SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. STANLEY BRYANT, DONALD FRANKLIN SMITH and LEROY WHEELER, Defendants and Appellants.	No. S049596 (Related Cases Los Angeles County Superior Court Nos. A711739 and A713611)

APPEAL FROM THE SUPERIOR COURT COUNTY OF LOS ANGELES

Honorable, Charles E. Horan, Judge

APPELLANT LEROY WHEELER'S OPENING BRIEF

(Volume 2, Pages 209-435)

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DEATH PENALTY

IV. THE EXTRAORDINARY SECURITY PRECAUTIONS EMPLOYED THAT INCLUDED STRAPPING APPELLANT TO A STUN BELT THROUGHOUT THE TRIAL IMPROPERLY PREJUDICED APPELLANT[74]

Extraordinary security precautions were taken throughout appellants' trial. They suggested to the jury that these defendants were dangerous and violent people and that only extraordinary security measures could ensure public safety. The affect of these precautions affected Appellant Wheeler's presumption of innocence, deprived him of his right to an impartial jury, a fair trial, and due process of law. As a result, his confinement and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

A. The Facts

On the first day of appellants' trial, the court told the parties that the case would require additional bailiffs and other security support personnel throughout the trial. (RT 6194-6195.) Seven to eight deputies were in the courtroom at all times and nine were present at the commencement of jury deliberations. (CT 15888, RT 6194-6195, 6202, 6298, 16865, 18596, 18782, 18787-18788.) Some wore uniforms, many were out of uniform. (RT 18787-18788.) Over the course of the trial, the jury became aware of these additional deputies. (RT 18788.)

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[74] This was a key issue in Appellant Wheeler's motion for a new trial. (RT 18781-18784.)

Structural changes were made to modify the courtroom that included installation of twice the normal number of tables to accommodate the four defendants and six counsel representing appellants. (RT 16867.) The courtroom was on the ninth floor of the courthouse and had its own metal detector in addition to the one at the entrance of the courthouse, and spectators, witnesses, and counsel had to pass through both. (RT 6442, 6567, 6651, 7468-7469.) In addition, the court informed the parties at the commencement of the trial that he was considering the likely installation of another metal detector at the entrance to the courtroom, although it is unclear from the record on appeal whether that was done. (RT 6296-6299.)

One of the themes that ran through the court's voir dire of prospective jurors was whether they would remain impartial if they learned that a witness or witnesses would be testifying only because they had been given a grant of immunity for their testimony. (RT 6662-6663, 6688-6689, 6722, 6738, 6743, 6764, 6799, 6810-6811, 6825-6826, 6908-6909, 6921, 7013, 7058, 7081, 7089, 7131, 7267, 7503, 7566, 7597-7598, 7605-7606, 7614, 7622, 7646-7467, 7721, 7737, 7911, 7929.) During one such exchange with a prospective juror in the presence of all the jurors being examined that morning, the court prefaced its inquiry:

> How about if there was somebody that was—I am not talking about this case but hypothetically. What if there was somebody who was

> so bad and so dangerous that nobody could testify against him unless they got something in return for it? ¶ Do you think that might be an appropriate time to give somebody immunity to get them into court? (RT 7596-7597.)

The defenses' motion to excuse that juror and the panel that heard this exchange was denied. (RT 7605-7607.) Thereafter, during the course of the guilt phase of the trial, the jury learned that at least four prosecution witnesses had been given grants of immunity.[75]

Among the security precautions taken, the jury itself was given unique status and treatment. Over appellants' objections, the court ordered that all the jurors' names would be withheld. (RT 6194, 6203, 6207, 6358-6359, 7980-7982.) Although the jury was permitted to go home at night, during the court day from the moment they parked their car until they left the parking lot in the evening, they were not free to roam in or leave the courthouse or be outside the company of the bailiffs. They had to take their breaks in a special room that was provided and they parked in a secret location and were escorted by bailiffs to and from the courtroom by way of a route known only to the jurors and court personnel. They were not permitted to leave the courthouse for lunch, but were fed in the building

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[75] Those witnesses were Andrew Greer (RT 11649-11650), George Smith (RT 11230, 14875-14876), James Williams (RT 12278, 12387-12388, 12587-12588, 12651-12653, 14907-14908, 16093-4-5), and Tannis Curry (RT 13050-13054.)

at the court's substantial expense. (RT 6194-6196, 6365, 6651-6653, 7980-7988, 8057-8072, 9567-9577.)

