

and impartial jury is one of the most sacred and important guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." By the Court's own jurisprudence, the constitutional error committed by the trial court during death qualification voir dire was prejudicial per se; the *Chapman* standard of error does not apply.

Alternatively, in any case, the juror responses and questionnaire answers indicate that virtually every sitting and alternate juror expressed strong bias and prejudice and possibly prejudgment of penalty, thereby justifying their excusal for cause. The responses of these jurors revealed and exposed bias and impartiality in favor of the death penalty, strongly-expressed unwillingness to consider all types of mitigating evidence, and prejudicial inability to remain impartial during the penalty trial until submission of the case. (See *People v. Avena, supra,* 13 Cal 4th at pp. 413-414; *People v. Bittaker, supra*, 48 Cal.3d at pp. 1085-1087.) Accordingly, even under the standard reserved for errors of constitutional dimension (*Chapman v. California, supra,* 386 U.S. at p. 24), the trial court's failure to conduct meaningful death qualification voir dire in this case and probe juror questionnaire and other responses in a sufficient or meaningful manner cannot be deemed harmless beyond a reasonable doubt.

In *People v. Cash, supra,* 28 Cal.4th 793, the Court reversed a death judgment and death sentence because of inadequate voir dire. Where the

comprehensiveness of the entire voir dire is at issue, a defendant who establishes that "any juror who eventually served was biased against him" is entitled to reversal. (*People v. Cunningham, supra*, 25 Cal.4th at p. 975; *People v. Avena, supra*, 13 Cal.4th at p. 413.) Here, virtually every juror in this case expressed strong bias or prejudice, creating the risk that one or more jurors who fixed the penalty at death voted to impose the death penalty, not because of properly-admitted penalty phase evidence or instructions, but for other impermissible reasons, such as bias, prejudice as to penalty, or other constitutionally improper factors. The trial court's failure to conduct meaningful death qualification voir dire in this case compels doubt that appellant was sentenced to death by a jury empanelled in compliance with the Fifth, Sixth, Eighth, and Fourteenth Amendments. Because the trial court's death qualification voir dire was so inadequate and insufficient -- indeed nonexistent -- despite manifestations of juror bias and prejudice so obviously revealed in the juror questionnaires and other oral responses, appellant's resulting penalty trial was fundamentally unfair. The judgment and sentence of death must be reversed.

## XVII

## APPELLANT'S JURY INCLUDED JURORS WITH ACTUAL PENALTY BIAS IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY IMPARTIAL JURY, DUE PROCESS, AND A TO RELIABLE DETERMINATION OF PENALTY GUARANTEED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; THE CONSTITUTIONAL VIOLATIONS AS TO PENALTY ARE REVERSIBLE PER SE

A criminal defendant is entitled to a fair trial and impartial jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, § 16 of the California Constitution. (See, e.g. *Morgan v. Illinois, supra,* 504 U.S. at p. 727 [and authorities cited therein]; *People v. Wheeler, supra,* 22 Cal.3d at p. 272.) Of course, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-522, fn. 20.) Hence, when the "pro-life" side of the spectrum is excluded, the state "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Id.* at pp. 520-521.)

Where a biased juror has actually been seated, the defendant has been deprived of his fundamental right to trial by a fair and impartial jury. (*See, e.g., Morgan v. Illinois, supra,* 504 U.S. at p. 729; *People v. Weaver* (2001) 26 Cal.4th 876, 910; *People v. Boyette, supra,* 29 Cal.4th at p. 416; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517.) Without qualification, the United States Supreme Court has

unambiguously declared that where such a violation has occurred and "the death sentence is imposed, the State is disentitled to execute the sentence." *(Morgan v. Illinois, supra*, 504 U.S. at p. 729; *see also United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316 [if trial court's denial of challenge for cause "result(s) in the seating of any juror who should have been dismissed for cause . . . that circumstance would require reversal"].)

In the present case, several actually-biased jurors deliberated appellant's fate and therefore his penalty must be reversed. This error does not concern the process by which the biased jurors were seated. As such, this error does not lay the blame upon the court or trial counsel for failing to conduct adequate voir dire (see Argument XVI, *supra*). Instead, the penalty must be reversed because biased jurors were seated on appellant's jury.

Under familiar cases decided by this Court, many seated jurors were patently biased. For example, in *People v. Boyette, supra*, 29 Cal.4th 318, this Court held that a juror who gave answers strikingly similar to many jurors' answers in this case should have been excluded for cause from a capital jury under the *Witt* standard. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 424.) In *Boyette*, the prospective juror indicated both that he was strongly in favor of the death penalty and that he was "somewhat pro-death." (*Id.* at pp. 417-418.) He initially stated that the death penalty should automatically be imposed on defendants convicted of multiple murder. (*Ibid.*) He later agreed that he could

vote for life if it was appropriate, but that he would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty." (*Ibid.*) He "equivocated when asked whether he would exclude consideration of a life term, saying, 'Never having been in that situation, I have no idea.'" (*Ibid.*) Finally, he stated that he could not "assume" that "life without parole means what it says." (*Ibid.*) The trial court denied the defendant's challenge for cause under *Witt*.

This Court held that the juror was biased and therefore the trial court erred in denying a defense challenge for cause: "This was not a case in which the juror gave equivocal answers: He was strongly in favor of the death penalty and was not shy about expressing that view. He indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. . . ." (*People v. Boyette, supra,* 29 Cal.4th at p. 419.)

In the present case, the responses of Juror Nos. 1, 3, 10, 11, and 12 were remarkably similar to the juror's responses in *Boyette*. Indeed, at least six seated jurors in this case -- not alternates -- were actually biased. They did not just give equivocal answers but, as in *Boyette*, were strongly in favor of the death penalty and should have been dismissed for cause. For example, in her questionnaire, Juror No. 1 indicated that she would *not* be willing to weigh and consider all the

aggravating and mitigating factors presented before deciding the penalty. (Supp B -- Juror Questionnaires CT 1054.) She also stated that "we need severe punishment for severe crimes" and that her beliefs had not changed in 10 years. (Supp B -- Juror Questionnaires CT 1055.)

In his questionnaire, Juror No. 3, a former military and civilian police officer (for over 20 years), indicated it would be difficult to follow court's instruction that "a defendant in a criminal case is presumed innocent unless proven guilty beyond a reasonable doubt." (Supp B -- Juror Questionnaires CT 1116.) In respect to the death penalty, Juror No. 3 indicated "if the death penalty was properly handled and now allowed felons to spend 10 or 15 years awaiting death, I think it would be the least severe until the moment of execution." (Supp B -- Juror Questionnaires CT 1120.) Juror No. 3 also indicated in response to a question about the purpose of the death penalty that "the courts and laws handling of it has nearly made a mockery of it." (Supp B -- Juror Questionnaires CT 1121.) He indicated that the death penalty was used too seldom because of "too many pressure on the juries." (Supp B -- Juror Questionnaires CT 1121.) Elsewhere, Juror No. 3 stated that he was strongly biased in favor the death penalty: "*I favor the death penalty no doubt about that.*" (RT 1386 [italics added].) Most significantly, Juror No. 3 even questioned his own ability to be a fair and impartial juror: "Only that my background in police training may make it very difficult" and also questioned whether his "police atmosphere can be subdued."

(Supp B -- Juror Questionnaires CT 1125.)

Defense counsel asked Juror No. 3 whether he would "really consider" psychological or psychiatric testimony as evidence in mitigation "that might sway you from that death penalty to life without possibility of parole." (RT 1387.) Juror No. 3 answered with a question, further revealing his opposition to that type of mitigation evidence and his bias in favor of death: "A. I would have to give some weight to it? *I wouldn't -- I don't think I would.*" (RT 1387-1388 [italics added].)

In response to defense counsel's question that he would "really have a hard road [row] to hoe to convince" him, Juror No. 3 agreed that he would. Although Juror No. 3 stated that he would *try* to be fair (RT 1388), he also stated that "I've had so many years in law enforcement that I know that it gives you a sort of attitude, you know, and *it's hard to get away from that attitude.*" (RT 1388 [italics added].) Defense counsel observed that "I just kind of have the feeling, to be honest with you, that in this case if you found him guilty of everything you'd want him executed without even considering that stuff and that's just where I'm coming from and you are the only one -- " (RT 1388.) Juror No. 3 interrupted counsel, stating with an unusual but revealing choice of words: "*I would give some prejudice to it*, but to scale it would be -- I don't know because I've never been in this situation. but I can't say that, yes, I would give 100 percent or, no, I wouldn't given zero percent and be wrong about it. You know what I'm saying? I don't know." (RT 1388.) Finally, as the prospective juror in *Boyette*, Juror No. 3 said

he would "really have to be convinced before considering any mitigating evidence. (RT 1389.)

In response to questioning by the prosecutor what he thought of the death penalty, Juror No. 7 replied that "if it's proven without a shadow of a doubt and voted you on it -- and I agree with it because we're in a democratic society and I would have to go with the law of the land." (RT 1519.) Juror No. 7 also stated that voting for the death penalty "wouldn't go against any beliefs." (RT 1519.) Juror No. 7 stated that he would vote for the death penalty if appellant "did the crime." (RT 1519.)