On February 14, 1995, after the jury had been impaneled and shortly before the prosecution's opening statement, the court spoke with the jury out of the presence of counsel and the defendants. In that session, the court attempted to ameliorate the natural concerns the jury would have over the implicit reasons for the special and unique provisions that were being taken in their behalf. Although the court cast the explanation as a need to safeguard them from media and witness contact, the court asked the jury not to "speculate as to any reasons that [they] might imagine exists and utilize that sort of speculation as evidence in this case...." (RT 8057-8072 [quote @ 8063].) The court continued, "We are having security arrangements, but that is appropriate. That does not mean you should now start imagining abut what was going on in my mind." (RT 8064.)

Two weeks later, on March 1, 1995, the court had another session with the jurors out of the presence of counsel and the defendants. They were told that the arrangements that had been made to get them into the court in the morning, to keep them together, and provide them lunches was "done for their benefit and at considerable expense." (RT 9567.) The court asked them not to speculate why the court was doing this. The court offered as explanation, "Let me indicate to you that based on my 20 years in the system, it is necessary for the reasons that I

stated earlier that this take place." (RT 9568.) "This is being done because the court thinks it is appropriate. That is about all I will say at this point in time." (9569.) The court continued:

> I understand this is a long case. It is uncomfortable to be here in the criminal courts building. But believe me when I tell you that it would be a lot worse if we were not doing this. ¶ Okay? It would be a lot harder on you in terms of getting here and all that you would have to do to fight the public elevators and things of that nature. (RT 9569.)

The court affirmed a juror's question whether they were restricted to the room provided even during their lunch break. (RT 9570.) Another juror expressed concern that they were no longer being searched. The juror said a bailiff explained that the court "didn't want it that way." The court replied that it was convinced there was no need to search them. (RT 9571.) The court again asked them not to speculate "about what is going on and why." (RT 9572.) Another juror asked whether there would be more "little talks like this" every couple of weeks. The court replied:

> [T]he answer is probably no unless something comes up because all the parties and the prosecution and defense have a right to be present for matters like that. Matters that deal with the security of the jury and the comfort of the jury the court feels they are not entitled to be present although they would all disagree with me." (RT 9572.)
>
> The court told the jurors that the deputies attending them had been "hand picked" over the course of a number of weeks. (RT 9573.)

The defense was told about these security precautions as faits accomplis without requiring the prosecution or anyone else to make any particular showing

on the need for such provisions and without holding an evidentiary hearing to explore the bases and their sources for these precautions.

In addition to these precautions, the court advised the parties that it wished their input on the court's proposal to employ one of two options: Each defendant would either wear a leg brace with waste and leg shackles during the trial or they would wear a "REACT" belt."[76] (RT 6200, 6205, 6297.) The choice would be made by each defendant. (RT 6205.) The device was recently described by the Ninth Circuit in *Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897.

> A stun belt is an electronic device that is secured around a prisoner's waist. Powered by nine-volt batteries, the belt is connected to prongs attached to the wearer's left kidney region. When activated remotely, "the belt delivers a 50,000-volt, three to four milliampere shock lasting eight seconds." Upon activation of the belt, an electrical current enters the body near the wearer's kidneys and travels along blood channels and nerve pathways. The shock administered from the activated belt "causes incapacitation in the first few seconds and severe pain during the entire period." "Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal." [Citations omitted.] (*Id.* at p. 899.)

The bailiffs at appellants' trial admitted that they had little experience using the device, although the court said that they were in use in this courthouse. (RT

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[76] The device is manufactured by Stun-Tech and is known as the Remote Electronically Activated Control Technology (REACT) belt. (*People v. Mar* (2002) 28 Cal.4th 1201, 1214 [124 Cal.Rptr.2d 161].)

6200-6202.) One of the deputies explained that the belt was the size of a belt used to protect the back when lifting and was worn under the shirt. (RT 6200-6202.) In addition, there was a square box that was worn and could be covered by a sweater or other garment. (RT 6202.) Deputies had access to a control unit that would shock and immobilize the wearer if the deputy activated the control. (RT 6200-6201, 6205-6206.) Activation of the belt could be limited to only the defendant or defendants that warranted the activation. (RT 6204.) The court explained that the benefit of the belt was that it was not visible to the jury unless it became necessary to activate it, and "then it becomes quite obvious." (RT 6201.) The defendants were given until the next hearing to decide which form of restraint they preferred. (RT 6206-6207.)