Juror No. 10 stated that she "would lean towards the death penalty" and was admittedly "very pro-death as far as death penalty." (See RT 875, 877.) In response to the prosecutor's question whether she could "listen to both sides" and be fair and make a proper decision, Juror No. 10 replied that she was "not sure. It would be very difficult, ... ." (RT 880.)

Juror No. 11 did not think she would be able to weigh and consider *any* evidence or circumstances that "causes sympathy or extenuates the gravity of the crime," including a person's life history, terrible abuse as a young child, abandonment, and so forth, all of which were involved in this case. (RT 1565.) Juror No. 11 indicated that she did not know whether she would consider psychological evidence. (RT 1567.) The prosecutor asked Juror No. 11 if, after she heard the whole case, "you conclude for yourself that this case demands the death penalty, the death penalty is appropriate, would you be able to vote for the

death penalty?" (RT 1568.) Juror No. 11 replied: "Oh, yes." (RT 1568.) She also stated that she would have no qualms about voting for the death penalty and that it would not "go against" her "beliefs or anything like that." (RT 1568.)

Juror No. 12 indicated that to "kill another person should warrant the death penalty" and that a person serving live without the possibility of parole "sounds" like "being catered to for a crime committed." (Supp B -- Juror Questionnaires CT 1450.) She stated that the death penalty was imposed too seldom and although many people have been sent to death row, "only a few have been executed." (Supp B -- Juror Questionnaires CT 1451.) She even indicated that a senseless killing warranted the death penalty. (Supp B -- Juror Questionnaires CT 1452.)

The constitution guarantees a defendant "the right to a jury that will hear his case impartially, not one who tentatively promises to try." (*Wolfe v. Brigano, supra,* 232 F.3d at p. 503 [jurors' "tentative statements that they would try to decide the case based on the evidence" insufficient to support finding of impartiality]; *see also Nance v. State* (Ga. Supreme Court 2000) 526 S.E.2d 560, 567 [court erred in denying challenge for cause to juror who stated that she would automatically vote for death if jury found one aggravating circumstance, even though she ultimately agreed that she would "listen" to the law and facts and choose the appropriate sentence].) In addition, a juror who will not consider mitigating evidence must be excused. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at p. 507.) Under the foregoing principles, Jurors Nos. 1, 3, 7, 10, 11, and 12

were actually biased and should not have sat on appellant's jury.

Both state and federal cases are clear that when an actually biased juror sits, the penalty must automatically be reversed. Trial counsel's failure to object or failure to conduct further voir dire matters not when a biased juror actually decides a capital defendant's fate. There is not a single case in which any court has held that a seated juror was biased, but also that counsel either waived his client's right to challenge the constitutional violation by failing to exhaust his peremptory challenges or was not ineffective in failing to remove that juror with a peremptory challenge. (*See, e.g., People v. Farnam* (2002) 28 Cal.4th 107, 132-133 [claim not preserved because exhaustion requirement not met, but also concluding jurors not biased]; *People v. Hillhouse, supra*, 27 Cal.4th at pp. 486-488 [same].) To apply the exhaustion requirement to avoid such a constitutional violation on appeal, or to analyze the effectiveness of counsel in failing to exercise a peremptory challenge or challenge for cause to prevent a biased juror from being seated, presupposes that counsel may waive his client's right to have an impartial jury decide whether his client lives or dies. (*Cf. United States v. Quintero-Barraza* (9th Cir. 1995) 78 F.3d 1314 (dis. opn. of Tang, J. at pp. 1353-1354) [discussing majority's dual holding that juror was not biased and counsel was not ineffective for failing to strike him: majority's "reasoning is confusing because either (the juror) is biased or he is not biased. If he is not biased, then counsel simply made no error in impaneling an unbiased juror. If (he) is biased, then the

issue is whether counsel can functionally waive the defendant's right to an impartial jury."].)

The starting point for this analysis is the fundamental rule that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" (*Johnson v. Zerbst, supra,* 304 U.S. at p. 464.) Of course, as this Court has observed, "'[b]y choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics.'" (*In re Horton* (1991) 54 Cal.3d 82, 95 [and authorities cited therein].) However, as to certain fundamental personal rights, waiver may not be implied through counsel's action or inaction; they require the defendant's personal and express, knowing and intelligent, waiver. Determining the manner in which certain rights may be waived (if they may be waived at all) often turns on a number of factors.

First and foremost, whether the defendant's express personal waiver is required turns on whether the right at issue is a "fundamental personal" one. (*In re Horton, supra*, 53 Cal.3d at p. 95; *see also, e.g., People v. Collins, supra,* 26 Cal.4th at p. 310.) If so, the nature of the right alone may require the defendant's express, personal, knowing, and intelligent waiver. In addition, courts may examine the significance of the fundamental personal right. If it is so critical that its violation amounts to a structural defect undermining the integrity of the trial

requiring reversal per se (*see, e.g., Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264), it is ordinarily the kind of right that the defendant must personally and expressly waive. (*See, e.g., People v. Collins, supra,* 26 Cal.4th at p. 310; *People v. Webster* (1991) 54 Cal.3d 411, 438 [concluding that right to peremptory challenges not "fundamental" right requiring personal waiver in part because, unlike violation of right to jury trial which requires automatic reversal, improper denial of peremptory challenge requires showing of prejudice].) Finally, if the waiver of a particular right can never be ascribed to "defense strategies and tactics" (*In re Horton, supra*, 54 Cal.3d at p. 94), it would follow that it is not the kind of right that counsel may waive on his client's behalf, but rather is one requiring the defendant's express personal waiver.

Under these principles, a defendant's state and federal constitutional right to trial by jury is a fundamental personal right, the violation of which amounts to structural error. (See, e.g., *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282; *Duncan v. Louisiana* (1968) 391 U.S. 145, 156-158; *People v. Collins, supra*, 26 Cal.4th at pp. 310-311; *People v. Ernst* (1994) 8 Cal.4th 441, 449.) Therefore, it requires the defendant's express personal waiver under both state and federal law. (*See, e.g., Patton v. United States* (1930) 281 U.S. 276, 308-312 [express personal waiver required under federal constitution]; Fed. Rules of Crim. Proc. Rule 23 [express, written waiver required under federal rules]; *People v. Collins, supra*, 26 Cal.4th at pp. 304-305 and n.2 [express waiver in open court required under state

and federal law]; see also Calif. Const., Art. I, § 16.)

According to the very text of the Sixth Amendment, trial by jury means trial by an "*impartial* jury." (*See also People v. Wheeler, supra,* 22 Cal.3d at pp. 265-266 [although right to impartial jury is not explicitly stated in California Constitution, it is implied].) The right to an impartial jury "'"is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."' [Citations]." (*In re Hitchings, supra,* 6 Cal.4th at p. 110.) Hence, it is as much a critical, "fundamental personal right" as is the right to trial by jury. (*People v. Boulerice, supra,* 5 Cal.App.4th at p. 473 [observing right to trial by impartial jury is "fundamental personal right"]; *accord, e.g., Rogers v. McMullen* (11th Cir. 1982) 673 F.2d 1185, 1189-1190 and fn. 5, cert. denied, 459 U.S. 1110 (1983).)

Indeed, "[t]he right to a fair and impartial jury is one of the most sacred and important guarantees of the Constitution" (*People v. Wheeler, supra*, 22 Cal.3d at p. 283.) As the United States Supreme Court has emphasized, "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors . . .." (*Gentile v. State Bar of Nev.* (1991) 501 U.S. 1030, 1075.) Moreover, it is deeply personal right, particularly in the capital context. Indeed, it is difficult to conceive of a right more "personal" than a defendant's right to have a fair and impartial decision-maker declare whether he shall live or die.

Moreover, the fundamental right to an impartial jury is so important that the

seating of even a single biased juror "taints the entire trial" (*Wolfe v. Brigano, supra,* 232 F.3d at p. 503), amounts to structural error, and requires reversal per se. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at p. 729; *People v. Weaver, supra*, 26 Cal.4th at p. 910; *In re Carpenter, supra,* 9 Cal.4th at p. 654 ["a biased adjudicator is one of the few 'structural defects in the constitution, which defy analysis by "harmless error" standards'"]; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463 [seating of biased juror is structural defect]; *Johnson v. Armantrout* (8th Cir. 1992) 961 F.2d 748, 755 ["trying a defendant before a biased jury is akin to providing him with no trial at all"]; *United States v. Gonzalez, supra,* 214 F.3d at p. 1111 [seating of even one biased juror requires reversal per se]; *United States v. Eubanks, supra*, 591 F.2d 513, 517 [same]; see also *Gray v. Mississippi* (1987) 481 U.S. 648, 668 ["impartiality of the adjudicator goes to the very integrity of the legal system;" hence, violation requires reversal per se].)

Finally, the waiver of the right to an impartial jury cannot be ascribed to "defense strategies and tactics." (*In re Horton, supra*, 54 Cal.3d at p. 94.) "The question of whether to seat a biased juror is not a discretionary or strategic decision." (*Hughes v. United States, supra*, 258 F.3d at p. 463; *cf. Gardner v. Florida , supra,* 430 U.S. at p. 361 [Court refuses to find that counsel's failure to object waived right to challenge court's consideration of undisclosed report in imposing death sentence because, *inter alia*, "there is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel

could possibly have made a tactical decision" not to object].) For all of the foregoing reasons, "if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' [Citation], then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury." (*Hughes v. United States, supra*, 258 F.3d at p. 463; *accord McCullough v. Bennett* (N.D.N.Y. 2003) 317 F.Supp.2d 112, 119.)

Even assuming for purposes of argument that counsel could technically waive his client's right to an impartial jury through inaction alone, the outcome would not change. It is beyond dispute that: (a) an attorney's failure to remove a biased juror falls below an objective standard of reasonableness and cannot be justified by any conceivable trial "tactic;" and (b) such deficient performance undermines confidence in the outcome of the case because a biased juror was seated. (*Hughes v. United States, supra,* 258 F.3d at pp. 463-464; *accord People v. Weaver, supra*, 26 Cal.4th at p. 911 ["because the presence of even a single juror compromising the impartiality of the jury requires reversal, counsel would be constitutionally ineffective if he had failed to" preserve the claim].) In other words, establishing the bias of a deliberating juror necessarily establishes that counsel was constitutionally ineffective in failing to remove that juror with a challenge for cause or peremptory challenge. (*Ibid*; see also *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.)

Accordingly, regardless of the analytical approach and whether the blame for the violation is placed on the shoulders of the trial court, trial counsel, or both, the result is that the defendant was deprived of his right to an impartial jury. (*Cf. People v. Estrada* (1998) 63 Cal.App.4th 1090, 1096 ["The direction of a blow is less important than the wound inflicted."]; *Tejada v. Dubois* (1st Cir. 1998) 142 F.3d 18, 24-25 ["It is unnecessary for us to attempt to divide the blame between lawyer and judge. . . . Instead, our constitutional focus is on the defendant . . . and he lost regardless" of the offender].) The reasons for the deprivation are immaterial and do not change the fact that, if a biased juror is actually seated on a jury that fixes the punishment at death, the State is disentitled from executing the death judgment. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at p. 729; *People v. Weaver, supra*, 26 Cal.4th at p. 910.)

Consistent with the foregoing principles, other jurisdictions recognize that the seating of a biased juror violates the Sixth and Fourteenth Amendments and therefore requires reversal without regard to counsel's action or inaction. Some courts simply refuse to find waiver under these circumstances. (*See, e.g., United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316 [we "reject the contention that under federal law, a defendant is obliged to use a peremptory challenge to cure a judge's error" in denying a challenge for cause; if court's ruling "result(s) in the seating of any juror who should have been dismissed for cause . . . that circumstance would require reversal"]; *Johnson v. Armontrout, supra,* 961 F.2d

748, 754 [rejecting state's argument that counsel's failure to object to seating of biased juror waived claim for review: "When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias. (Citations.) If a defendant proves that jurors were actually biased, the conviction must be set aside (Citations)"]. Other jurisdictions have reversed by finding counsel constitutionally ineffective for the reasons discussed above. (*See, e.g., Hughes v. United States, supra*, 258 F.3d at pp. 463-464; *Johnson v. Armontrout, supra,* 961 F.2d at pp. 754-755; *McCullough v. Bennett, supra,* 317 F.Supp.2d at p. 119.) Still others apply both analyses and reach the same conclusion. (*See, e.g., Johnson v. Armontrout, supra*, 961 F.2d at pp. 754-755.)

In sum, where, as here, it has been shown that one or more biased jurors actually sat on a jury which returned a death verdict, the State is disentitled from executing the death judgment regardless of whether trial counsel satisfied the exhaustion rule. As such, penalty reversal is required.

## XVIII

## THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION OF THE LAWS, AND PROTECTION FROM THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY GUARANTEED BY THE FIFTH, EIGHTH AND, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. The failure to conduct intercase proportionality review of death sentences violates appellant's right to be protected from the arbitrary and capricious imposition of capital punishment guaranteed by the Eighth Amendment to the United States Constitution, and his Fifth, Eighth, and Fourteenth Amendment right to a fair trial, due process, and equal protection of the laws.

### A. The Lack of Intercase Proportionality Review Violates Appellant's Eighth and Fourteenth Amendment Protections Against the Arbitrary and Capricious Imposition of the Death Penalty

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (*See Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.)

Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

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

However, as Justice Blackmun observed, the holding in *Pulley v. Harris, supra,* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, [*citations omitted*] (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, [*citations omitted*], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions,

> the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*
>
> (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

In its now time for the Court to reevaluate its reliance on *Pulley v. Harris, supra.* As this case (predicated alternatively on felony-murder) 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).)[48] 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, unlike California, some type of comparative or intercase proportionality review.[49]

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[48]/ Appellant does not challenge the narrowing effect of California's special circumstances in this automatic appeal because that factual question depends on an empirical showing that must wait for a petition for writ of habeas corpus. (*See* Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1317-1318.)

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

The capital sentencing scheme in effect in 1996 at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming for purposes of this argument that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors -- especially the circumstances of the offense factor delineated in §190.3, subdivision (a) -- and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 (1989

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Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988). Other states have judicially instituted similar review. (*See, for example, State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

Revision) given by the trial court in this case (CT 652) grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (*See Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.).)

Indeed, as applied in California, however, § 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. As more thoroughly discussed and demonstrated in Argument XX, Subdivision B, *infra*, (and incorporated by reference herein), prosecutors throughout California have argued for the death penalty in almost every conceivable circumstance of the crime, even those that -- from case to case -- reflect starkly opposite circumstances -- e.g., arguing in one case that the defendant struck with many blows and, then in another, that he struck with a single blow; arguing the defendant killed with a purportedly aggravating motive and, then in another, that the defendant acted without any motive at all; arguing that the defendant engaged in a cover-up to conceal his crime and, then in another, that the defendant did not engage in a cover-up; arguing that the defendant made the victim endure terror and, then in another, that the defendant killed without any warning; arguing that the victim had children and, then in another, that the victim had not yet had a chance to have children; arguing that the victim struggled and, and then in another, that the victim did not struggle; and arguing that the defendant was a complete stranger to the

victim and, then in another that the defendant knew the victim.

California's authorization of the death penalty for felony-murder works in combination with the far-reaching and malleable statutory sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Section 190.2 immunizes few kinds of first degree murderers from death eligibility, and § 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 Arguments XX through XXII, *infra*, which are incorporated herein. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability, criminal history, and backgrounds are sentenced to death.

California's capital sentencing scheme neither operates in a manner to ensure consistency in penalty phase verdicts nor in a manner to prevent arbitrariness of verdicts in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment rights not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

/ / /

### B. The Lack of Intercase Proportionality Review Also Violates Appellant's Right to a Fair Trial, Due Process, and Equal Protection of the Laws Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (*See, e.g., Monge v. California* (1988) 524 U.S. 721, 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

At the time of appellant's sentence, California required intercase proportionality review for noncapital cases. (See § 1170, subd. (d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL) -- a comprehensive and detailed disparate sentence review. (See, generally, *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) However, persons sentenced to death, the most extreme penalty, are unique among convicted felons in that they are not accorded this review. This distinction is irrational.

To succeed on a claim under the equal protection clause, a defendant first must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*Batchelder v. United States*

(1979) 442 U.S. 114, 123-125; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568; *In re Eric J.* (1979) 25 Cal.3d 522, 530.) In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, the Court applies different levels of scrutiny to different types of classifications. Classifications affecting fundamental rights are given the most exacting scrutiny. (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) Since life itself and freedom from the arbitrary imposition of death are perhaps the most elemental aspects of the fundamental constitutional rights to life and personal liberty, the strict scrutiny test is necessary applicable. (*People v. Olivas* (1976) 17 Cal.3d 236, 250-251 [personal liberty is a fundamental interest, second only to life itself].)

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning of *Allen*, however, was flawed.

The *Allen* Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.) Although the observation may be true, it ignores a more

significant point, *i.e.*, the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (§ 190.2) and sentencing factors (§ 190.3), and a court of statewide jurisdiction is well-situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (*See McCleskey v. Kemp* (1987) 481 U.S. 279, 305; see also *People v. Cromer, supra*, 24 Cal.4th at pp. 902-903 [discussing need for statewide due diligence standards and reasons why appellate courts are better able than trial courts to set such standards].) Principles of uniformity and proportionality remain alive in the area of capital sentencing through prohibition of death penalties that flout a societal consensus as to particular offenses or offenders. (*See Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida, supra,* 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584; *Atkins v. Virginia* (2002) 536 U.S. 304.) But juries -- like trial courts and counsel -- are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out

aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (*See* § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a capital verdict would render the jury's sentencing function less than inviolate, since it is already not entirely inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287 [emphasis added].) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra,* 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term

differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for -- rather than against -- requiring application of review procedures to potentially disparate capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (*See People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (*Compare* § 190.3, subds. (a) through (j) with Cal. Rules of Court, rule 4.421 [circumstances in aggravation] and rule 4.423 [circumstances in mitigation].) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the non-capital, disparate review mechanism under § 1170, subdivision (d).

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*See Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the

equal protection clause prevents violations of rights guaranteed to the people by state governments. (*See Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons, like appellant, who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. All criminal sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state -- the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review thus additionally violates appellant's fundamental constitutional right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and requires reversal of his death sentence.

## XIX

## THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

In his proposed penalty jury instructions, appellant submitted, as Special Instruction No. A2, the following instruction on the use and consideration of victim impact evidence:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case.
>
> You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(CT 589.)