Counsel for Appellant Wheeler objected, noting that appellant had been in this courthouse for a number of years and had presented no problem to the court staff or its personnel. (RT 6202-6203.) The court felt that these options were warranted by the number of defendants and "these kinds of allegations floating around." (RT 6202.) Again, the defense was told about these provisions as faits accomplis without requiring the prosecution or anyone else to make any particular showing on the need for such restraint and without holding an evidentiary hearing to explore the bases for these precautions or their sources.

The court acknowledged that they would have a lot of security present. (RT 6202.)

At the next hearing, counsel for Appellant Bryant informed the court that she had learned from the Sheriff's Department that the "REACT" belt" when activated pumped about 50,000 amps of electricity into the kidneys. (RT 6344-6345.) Counsel for Appellant Wheeler repeated her objection that any form of restraint be used. (RT 6346.) Counsel for Appellant Smith pointed out that there had been no evidentiary hearing or showing made that there was a need for restraints. (RT 6346.)

The court explained that the belt would be activated under the following circumstances:

> Attempted escapes, a sudden or hostile movement toward other individuals involved in the case, like attacking another lawyer or defendants. Tampering with the belt, failure to comply with repeated demands or requests by the court. Threats to other individuals, things of that nature. Not just simply for the heck of it. (RT 6347.)

The court asked the prosecution to provide their reasons that they felt restraints were "appropriate." (RT 6347.) Mr. McCormick informed the court:

> The only acts I am aware of that are taking place in addition to the obvious circumstances of this crime in and of itself is that Mr. Wheeler has a subsequent arrest in custody for an attack on an inmate, which is a pending attempted murder, and an attack on a deputy, which is also being charged as an assault with a deadly weapon. (RT 6347.)

The prosecutor conceded that none of the incidents had happened in the courthouse. (RT 6348.) Mr. McCormick added:

> The nature of the case is somewhat unusual in that the allegations are that each of these defendants is member of a sophisticated criminal organization which exists within the court, or in the county jail system, that being the BGF family, and also has ties to the Crips and Bloods because of their narcotic transaction activity. ¶ ...
>
> Mr. Bryant does not have any acts of aggression, it appears from the cards from the county jail I have received as to him, he continues the same type of illicit activity which allows him to have excessive funds in the county jail, such as having numerous razor blades in his possession or excessive amounts of razor blades, hundred packages of cookies, excessive candy bars and amounts of money. He has received a number of incident cards, not for violent types of activity, but for the same type of money-generating activity that he was alleged to have engaged in on the outside.
>
> Mr. Smith is currently incarcerated and doing time for an attempted murder on one of the witnesses in this case, Keith Curry. He's been sentenced for that attempted murder. ¶ ...
>
> I have no comment as to Codefendant Settle other than the obvious need for the protection of all the people in the court. (RT 6348-6349.)

Counsel for Appellant Smith told the court that his client was allowed to remain out of custody for that offense and surrendered when he was ordered to do so. (RT 6350.)

The court ordered that restraints would be imposed. (RT 6375-6377) The court reasoned:

> [F]or reasons quite similar to the court's decision to use an anonymous jury, and more particularly and in addition to that, two of

> the defendants have engaged themselves in acts of violence while incarcerated, or I guess that was one defendant who did that while incarcerated; and for the other reasons stated regarding the nature of the case, the obvious ill will between some of the defendants here and others, or at least one defendant and others, and the very high pressure situation that all defendants will find themselves in, to wit, a death penalty trial and a multiple murder case, and the facts of the case as I understand them, the court feels this is an appropriate vehicle to assure the safety of all parties and counsel and witnesses and jurors and the orderly moving forward of the trial. (RT 6376.)

Counsel for Appellant Wheeler pointed out, and the court agreed, that the acts of violence while in custody attributed to Appellant Wheeler were mere allegations, and there had been no convictions. (RT 6377.)