On the prosecutor's objection to appellant's Special Instruction No. A2 (RT 5640-5641), the trial court refused the instruction. (RT 5641.)

Gayle Johnson's daughter, Monica DiVencenzo, testified that she had a brother and a sister. Monica and her husband had two children, daughter Jessica and son Dario. (RT 4001-4002.) Monica identified various family photographs, including one of her mother. (RT 4002.) Monica saw her mother every day before the murder; they were very close. They used to talk, shop, and go places together. "She was so close." (RT 4003.) Gayle Johnson took care of her

grandchildren. Monica's daughter usually stayed with her grandmother every Saturday and went to church with her on Sunday. (RT 4003.)

In closing argument, the prosecutor asked the jury:

> Let's think about Gayle for a minute. You didn't hear her entire life story, but you heard a little about her. You heard that she was a wife; she was a mother; she was a grandmother. She was close with her grandchildren, with her children, with her husband. ...

(RT 5674.)

Later, the prosecutor stressed: "Mr. Foster wants all the things that he took from Gayle. He wants to be able to turn on the TV set at night, watch his favorite show. He wants to be able to visit with the people that he makes friends with, with his family. Gayle will never be able to do that." (RT 5693.)

### B. The Court Erred in Failing to Instruct the Jury on the Proper Use of Victim-Impact Evidence

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman, supra*, 19 Cal.4th at p. 154.)

In this case, the trial court breached its instructional obligation by denying appellant's proposed jury instruction on victim-impact evidence and by failing to instruct the jury on the proper use of victim-impact evidence. The victim's daughter testified for the prosecution as a victim-impact witness. Although her testimony was relatively brief, the testimony undoubtedly had a strong emotional impact on the jury. This evidence detailed the victim's virtues and her closeness to her family, children, and grandchildren. As discussed above, during his penalty-phase closing argument to the jury, the prosecutor reminded the jurors of this victim-impact evidence and stressed its import in the jury's penalty determination calculus.

Given the highly inflammatory nature of the crime itself, there was a very real danger that emotions engendered by the victim-impact evidence would preclude the jury from making a rational penalty decision unless the trial court provided some guidance on how the victim-impact evidence should be used and considered. An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore it should have been given (as requested by appellant) or on the court's own motion. (See generally *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; *People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022.)

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal

principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee, and Georgia have held that, in every case in which victim-impact evidence is introduced, the trial court must instruct the jury on the appropriate use, and admonish the jury against the misuse, of the victim-impact evidence. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required instruction varies in each state, depending upon the role victim-impact evidence plays in that state's statutory scheme, common features are an explanation of how the evidence can properly be considered and the admonition not to base a decision on emotion or the consideration of improper factors. If not appellant's proposed instruction, an alternative instruction for California would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in

> question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Further, you must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the appropriate punishment to be imposed.

The first four sentences of this instruction duplicate the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159. The last sentence is based on *State v. Koskovich*, *supra*, 776 A.2d at p. 177.[50]

This Court addressed a different proposed limiting instruction in *People v. Ochoa, supra,* 26 Cal.4th at p. 445, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, an instruction which was also given in this case.[51] (See CT 650.) However, CALJIC

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[50]/ In *State v. Koskovich*, *supra*, the New Jersey Supreme Court held: "We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard." (*Id.* at p. 177.)

[51]/ The version of CALJIC No. 8.84.1 given to appellant's jury read as follows:

> "You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> "You must determine what the facts are from the evidence received during the entire trial unless you are instructed

No. 8.84.1 does not cover any of the points made by the instruction proposed here. It does not tell the jurors why victim-impact evidence was introduced. It does not caution the jurors against an irrational decision, such as imposing death based on the prosecutor's comments regarding appellant's supposed courtroom demeanor. (See *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 979-982 [prosecutor's reference to non-testifying defendant's courtroom behavior violated defendant's due process rights to a guilt determination based on evidence and his constitutional right not to testify, and was reversible error].) It does not warn the

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otherwise.

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

"You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict."

(CT 650.)

jurors not to consider what they may perceive to be the opinions of the victim-impact witnesses -- a clearly improper factor (*Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2; *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; *People v. Smith, supra,* 30 Cal.4th at p. 622) which the prosecutor nevertheless strongly urged the jurors to use as a reason to vote for death (see RT 3747-3748). Nor does it admonish them not to employ the improper, but heavily emphasized (see RT 3742-3748), factor of vengeance in their penalty determination. (See, e.g., *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713 [prosecutor's "role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim"].) These defects were addressed in appellant's proposed Special Instruction A2 which properly cautioned the jury against focusing on impermissible considerations to which CALJIC No. 8.84.1 did not refer and which were likely to arise by virtue of the overwhelmingly emotional nature victim-impact evidence. As the High Court explained in *Payne*: "'The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825, quoting *Booth v. Maryland* (1987) 482 U.S. 496, 517 (dis. opn. of White, J.).)

True, CALJIC No. 8.84.1 does contain the admonition: "You must neither

be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim-impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victim's relatives, or by any exhortation to seek vengeance on behalf of the victim's family or society as a whole.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction proposed here would have conveyed that message to the jury; none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion and other improper considerations, including vengeance and the wishes of the victim's family, from tainting the jury's decision. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The violations of appellant's federal constitutional rights require reversal

unless the state can show that they were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 381 U.S. 18, 24.) The violations of appellant's comparable or equivalent state rights also require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown, supra,* 46 Cal.3d at pp. 447-448.) In *Brown*, the Court stressed the applicability of a more exacting standard of review when assessing the prejudicial effect of state-law errors at the penalty phase of a capital trial. (*People v. Brown, supra*, 46 Cal.3d at p. 447.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase.

In *People v. Ashmus, supra*, 54 Cal.3d at pp. 983-984, the Court again invoked *Brown,* explaining that to apply the standard required the reviewing court to reverse based on even the possibility that a hypothetical juror might have reached a different decision absent the error. "We must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*Id.* at pp. 983-984.) For the reasons discussed above in *Ashmus*, where the Court equated the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard (*ibid.*), and additionally in view of the purely emotional nature of the victim-impact evidence presented in this case, as well as the prosecutor's effective use of that evidence during his closing argument, the trial court's instructional error alternatively cannot be considered harmless under *Brown*, and therefore reversal of the death judgment is required.

## XX

## THE JURY INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS IN § 190.3, AND THE JURORS' APPLICATION OF THESE SENTENCING FACTORS, RENDERED APPELLANT'S DEATH SENTENCE CAPRICIOUS AND ARBITRARY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Factual and Procedural Background

The trial court instructed the jury on the sentencing factors in § 190.3 in the language of CALJIC No. 8.85, the standard instruction regarding the statutory factors to be considered by the jury in determining whether to impose a sentence of death or life without the possibility of parole. (CT 655-656.) In addition to CALJIC No. 8.85, the court instructed the jury as follows:

> Potential aggravating factors are limited to those listed in CALJIC No. 8.85 (a), (b) and (c) only. You may not consider any other evidence as an aggravating factor. You may not consider the absence of a mitigating factor as an aggravating factor.
>
> You may not consider the same facts more than once in determining the presence of aggravating factors.

(CT 657.)

In its oral instructions, the court did not define for the jury what it meant by the reference to CALJIC No. 8.85. (See RT 5752.[52]) The jury was also instructed

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[52]/ The Reporter's Transcript on Appeal as originally transcribed contained numerous, serious errors in key penalty jury instructions, ostensibly as read to the jury by the trial court, rendering them virtually unintelligible. (See RT 5748-5773 [(1) original version as read and reported and (2) penalty instructions "corrected" by reporter].) Appellant sought correction of the record to reflect the instructions as actually read by the court. Appellant's correction requests were predicated

in the language of CALJIC No. 8.88, the standard instruction on aggravating and mitigating factors, generally. (CT 651-652; see Argument XXI, infra.) Together, these instructions rendered appellant's death sentence unconstitutional.

### B. The Instruction on § 190.3, Subdivision (a) and Application of that Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, subdivision (a) permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "[t]he circumstances of the crime

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exclusively on the assumption that the trial court, generally, read to the jury the printed text of the jury instructions. However, considering the unintelligibility of the instructions contained in the initial record on appeal, that assumption may have been misplaced. The judge who presided over record correction was not the same judge who presided at appellant's trial, the latter having left the bench and having returned to the practice of law. It is not known how the reporter thus determined from contemporaneous, yet erroneous, trial notes what in fact was actually read by the trial court in its oral instructions to the jury. The issue of penalty jury instruction unintelligibility and the method utilized by the reporter to correct the record on appeal may therefore be raised in appellant's petition for writ of habeas corpus.

of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (CT 655.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that -- at least in the abstract -- it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California, supra,* 512 U.S. at p. 975.)

An analysis of how § 190.3, subdivision (a) is actually used by prosecutors in capital cases shows that the essence of the Court's judgment in *Tuilaepa* is incorrect. In fact, there is an extraordinarily disparate use of the circumstances-of-the-crime factor. Beyond question, whatever "common sense core of meaning" subdivision (a) once may have had is long gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision-making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires the adoption of "procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

As applied in California, however, § 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. Prosecutors throughout California have argued that the penalty jury weigh aggravation in almost every conceivable circumstance of the crime, even those that -- from case to case -- reflect starkly opposite circumstances. For example, records in other capital cases before the Court[53] reveal that prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale because:

1. The defendant struck many blows and inflicted multiple wounds;[54]

2. The defendant killed with a single execution-style wound;[55]

3. The defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification);[56]

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[53]/ Ev. Code § 452, subd. (d) authorizes the Court to take judicial notice of the records of any court of this state.

[54]/ See, e.g., *People v. Morales*, Cal. Sup. Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

[55]/ See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-3027 (same).

[56]/ See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

4. The defendant killed the victim without any motive at all;[57]

5. The defendant killed the victim in cold blood;[58]

6. The defendant killed the victim during a savage frenzy;[59]

7. The defendant engaged in a cover-up to conceal his crime;[60]

8. The defendant did not engage in a cover-up and so must have been proud of it;[61]

9. The defendant made the victim endure the terror of anticipating a violent death;[62]

10. The defendant killed instantly without any warning;[63]

11. The victim had children;[64]

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[57]/ See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[58]/ See, e,g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

[59]/ See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy (trial court finding).

[60]/ See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[61]/ See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[62]/ See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[63]/ See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[64]/ See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

12. The victim had not yet had a chance to have children;[65]

13. The victim struggled prior to death;[66]

14. The victim did not struggle;[67]

15. The defendant had a prior relationship with the victim;[68] and

16. The victim was a complete stranger to the defendant.[69]

The above examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is now being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on diametrically-opposed or squarely-conflicting circumstances, demonstrating that the term has no common or core meaning or significance but is so malleable that it can be applied or invoked in virtually every case.

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[65]/ See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[66]/ See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[67]/ See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[68]/ See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[69]/ See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the circumstances-of-the-crime aggravating factor to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide, including age of victim, method of killing, motive, and location of crime. For example, prosecutors have also argued, and juries have been permitted to find, that factor (a) is an aggravating circumstance because:

1. The victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[70]

2. The victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[71]

3. The defendant killed for money, to eliminate a witness, for sexual

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[70]/ See, e.g., *People v. Deere*, No. S004722, RT 155-156 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-4716 (victim was "elderly").

[71]/ See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

gratification, to avoid arrest, for revenge, or for no motive at all;[72]

4. The victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[73] and

5. The victim was killed in her own home, in a public bar, in a city park, or in a remote location.[74]

The foregoing examples illustrate how the factor (a) aggravating circumstance actually is being applied and demonstrate beyond doubt that it is used as an aggravating factor in every case regardless of the facts or circumstances, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts -- or facts that are inevitable variations of every homicide -- into aggravating factors that are offered to every jury as unique factors weighing on death's side of the scale.

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[72]/ See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[73]/ See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

[74]/ See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

In this case, the prosecutor argued that factor (a) encompassed not just the murder of Gayle Johnson, but the circumstances before and after the murder. As in the cases illustrated above, the prosecutor here invoked a multiplicity of circumstances and facts that, he argued, rendered factor (a) uniquely applicable to appellant: He went to a church armed with a knife ["what kind of person picks a church?" (RT 5673)]. The prosecutor stressed that there were "gentle God-fearing people at the church, "and that's the place he picked to commit this crime." (RT 5773.) The prosecutor urged the jury to examine the weapon -- " very personal way of killing someone" (RT 5673) He stressed the cruelty of using a knife and the terror it must have caused the victim. (RT 5674.) The prosecutor stressed the manner of killing -- "slamming" and "jamming" the knife into the victim. (RT 5673.) The prosecutor concluded, stressing that these circumstances "dominate overwhelming, crush, totally outweigh anything else that he has presented to you in mitigation." (RT 5676.)

In so arguing factor (a) to the jury, the prosecutor thus invoked virtually all of the purportedly unique facts and circumstances that apply in virtually every homicide. In this case, the prosecutor invoked factor (a) because appellant struck many blows and inflicted multiple wounds; he killed the victim for the selfish, aggravating motive of robbery; he killed the victim in cold blood and without remorse; he killed the victim during a savage frenzy; he engaged in a cover-up to conceal his crime; and he made the victim endure the terror of anticipating a

violent death ["Can you imagine what it must have been like, how terrified Gayle Johnson was when [appellant] is slashing at her ..." (RT 5674).]

As in the illustrative cases, the prosecutor here stressed, as uniquely applicable circumstances justifying death in this case, that the victim was a wife, mother, grandmother, and friend to the people at the church ["You heard that she was a wife; she was a mother; she was a grandmother. ... She was a friend to the people at the church. She was a volunteer at the church. She was a religious person. She was a very religious person." (RT 5674-5675).] As in the illustrative cases, the prosecutor stressed that the victim struggled prior to death; that the victim was in the prime of her life; that the victim was stabbed; that appellant killed for money; that he sought to cover up the crime; that, as a unique circumstances, appellant killed in the middle of the day, carefully picking the time and place of the crime. (RT 5673.)

As this case so clearly illustrates, the circumstances-of-the-crime aggravating factor can be invoked in every conceivable situation or circumstance. Every fact or circumstance involved in a crime -- precisely because they are so malleable in the hands of the prosecution -- licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 363.) That this factor

may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. Factor (a) is being used -- as was used in this case -- to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

### C. The Instruction on Penal Code § 190.3, Subdivision (b) and the Jurors' Application of that Sentencing Factor Violated Appellant's Constitutional Rights to a Fair Penalty Trial, Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination

1. Introduction

In addition to CALJIC No. 8.85 and 8.88, as discussed in Subsection A, *supra*, the trial court instructed the jury in the language of CALJIC No. 8.87 (1989 Revision) that as aggravating factors under § 190.3, subdivision (b), the jury could consider the robbery and forcible rape of Johnnie Clark on May 23, 1972; the kidnapping, robbery, forcible rape and oral copulation of Dinah Jackson on June 13, 1972; the robbery and assault with intent to commit rape of Cindy Makris on March 29, 1982; and the express or implied threats to use force or violence on Megan Miles during the telephone calls to Lynn Miles on October 25, 1989 and December 3, 1989. (CT 685-686.) The jury was told it could rely on these aggravating factors in the weighing process necessary to determine if appellant should be executed. The jury was told that it was not necessary for all jurors to agree. "If any juror is convinced beyond a reasonable doubt that such criminal

activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." (CT 686.) Thus, although the jury was told in the language of CALJIC No. 8.88 (1989 Revision) that all jurors 12 must agree on the penalty determination (CT 652), the jury was also explicitly told that as to factor (b) it was not necessary for all jurors to agree. (CT 654.) Indeed, the jury was explicitly instructed that such unanimity as to factor (b) was not required. Thus, the sentencing instructions contrasted sharply with those given at the guilt phase, where the jurors were told they had to agree unanimously on appellant's guilt, the degree of the homicide (if any), and the special circumstances allegations.

As set forth below, the unadjudicated crimes evidence involving the alleged 1972 oral copulation of Dinah Jackson and the alleged 1989 threats to use force or violence during telephone calls to Lynn Miles should not have been admitted or considered by the jury. However, even assuming the evidence was constitutionally permissible, the aspect of § 190.3, subdivision (b), permitting the jury to sentence appellant to death by relying on evidence on which it did not necessarily agree unanimously, violated both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

### 2. The Use of Unadjudicated Criminal Activity as Aggravation Renders Appellant's Death Sentence Unconstitutional

The instruction on factor (b) aggravation was upheld against an Eighth

Amendment vagueness challenge in *Tuilaepa v. California*, *supra*, 512 U.S. at p. 977. However, the instruction and evidence in this case violated the Eighth Amendment, because they permitted the jury to consider unreliable evidence of appellant's alleged prior unadjudicated criminal conduct.

The admission into evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment, and a reliable determination of penalty under the Eighth Amendment. (*State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments]; *see also State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance based on state constitution with due process and impartial jury provisions comparable to United States and California Constitutions].) Thus, the trial court's instructions in this case that expressly permitted the jury to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, the use of this evidence in a capital proceeding violated appellant's equal protection rights under the California and United States Constitutions. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) Further, because the state applies its law in an irrational manner by providing more sentencing

rights in non-capital cases, the use of this evidence in a capital sentencing proceeding also violated appellant's California and United States constitutional rights to due process and equal protection of the laws. (*Hicks v. Oklahoma (1980)* 447 U.S. 343, 346; U.S. Const., 6th & 14th Amendments; Cal. Const., art. I, §§ 7 and 15.)

3. The Failure to Require a Unanimous Jury Finding on the Unadjudicated Acts of Violence Denied Appellant His Right to a Jury Trial Guaranteed by the Sixth and Fourteenth Amendments and Requires Reversal of his Death Sentence

Even assuming for purposes of argument that the evidence of alleged prior unadjudicated acts was constitutionally admissible at the penalty trial, the failure of the trial court's instructions pursuant to § 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior acts of violence renders his death sentence unconstitutional.[75] The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The United States Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356,

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[75]/ Argument XXI, *infra*, discusses the constitutional burden of proof requirements, jury unanimity, and fact-finding determinations made by a capital sentencing jury in California. This argument addresses solely the use of unadjudicated acts under factor (b), including the absence of jury unanimity as to unadjudicated acts under factor (b).