The court allowed appellants to elect between shackling and the REACT belt. Appellant Bryant's counsel responded that his client was enduring a great deal of pain as the result of shackling and could not tolerate it from 9:00 a.m. to 4:00 p.m. throughout the trial. (RT 6372.) The leg chains were heavy and chafed. (RT 6373.) Thus, he had no option but to choose the REACT belt. (RT 6372-6373.) Appellants Wheeler and Smith made the same election. (RT 6373-6375.) The court expressed the view that it was the wisest choice and the belt would not restrict their movements. (RT 6374.)

This decision was made on January 24, 1995. (RT 6306.) The jury began their penalty phase deliberations on July 7, 1995. (RT 18599.) Thus, for a substantial part of five months, Appellant Wheeler sat with the threat of a 50,000 volt charge to his left kidney safeguarded only by the reliability of the technology

employed and the trained and untrained hands that would come within close proximity to the activating switch over the course of that time.

Appellant Wheeler raised the issues raised in this argument in his motion for a new trial. (CT 16111, 16113-16114.) The court denied that motion on October 19, 1995. (RT 18781-18795)

B. The Extraordinary Security Precautions Taken Created the Same Aura of Guilt and Violence over the Trial as Would Displaying Appellant to the Jury Shackled

All of the extraordinary security precautions taken by the court because of the number of defendants would not have been necessary had Appellant Wheeler been tried alone. This point was addressed in Argument I. Adoption of security measures requires due process safeguards, because the measures create a courtroom environment that distinguish the defendants' trial from those of others, that suggest to the jurors that these defendants are dangerous and violent people requiring extraordinary measures, and possibly deter some persons from attending. (*Gibson v. Superior Court* (1982) 135 Cal.App.3d 774, 779 [185 Cal.Rptr. 741].)

Security at the scale employed in appellants' trial created the same negative impact on the presumption of innocence and impartiality of the jury as would the requirement that appellants wear shackles visible to the jury. (Cf., *Gibson v. Superior Court, supra,* at pp. 779-780.) Displaying a defendant shackled at his trial is inherently prejudicial and, hence, requires close scrutiny and a showing that it is justified by an essential state interest. (*Illinois v. Allen* (1970) 397 U.S. 337,

343 [25 L.Ed.2d 353, 90 S.Ct. 1057].) "The sight of physical restraints may have a significant effect on the jury and may impede the defendant's ability to communicate with his counsel and to participate in the defense of the case. The use of physical restraints may also 'confuse and embarrass the defendant, thereby impairing his mental faculties,' and it 'may cause him pain.' (*Gonzalez v. Pliler, supra,* 341 F.3d at pp. 899-900, quoting *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748.)

This Court has embraced and emphasized the importance of limitations on the use of physical restraints as early as 1871, when the Court held in *People v. Harrington* (1871) 42 Cal. 165:

> [A]ny order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional right of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf. (*Id.* at p. 168, accord *People v. Mar* (2002) 28 Cal.4th 1201, 1216 [124 Cal.Rptr.2d 161])

"Generally, a criminal defendant has a constitutional right to appear before a jury free of shackles." (*Spain v. Rushen*, (9th Cir. 1989) 883 F.2d 712, 716.) Due process requires that if there are less onerous alternatives, they must be employed. (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1826-1827 [18 Cal.Rptr.2d 586], citing *Spain v. Rushen, supra,* 883 F.2d at p. 728.) A defendant

may be physically restrained at trial only if there is a "manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 291 [127 Cal.Rptr. 618], citing *Holbrook v. Flynn, supra,* 475 U.S. 560, 568-569, Pen. Code, § 688[77].) The Ninth Circuit in *Duckett v. Godinez, supra,* 67 F.3d 734 noted, "In all ... cases in which shackling has been approved, ... there has been 'evidence of disruptive *courtroom* behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a *pattern* of defiant behavior toward corrections officials and judicial authorities." (*Id.* at p. 749, emphasis in orig.) In *People v. Mar, supra,* this Court provided numerous illustrative cases that indicated what circumstances demonstrate such a need:

> "(See *People v. Kimball* (1936) 5 Cal.2d 608, 611 [55 P.2d 483] [defendant expressed intent to escape, threatened to kill witnesses, secreted lead pipe in courtroom]; *People v. Burwell* (1955) 44 Cal.2d 16, 33 [279 P.2d 744] [defendant had written letters stating 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 [56 Cal.Rptr. 280 ...] [defendant had 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 [89 Cal.Rptr. 652] [evidence of escape attempt]; *People v. Stabler* (1962) 202 Cal.App.2d 862. 863 [21 Cal.Rptr. 120] [defendant attempted to escape from county jail while awaiting trial on other escape charges]; *People v. Loomis* (1938) 27 Cal.App.2d 236, 239 [80 P.2d 1012] [defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers, and

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[77] Penal Code section 688 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."