362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding -- at least in a non-capital case -- although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[76]

Prior to June of 2002, the United States Supreme Court's law on the Sixth Amendment did not apply to the aggravating factors set forth in § 190.3. Prior to

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[76]/ The United States Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida, supra,* 430 U.S. at p. 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged unadjudicated acts of violence, there is no need to reach this question here.

that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Hines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s]"].) In other words, absent juror unanimity in connection with the aggravating factor set forth in § 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to tell if all 12 jurors would have agreed that appellant committed the

previously unknown act of oral copulation with which appellant was never charged and about which Dinah Jackson had never previously testified. (See 3972-3973.) For the same reasons, there is no way to tell if all 12 jurors agreed that appellant committed unadjudicated acts involving Lynn Miles or her daughter (see RT 3892-3932), particularly when it is considered that any charges against appellant for those alleged and unadjudicated crimes were dismissed by the prosecution in 1989. (See also *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Dellinger* (1985) 163 Cal.App.3d 284, 302 [same].)[77]

4. Absent a Requirement of Jury Unanimity on the Alleged, Unadjudicated Acts of Violence, the Instructions on § 190.3, Subdivision (b) Allowed Jurors to Impose the Death Penalty on Appellant Based on Unreliable Factual Findings That Were Never Deliberated, Debated, or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a

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[77]/ This assumes that a harmless error analysis may apply to *Ring* error. In *Ring*, the High Court did not reach this question, but simply remanded the case. Because the error here is not harmless even under *Chapman v. California, supra,* 386 U.S. at p. 24 standard, there may be no need to decide whether *Ring* errors are structural in nature and hence prejudicial per se.

qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio*, supra, 438 U.S. at p. 604.) For this reason, the High Court has not hesitated to strike down penalty phase procedures that increase the risk that the fact-finder will make an unreliable determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Supreme Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (§ 190.3, subd. (b).) Before the fact-finder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (CT 653-654.) Thus, as noted above, members of the jury may individually rely on this -- and any other -- aggravating factor each of the jurors deems proper as long as the jurors all agree on the ultimate punishment. Because

this procedure totally eliminates the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . . even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas).)

The High Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable fact-finding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group

deliberation. At some point this decline [in jury number] leads to inaccurate fact-finding . . .." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Supreme Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States, supra,* 164 U.S. at p. 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The United States Supreme Court's observations about the effect of jury unanimity on group deliberation and fact-finding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable fact-finding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual

findings that they have neither debated, deliberated nor even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi,* supra, 486 U.S. at p. 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

### D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g) in CALJIC No. 8.85 as read to the jury; CT 655-656), and "substantial" (see factor (g); CT 656) acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

### E. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate

review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980). There can be no meaningful appellate review unless juries make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.) Indeed, written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber, supra,* 2 Cal.4th at p. 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to

establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.) By parity of reason, the same requirement must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170, subd. (c).) Under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing greater protection to noncapital than to capital defendants under similar circumstances violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra,* 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems,

25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[78] California's failure to require such findings renders its death penalty procedures unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

### F. Even if the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants as Appellant Nevertheless Violates Equal Protection Requirements of the Fourteenth Amendment to United States Constitution

As noted above (Subsections C and E, *supra*), the United States Supreme

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[78]/ See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1993); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1993); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive of the High Court, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws under the Fourteenth Amendment.

Equal protection analysis begins with identifying the interest at stake. In California, Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas, supra,* 17 Cal.3d at p. 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) . . .." (*Commonwealth v. O'Neal* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," this Court and others have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and

that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

California cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the California and United States Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections in order to make death sentences more reliable.

Appellant has previously demonstrated (Argument XVIII, *supra)* why the failure to provide intercase proportionality review violates his right to equal protection under the Fourteenth Amendment. He reasserts, as though set out in full, that argument here with regard to the denial of other safeguards such the requirement of written jury findings, unanimous agreement on alleged unadjudicated, violent criminal acts under § 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in Subsections B through E, *supra*. The procedural protections outlined in these assignments of error but denied capital defendants as appellant are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand Fourteenth Amendment close scrutiny analysis that should apply when the most fundamental interest -- life -- is at stake.

### G. Conclusion

For the reasons set forth above, both separately and in the aggregate, appellant's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and their California counterparts, and must therefore be reversed.

## XXI

## PENAL CODE § 190.3 AND IMPLEMENTING JURY INSTRUCTIONS (CALJIC NOS. 8.84-8.88) ARE UNCONSTITUTIONAL, BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF OR CONTAIN OTHER CONSTITUTIONALLY COMPELLED SAFEGUARDS AND PROTECTIONS REQUIRED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

### A. Introduction

The California death penalty statute and the instructions given in this case (CALJIC Nos. 8.84-8.88) fail to assign a burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. The instructions do not delineate a burden of proof either with respect to the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. Neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors utilized by the jury as the basis for imposing a sentence of death. As shown below, these and other critical omissions in the California capital sentencing scheme embodied in § 190.3 and CALJIC Nos. 8.84-8.88 violated appellant's rights to trial by jury, fair trial, unanimous verdict, reliable penalty determination, due process, and equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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### B. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, that the Aggravating Factors Outweigh the Mitigating Factors, and that Death is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (§ 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, *rev'd on other grounds*, *California v. Brown, supra,* 479 U.S. 538; *see also People v. Cudjo, supra,* 6 Cal.4th at p. 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.[79]

Here, the jury was specifically instructed in the language of CALJIC No. 8.84 and No. 8.88 that it must determine whether the death penalty or "confinement in the state prison for life without possibility of parole" shall be imposed. (CT 649, 651.) No burden of proof was specified or required by the trial court to guide the jury in determining penalty. The failure to assign or impose a burden of proof as a prerequisite for a jury's sentence of death renders both the

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[79]/ There are two exceptions to this lack of a burden of proof. The special circumstances (§ 190.2) and the aggravating factor of unadjudicated violent criminal activity (§ 190.3, subd. (b)) must be proved beyond a reasonable doubt. Appellant further discusses the defects in § 190.3, subd. (b), *infra*, as well as in Argument XX, *supra*.

California death penalty scheme and implementing instructions unconstitutional, and, in this case, renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution..

This Court has consistently held that neither the United States nor California Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, or that they outweigh mitigating factors. (*People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Anderson, supra,* 25 Cal.4th at pp. 589-590.) The Court's reasoning, however, 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, supra,* 536 U.S. 584; and most recently in *Blakely v. Washington* (2004) 542 U.S. __, 124 S. Ct. 2531, 159 L.Ed.2d 403.

The High Court in *Apprendi* considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crime statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New

Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra,* 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process of law, reasoning that labeling a particular matter simply a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The High Court thus held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring v. Arizona, supra,* the Court applied *Apprendi's* principles in the context of capital sentencing requirements, stressing most importantly "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra,* 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating

circumstances sufficiently substantial to call for leniency. (*Id.* at 593.) Although the Court had previously upheld the Arizona scheme in *Walton v. Arizona, supra,* 497 U.S. at p. 639, the Court newly-found that *Walton* was irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra,*, 536 U.S. at p. 609.) The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id.*) In his concurring opinion, Justice Scalia distinctively and succinctly distilled the Court's holding: "All facts essential to the imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 610 (Scalia J., concurring).)

In *Blakely*, the High Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling

reasons." (*Blakely v. Washington, supra,* 124 S. Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Id.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

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

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[80] Only California and four other states

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[80]/ *See* Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., §

(Florida, Missouri, Montana, and New Hampshire) fail to address the matter explicitly by statute.

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31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre, supra,* 572 P.2d at p. 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992). Washington has a related requirement that before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. § 10.95.060(4) (West 1990). Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (See *State v. Ring* (Az. 2003) 65 P.3d 915.)

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance -- and even in that context the required finding need not be unanimous. (*People v. Fairbanks* (1977) 16 Cal.4th 1223, 1255; *see also People v. Hawthorne, supra,* 4 Cal.4th at p. 79 [concluding that penalty phase determinations are "moral," not factual, and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, § 190.3 requires the jury or trier of fact to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[81] As set forth in CALJIC No. 8.88, California's "principal sentencing instruction," *People v. Farnam, supra,* 28 Cal.4th at p. 177, which was read to appellant's jury, "an aggravating factor is any *fact*, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime

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[81]/ 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.)

itself." (CT 651-652 [italics added].)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[82] 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.[83]

In *People v. Anderson, supra,* 25 Cal.4th at p. 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (*See, e.g., People v. Prieto, supra,* 30 Cal.4th

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

[83]/ This Court has held that despite the "shall impose" language of § 190.3, even if jurors determine or find that aggravating factors outweigh mitigating factors, a sentence of life in prison without possibility of parole may still be imposed. (*People v. Allen, supra,* 42 Cal.3d at pp. 1276-1277 (1986); *People v. Brown, supra,* 40 Cal.3d at p. 541.)

at p. 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; *see also People v. Snow, supra,* 30 Cal.4th 43.)

In the face of the United States Supreme Court's recent decisions, this Court's burden of proof analysis and holdings in such cases as *Anderson, Prieto*, and *Snow* are simply no longer tenable. Read together, the *Apprendi-Ring-Blakely* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*See Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 586.) As Justice Breyer points out in explaining the holding in *Blakely*, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington, supra,* 124 S. Ct. at p. 2551 (Breyer, J., dissenting).)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment

than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that: (1) aggravation exists; (2) aggravation outweighs mitigation; and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona, supra,* 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey, supra,* 530 U.S. at p. 541 (O'Connor, J., dissenting)).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase -- that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona, supra* 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494)), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona, supra,* 536 U.S. at p. 610 (Scalia, J.,

concurring).) They thus trigger *Blakely-Ring-Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

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

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence -- in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death -- no

single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the United States Constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra,* 512 U.S. at p. 972). No single factor therefore determines which penalty -- death or life without the possibility of parole -- is appropriate." (*People v. Prieto, supra* 30 Cal.4th at p. 263 (emphasis added).) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present -- otherwise, there is nothing to put on the scale in support of a death sentence. (*See People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by § 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The

Supreme Court of Arizona, for example, has found that this weighing process is the functional equivalent of an element of capital murder and is therefore subject to the protections of the Sixth Amendment. (*See State v. Ring, supra,* 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; *accord State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[84])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this reality does not thereby make the jury's finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself, the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were only illustrative and not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own -- a finding which, appellant submits, must inevitably involve both normative

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[84]/ *See also* Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

("what would make this crime worse") and factual ("what happened") elements. The High Court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative-factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington, supra,* 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding to be constitutionally sufficient must be made by a unanimous jury and must be made beyond a reasonable doubt.

In *People v. Griffin* (2004) 33 Cal.4th 536, in its first post-*Blakely* 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 amount of punitive damages, it had to answer in the affirmative the following interrogatory: "[E]vidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and

has acted with a conscious indifference to Leatherman's rights?" *(Cooper Industries, Inv. v. Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

*Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed de novo. Although the Court found that the ultimate amount was a moral decision that should be reviewed de novo, it made clear that all findings that were prerequisite to the dollar amount determination were 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 United States Constitution.

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring,* and *Blakely* are:

1. What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? *Answer*: The maximum sentence would be life imprisonment without possibility of parole.

2. What is the maximum sentence that could be imposed during the penalty

phase based on findings that one or more aggravating circumstances are present? *Answer*: The maximum sentence without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life imprisonment without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for 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 of aggravating circumstances beyond a reasonable doubt by arguing that "death is different." This effort to turn the High Court's recognition of the irrevocable nature of the death penalty to its advantage was explicitly rebuffed by the Supreme Court itself:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation]. The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."
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> (*Ring v. Arizona, supra,* 536 U.S. at p. 606 (quoting with approval *Apprendi v. New Jersey, supra,* 530 U.S. at p. 539 (O'Connor, J., dissenting)).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California, supra,* 524 U.S. at p. 732 ["the death penalty is unique in its

severity and its finality"].) As the High Court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . .. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.
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> *(Ring v. Arizona, supra,* 536 U.S. at p. 589.)

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

### C. The State and Federal Constitutions Require an Instruction that the Jury May Impose a Sentence of Death Only if Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Outweigh the Mitigating Factors and that Death is the Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal

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

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

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion

generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; *see also Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship, supra,* 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; *see also Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

On examining the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall, supra,* 375 U.S. at p. 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*See In re Winship, supra,* 397 U.S. p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338

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

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

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation]. The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."
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> (*Santosky v. Kentucky, 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 (quoting *Addington v. Texas, supra*, 441 U.S. at pp. 423-424)) (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

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

> We disagree with the dissent . . . suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's

> contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.
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> *(State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. at pp. 625, 637-638; *Monge v. California, supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments to the United States Constitution, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

### D. The Sixth, Eighth, and Fourteenth Amendments Require that the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing to impose a reasonable doubt standard on the

prosecution, the trial court in its penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (*See People v. Hayes, supra,* 52 Cal.3d at p. 643.) Appellant urges the Court to reconsider that ruling because it is constitutionally unsound under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) When a single, consistent standard of proof is not articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt,

some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (*See Proffitt v Florida, supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland, supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

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

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[85]

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 of how to make factual findings is inexplicable.

Third, in noncapital cases, California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (*See* Cal. Rules of Court, rule 4.420(b) (existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence); Evidence Code § 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

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

relate to wrongdoing; those that are not themselves wrongdoing, (such as, for example, age when it is counted as a factor in aggravation), are still deemed to aggravate other wrongdoing by a defendant. Evidence Code § 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 Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument (*see* Argument XX, *supra*), the provision of greater protection to noncapital than to capital defendants violates the Fourteenth Amendment rights to due process and equal protection, and the Eighth Amendment right to be free from cruel and unusual punishment. (*See e.g. Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking a defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors -- and the juries on which they sit -- respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) It is unacceptable -- indeed "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at p. 260) -- the "height of arbitrariness" (*Mills v. Maryland, supra*, 486 U.S. at p. 374) -- that one defendant should live and another

die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the state on the same facts, with no uniformly applicable standards to guide either.

Similarly, in the alternative, were it permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof and the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation at the penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of 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 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 is

not, is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.)

### E. The Instructions Violated the Sixth, Eighth, and Fourteenth Amendments by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. Indeed, the trial court instructed the jury that "there is no requirement that all jurors unanimously agree on any matter offered in aggravation ... ." (CT 658.) 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, supra,* 501 U.S. at pp. 632-633.)

Appellant recognizes that this Court has previously held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in

aggravation that support its verdict." (*See People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; *see also People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious, and unreviewable manner, slanting the sentencing process in favor of death. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (*See Ballew v. Georgia, supra,* 435 U.S. at pp. 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.[86])

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

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[86]/ The absence of historical authority to support such a practice is an additional reason why the absence of jury unanimity violates of the Sixth, Eighth, and Fourteenth Amendments. (*See, e.g., Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

not required. Moreover, the Supreme Court's holdings in previously-discussed *Ring* and *Blakely* make the reasoning in *Hildwin* highly questionable and constitutionally suspect, undercutting as well the constitutional underpinnings of the Court's analysis and ruling in *Bacigalupo*.[87]

Applying the *Ring* and *Blakely* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (Kennedy, J., concurring).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana, supra,* 447 U.S. at p. 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732; *accord Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a

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[87]/ 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 p. 265.) However, *Prieto* was decided prior to *Blakely*. In any event, appellant raises this issue to preserve his rights to further review.

capital jury.

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

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[88] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (*See, e.g.*, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections

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

than those afforded noncapital defendants (*see Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994), and since the provision of greater protections to a noncapital defendant than to a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see, e.g., Myers v. Yist, supra*, 897 F.2d at p. 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement of unanimity to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina, supra,* 11 Cal.4th at pp. 763-764), would by its inequity violate the fundamental constitutional requirement of equal protection, and by its irrationality violate both the due process and cruel and unusual punishment clauses of the California and United States Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 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.
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> (*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (as in California) 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 did not do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79; *People*

*v. Hayes, supra,* 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the findings of one or more aggravating circumstances and that the aggravating circumstances outweigh mitigating circumstances are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

### F. The 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

Although the trial court instructed the jury that all jurors were not required to unanimously agree on matter offered in mitigation (see CT 658), the trial court did not accept appellant's proposed special instruction or instruct the jury on the standard of proof regarding mitigating circumstances (that is, that the defendant has no burden to prove the existence of a mitigating factor). (See RT 5650 ["Okay, ... [Defendant's Special Instruction No.] M ... is out."].) 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* (1990) 494 U.S.

370, 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." (*Id.*) 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.

As the United States Court of Appeals for the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8th Cir. 1992) 957 F.2d 1495, 1501), *rev'd on other grounds*, 501 U.S. 272 (1993).) 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*, 79 Cornell L. Rev. 1, 10 (1993).)

The failure of the California death penalty scheme to require instruction on unanimity as to aggravating factors 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 to the United States Constitution, as well as his corresponding rights under article I, §§ 7, 17, and 24 of the California Constitution.

### G. The Penalty Jury Should Have Been Instructed on the Presumption of Life

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

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amendment; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner

(U.S. Const.. 8th and 14th Amendments; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const., 14th Amendment; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 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 190.) However, as the other subsections of this argument, as well as Arguments XIX, XXI and XXII demonstrate, California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally compelled or required.

**H. Conclusion**

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California constitutional counterparts. Therefore, appellant's death sentence must be reversed.

## XXII

## THE USE OF CALJIC NO. 8.88 (1989 REVISION), DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As discussed in Argument XXI, *supra*, the trial court instructed the jury in the language of CALJIC No. 8.88 (1989 Revision). (See CT 651-652.) The use of CALJIC No. 8.88 was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. Whether considered singly or together, the flaws violated appellant's fundamental rights to due process, fair trial by jury, and to a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and require reversal of the sentence imposed. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.)

### A. The Use CALJIC No. 8.88 (1989 Revision) Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard that Failed to Provide Adequate Guidance and Direction

Under CALJIC No. 8.88 (1989 Revision), the decision to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating

circumstances that it warrants death instead of life without parole." (CT 652.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty . . .." (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia[, supra,]* . . .." (*Id.* at p. 362.)