> threw himself on the floor].)" (*People v. Mar, supra*, at pp. 1216-1217, quoting *People v. Duran, supra,* at pp. 290-291.)

A year earlier this Court in *People v. Seaton* (2001) 26 Cal.4th 598 [110 Cal.Rptr.2d 441] explained:

> "Such a '"[m]anifest need" arises only upon a showing of unruliness, an announced intention to escape, or "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained..."' [Citation.] 'Moreover, "[t]he showing of nonconforming behavior ... must appear as a matter of record.... 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."' [Citation.]" (*Id.* at p. 651, quoting *People v. Hill* (1998) 17 Cal.4th 800, 841 [72 Cal.Rptr.2d 656].)

"The trial court may not delegate to law enforcement personnel the decision whether to shackle a defendant." (*Ibid.*) And, the court must consider each defendant's history individually on the record. (*People v. Jackson, supra,* 14 Cal.App.4th at p. 1825.) The fact that a defendant was a state prison inmate and was charged with a violent crime does not establish sufficient threat of violence or disruption to justify physical restraints during trial. (*People v. Mar, supra,* 28 Cal.4th at p. 1218; *People v. Seaton, supra,* at p. 651, citing *People v. Hawkins* (1995) 10 Cal.4th 920, 944 [42 Cal.Rptr.2d 636]; *People v. Duran, supra*, at pp. 290-291.) Idiosyncrasies of the courthouse layout do not establish any individualized suspicion that a defendant would engage in nonconforming conduct and need to be shackled. (*People v. Seaton, supra,* at p. 651.)

No one should be tried shackled except as a last resort. (*Rhoden v. Rowland, supra,* 172 F.3d 633, 636, citing *Illinois v. Allen, supra,* 397 U.S. 337, 344.) The resulting aura of guilt given rise by such use of shackles is indistinguishable from that that arose from the extraordinary security precautions taken in appellants' case. It provided "'the constant reminder of the accused's condition implicit in such distinctive'" circumstances and "'may [have affected] a juror's judgment.'" (*Rhoden, supra*, quoting *Estelle v. Williams, supra,* 425 U.S. 501, 504-505.) Such an aura "is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy. (*Rhoden, supra,* citing *Holbrook v. Flynn,* 475 U.S. at pp. 568-569; accord *Dyas v. Poole, supra,* 309 F.3d at p. 588.)

In *People v. Mar, supra,* this Court repeated the caution specified in *Duran*:

> "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." (*People v. Mar, supra,* 28 Cal.4th at p. 1217, quoting *People v. Duran, supra*, 16 Cal.3d at pp. 291-292.)

"'It is the function of the court ... 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. 1221, quoting *People v. Duran, supra,* at p. 293, fn. 12, italics added in *Mar.*) No formal hearing is necessary unless the

imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court. (*Id.* at p. 1221.) Then,

> sufficient evidence of that conduct must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others. (*Ibid.*, citing *People v. Cox* (1991) 53 Cal.3d 618, 651-652 [280 Cal.Rptr. 692].)

In *Cox* the capital defendant initially had one arm handcuffed to the chair after his counsel advised the court, "'[i]n our investigation of the case there-we think that there is some possibility that there may be an escape attempt in this case....'" (*People v. Cox, supra,* at p. 650.) "A day or so later," the defendant was required to wear leg shackles based on a rumor that was floating through the jail provided the court by the bailiff that there would be an escape attempt made that day. (*Id.* at pp. 650-651.) This Court found this was an abuse of discretion and 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. (*Id.* at p. 652, citing *Duran*, at p. 293.)

Similarly, in *People v. Hill, supra,* 17 Cal.4th 800, the capital defendant in a pretrial session suddenly stood up and walked toward the lockup, saying "'he had

enough of this shit.'" (*Id.* at p. 839.) This Court held that his subsequent shackling was an abuse of discretion because it had been ordered at the hest of the sheriff's department without the court holding a hearing on, or otherwise determining for itself, whether adequate justification existed to physically restrain the defendant in the courtroom. (*Id.* at p. 842.)

> "In those instances when visible restraints must be imposed the court shall instruct the jury sua sponte that such restraints should have no bearing on the determination of the defendant's guilt." (*People v. Mar, supra,* 28 Cal.4th at p. 1217, quoting *People v. Duran*, *supra*, 16 Cal.3d at pp. 291-292.)

As discussed in Part A, above, the court had told the jury that the special and unique provisions taken in their behalf were necessitated by the court's concern for them to avoid media and witness contact and to make it easier for the jurors to get in and out of the courthouse. Security was not highlighted as a reason for any of the precautions (RT 8057-8072, 9567-9573), although the court twice mentioned security in his private sessions with the jurors (RT 8064, 9572), and repeatedly asked them not to speculate on the reasons for the precautions taken. However, what other reasons could there be? Certainly the juror who inquired why they were no longer being searched (RT 9571) was concerned about security and not media or witness contact.

Moreover, at least those jurors present in the morning session of the February 7, 1995 jury voir dire hearing had been programmed to assume that a

motivation for immunizing prosecution witnesses was because the defendants were "so bad and so dangerous that nobody could testify against [them] unless they got something in return for it." If all the jurors had not immediately after being advised of the precautions being taken or soon thereafter understood that security was the prime reason for all of the precautions being taken, it would have been clear by the midpoint of the guilt phase when Detective Vojtecky was permitted to testify over defense objection that during a portion of the period pretrial, he took varying routes between the courthouse and the police station because of security concerns that he had. (RT 10755-10757.)

In addition, the prosecution used a series of witnesses[78] to ostensibly testify about the drug business of the organization, but that provided a much more damaging theme that their lives were in danger by their role in the prosecution's case against Stanley Bryant and his organization. This was a predominant theme of the prosecution's opening (RT 16448-16449, 16458-16459, 16474-16480,

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[78] These witnesses were G.T. Fisher (RT 8887), Barron Ward (RT 9027), Rhonda Miller (RT 9077), John Allen RT 9228-9233, 9337-9339, 9348-9350), Reynard Goldman (RT 9264), Francine Smith (RT 9455-9456), Una Distad (RT 9726, 9741-9742), William Johnson (RT 10215-10218, 10220-10222, People's exh. 216, CT3 10601-10617), Ladell Player (RT 10233, 10248, 10252-10253, 10338-10339, 10488-10492, People's exh. 216, CT3 10546-10570), Laurence Walton (RT 10681-10682, 10688-10689, 10698-10700, People's exh. 216, CT3 10468-10472.), George Smith (RT 10781-10791, 10836-10837), Alonzo Smith (RT 10986-10987), Pierre Marshall (RT 11773, 11781-11782), James Williams (RT 12494, 12604, 15768).

16483-16487, 16490-16491) and closing arguments (RT 16474-16489, 16804, 16807-16809, 16824.) If there remained any doubt about why the extraordinary precautions were taken, it was made abundantly clear in the court's instructions to the jury that they were not to consider or discuss the security measures employed in determining any issue in the case. (RT 16381.) In addition, during the jury's deliberations at the end of the guilt phase, it became necessary for the court to interview one of the jurors when the concern arose whether the juror was discussing the "security" arrangements with someone on the telephone in the special room that had been made available for the jury during their breaks. (RT 17001-17002, 17006.) Immediately after that interview, the court again referred to the "security" arrangements that the jury had to endure. (RT 17005-17006.)

In short, the jury was constantly reminded from the beginning of the trial until its end, directly and indirectly, that this was a very bad organization made up of very bad men doing very bad things. Appellant was entitled not to be so marked with the concomitant suggestion "that the fact of his guilt [was] a foregone conclusion." (*Rhoden, supra,* 172 F.3d 633, 636, quoting *Stewart v. Corbin* (9th Cir. 1988) 850 F.2d 492, 497.) Due process only permits such an aura as a last resort. (*Rhoden, supra,* citing *Stewart v. Corbin, supra,* at pp. 497-498.)