It is noteworthy that the Supreme Court of Georgia has found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. Indeed, the Georgia Supreme Court in *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391; see also *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.) As to the word "substantial," the *Arnold* court stressed:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's

> prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.
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> (*Arnold v. State, supra*, 224 S.E.2d at p. 392, fn. omitted.)[89]

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.) Nevertheless, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, as all cases, are factually different; their differences, however, are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold v. State*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instruction

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

here, as the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, although the three cases are different, they have at least one common characteristic -- they all involve penalty-phase instructions that fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, the use of the "substantial" language in CALJIC No. 8.88 (1989 Revision) arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. 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 CALJIC No. 8.88 (1989 Revision) that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th and 14th Amendments), the judgment of death must be reversed.

### B. CALJIC No. 8.88 (1989 Revision) Failed to Inform the Jurors that the Central Determination is Whether the Death Penalty is the Appropriate Punishment, Not Simply an Authorized Penalty

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, on weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner, supra,* 45 Cal.3d at pp. 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) Nevertheless, CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling jurors that they could return a judgment of death if the aggravating evidence "warrants death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" to mean "to give warrant or sanction to" something, or "to serve as or give adequate

ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, on weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the United States Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate.

To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established. Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, 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" in CALJIC No. 8.88 (1989 Revision) here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (CT 651-652 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances"].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." Indeed, by referring to the "totality" of the circumstances, the instruction also conflicted with other instructions which sought to inform the jury that even in the absence of mitigating circumstances the death penalty would not necessarily be appropriate. (See CT 661.)

The crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The

death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346), and must be reversed.

### C. CALJIC No. 8.88 (1989 Revision) Failed to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[90] 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 statutory language, however, is not included in the text of CALJIC No. 8.88 (1989 Revision) as read to the jury. CALJIC No. 8.88 (1989 Revision) only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty

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[90]/ 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.)

is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by § 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 § 190.3, the instruction given to appellant's jury violated the Fourteenth Amendment to the United States Constitution. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

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

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully offers that the Court's ruling conflicts with other 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* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[91]

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

> It is true that the . . . instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a 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

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[91]/ There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" "there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

> 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*].)

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

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (*See People v. Cole* (2004) 33 Cal.4th 1158, 1206; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, CALJIC No. 8.88 is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Until the parameters and applicability of *Blakely v. Washington, supra*, are resolved, individuals convicted

of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants -- if not more so -- to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

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

**D. Conclusion**

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88 (1989 Revision) was impermissibly vague in crucial respects; denied appellant fundamental rights to a fair penalty trial by jury; failed to comply with the requirements of the due process and equal protection; and failed to assure a reliable determination of penalty in violation of the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution. Therefore, appellant's sentence of death must be reversed.

## XXIII

## APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

### A. Introduction

In 2001, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.
>
> (*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal

norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (*See Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

### B. The Death Penalty in California Violates International Law

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

The ICCPR was ratified by the United States in 1992, and applies to the states under the supremacy clause of the United States Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[92] The United

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[92]/ The United States Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (*See* 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (*see* Greenfield & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (*see* 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (*see* Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

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

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR.

Appellant recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403-404; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-779; *see also id.* at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse, supra,* 27 Cal.4th at p. 511.) However, despite the Court's finding that the United States signed the ICCPR with an express reservation of the right to impose capital punishment (*People v. Brown, supra*), that condition does not relieve the United States or its political subdivisions, including California, of its obligation to comply with the general ICCPR prohibition against cruel, inhuman or degrading punishment and the still-binding proscription against the arbitrary deprivation of life which is involved in this case.

Moreover, whether or not the United States reserved the right to impose

capital punishment on signing the ICCPR, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*See United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, appellant requests that the Court reconsider and, in the context of this case, substantively find appellant's death sentence violates international law. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

### C. Evolving International Norms Compel the Conclusion that Appellant's Death Sentence Also Constitutes Cruel and Unusual Punishment in Violation of the Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason -- as opposed to its use as a regular punishment for ordinary crimes -- is particularly uniform in the nations of Western Europe. (*See, e.g.*, *Stanford v. Kentucky, supra,* 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.)). Indeed, *all* nations of Western Europe -- plus Canada, Australia, and New Zealand -- have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of June 2004) at

<http://www.amnesty.org>.[93]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because the framers of the United States Constitution looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress' power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment" as defined in the Constitution is not

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[93]/ Many other countries, including almost all Eastern European, Central American, and South American nations, also have abolished the death penalty either completely or for ordinary crimes. (*See* Amnesty International's "List of Abolitionist and Retentionist Countries," *supra,* at <http://www.amnesty.org> or http://www.deathpenaltyinfo.org.)

limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th Century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100.) And if the standards of decency as perceived by the civilized nations of Europe to which the framers looked as models have evolved, the Eighth Amendment requires that society evolves with them.

The Eighth Amendment prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world -- including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (*See Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming for purposes of argument that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes -- as opposed to extraordinary punishment for extraordinary crimes -- is contrary to those norms. Nations in the Western world

no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*See Hilton v. Guyot*, *supra*, 159 U.S. 113; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

## XXIV

## THE CUMULATIVE EFFECT OF ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF TRIAL BY JURY, DUE PROCESS OF LAW, AND THE RELIABILITY OF THE DEATH JUDGMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Even if no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller, supra,* 483 U.S. at p. 764.)[94] 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].) Here, in addition to the several assignments of error, the cumulative effect of these errors undermined

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[94]/ Indeed, where there are a number of errors at trial, a balkanized, issue-by-issue, error review is far less meaningful than analysis of the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction on all counts, the enhancements, special circumstance findings, and the sentence of death.

In this case, in addition to insufficiency of the evidence, there were a host of guilt phase errors, including a jury that contained biased jurors, the failure to conduct meaningful general voir dire (Argument I), errors as to the admissibility of evidence of prior crimes (Argument II), errors as to the nature and scope of appellant's cross-examination (Argument III), improper third-party contacts during trial that tainted the jury (Argument IV), the erroneous use of physical restraints and a stun belt (Argument V), instructional errors as to lesser included crimes and the burden of proof (Arguments VI and VII), the erroneous use of CALJIC NOS. 2.50, 2.50.1, and 2.50.2 (Argument VIII), insufficiency of the evidence as to robbery, burglary, felony-murder, and the special circumstances (Arguments IX through XII), insufficiency of the evidence of premeditation and deliberation (Argument XIII), and prosecutorial misconduct (Argument XV)

The cumulative effect of these guilt-phase errors infected appellant's trial so as to render the proceedings fundamentally unfair and a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial

errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill, supra,* 17 Cal.4th at pp. 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes, supra,* 52 Cal.3d at p. 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase]; *People v. Brown, supra,* 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [reviewing court is obliged to consider cumulative effect of multiple errors on sentencing outcome].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.
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> (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)

At the penalty trial, aside from the trial court's erroneous preinstructions (Argument XV), the errors committed include, inter alia, abdication by the court of its statutory and constitutional responsibility to conduct meaningful death qualification of the jury (Argument XVI), unconstitutionally biased jurors were seated to determine penalty in this case (Argument XVII), the California death penalty scheme fails to provide intercase proportionality review (Argument XVIII), the trial court erroneously failed to instruct the jury on the appropriate use of victim-impact evidence (Argument XIX), the trial court's instructions on the mitigating and aggravating factors in § 190.3 and the application of these sentencing factors render appellant's death sentence unconstitutional (Argument XX), § 190.3 and implementing jury instructions are unconstitutional for additional reasons because they fail to set out the appropriate burden of proof and

contain other constitutional infirmities Argument XXI), the use of CALJIC No. 8.88 (1989 Revision) defining the scope of the jury's sentencing discretion and the nature of its deliberative process additionally contain other constitutional defects (Argument XXII), and appellant's death sentence violates international law (Argument XXIII). Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's conviction all counts and the death sentence. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction fundamentally and inherently unfair and a denial of due process law, and the judgment of death constitutionally unreliable. (U.S. Const., 5th, 6th, 8th & 14th Amendments; Cal. Const. art. I, §§ 7 & 15.)

## CONCLUSION

By reason of the foregoing, appellant Richard Don Foster respectfully requests that the judgment of conviction on all counts, the enhancements, special circumstances, and the sentence of death in this case be reversed.

DATED: December 10, 2004.

Respectfully submitted,

*/s/ WILLIAM D. FARBER*

WILLIAM D. FARBER
Attorney at Law

Attorney for Appellant

## CERTIFICATE OF COUNSEL
## (CAL. RULES OF COURT, RULE 36(b)(2))

I, William D. Farber, certify that the number of words in this opening brief, excluding the tables, totals 116,233 words. In counting words, I have relied on the word count of the computer program used to prepare this document as authorized by Cal. Rules of Court, rule 36(b)(2).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 10, 2004

*/s/ WILLIAM D. FARBER*

WILLIAM D. FARBER

## PROOF OF SERVICE

RE: **PEOPLE v. FOSTER**
S058025

I, WILLIAM D. FARBER, declare under penalty of perjury that I am counsel of record for appellant Richard Don Foster in this case, and further that my business address is William D. Farber, Attorney at Law, P.O. Box 2026, San Rafael, CA 94912-2026. On December 10, 2004, I served APPELLANT'S OPENING BRIEF by depositing each copy in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at San Rafael, California, addressed respectively as follows:

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Appellant's trial attorneys, **John F. Hardy** (State Bar # 41387) and **Ray L. Craig** (State Bar # 37120), are deceased.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: December 10, 2004.

*/s/ WILLIAM D. FARBER*

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