C. Strapping to Appellant for the Five Month Duration of the Trial the Imminent Threat of 50,000 Volts to the Kidney Without Any Showing of a Manifest Need for Such a Measure Deprived Him of the Due Process of Law

Appellant Wheeler sat for five months over the course of his trial with the threat of a 50,000 volt charge to his left kidney safeguarded only by the reliability of the technology employed and the trained and untrained hands that would come within close proximity to the activating switch over the course of that time.

The function of a REACT belt was described in Part A, above, as provided in *Gonzalez v. Pliler, supra,* 341 F.3d 897, 899. "The use of stun belts, depending somewhat on their method of deployment, raises all of the traditional concerns about the imposition of physical restraints. The use of stun belts, moreover, risks 'disrupt[ing] a different set of a defendant's constitutionally guaranteed rights.'" (*Id.* at p. 900, quoting *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1305.)

This Court first addressed its use in *People v. Mar, supra,* 28 Cal.4th 1201, 1205.[79] The Court found that the general principles applicable to traditional types of physical restraints also applied here. (*Ibid.*) The Court affirmed that the device was a physical restraint, despite the fact that it may not be visible to the jury, and the trial court's approval of its use is governed by the same standards as other

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79. Mar was charged with interfering with a peace officer in the performance of his or her duties (§ 69) and resisting a peace officer, resulting in serious bodily injury to the officer (§ 148.10). (*Id.* at p. 1210.)

physical restraints. (*Id.* at p. 1219.) However, the Court found that there were "a number of distinct features and risks posed by a stun belt that properly should be taken into account by a trial court ... before compelling a defendant to wear such a device at trial." (*Ibid.*) This Court explained:

> Unlike shackles and manacles, which have been used for hundreds of years and whose operation is predictable and effects well known, the stun belt is a relatively new device with unique attributes and whose use has not been without problems or controversy. In light of the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may impair a defendant's capacity to concentrate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury. In addition, past cases both in California and in other jurisdictions disclose that in a troubling number of instances the stun belt has activated accidentally, inflicting a potentially injurious high-voltage electric shock on a defendant without any justification. The potential for accidental activation provides a strong reason to proceed with great caution in approving the use of this device. Further, because the stun belt poses serious medical risks for persons who have heart problems or a variety of other medical conditions, we conclude that a trial court, before approving the use of such a device, should require assurance that a defendant's medical status and history has been adequately reviewed and that the defendant has been found to be free of any medical condition that would render the use of the device unduly dangerous. (*Id.* at pp. 1205-1206.)

This Court disabused the notion that the device's lack of visibility to the juror was determinative in selecting a restraint. (In a trial of the duration of appellants' trial, it is highly unlikely that anything missed the scrutiny of the jurors.) This Court made three points.

First, although the use of a stun belt may diminish the likelihood that the jury will be aware that the defendant is under special restraint, it is by no means clear that the use of a stun belt upon any particular defendant will, as a general matter, be less debilitating or detrimental to the defendant's ability fully to participate in his or her defense than would be the use of more traditional devices such as shackles or chains. The 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. Promotional literature for the REACT stun belt provided by the manufacturer of the belt reportedly champions the ability of the belt to provide law enforcement with" 'total psychological supremacy ... of potentially troubling prisoners'" (*REACT Security Belt, ...* 30 St. Mary's L.J. 239, 248, citation omitted), and a trainer employed by the manufacturer has been quoted as stating that "'at trials, people notice that the defendant will be watching whoever has the monitor.'" (Cusac, *Life in Prison: Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry* (July 1996) The Progressive, p. 20.)[80] Other courts have noted that the psychological effect of a stun belt may affect adversely a defendant's participation in the defense (see, e.g., *Hawkins v. Comparet-Cassani, supra,* 251 F.3d 1230, 1239-1240), and, indeed, the Supreme Court of Indiana recently held that stun belts should not

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80 In a footnote, the Court added:

Another magazine article, in describing the manufacturer's promotional materials, reports that "[o]ne of the great advantages [of the stun belt], the company says, is its capacity to humiliate the wearer. 'After all, if you were wearing a contraption around your waist that by the mere push of a button in someone else's hand could make you defecate or urinate yourself,' the brochure asks, 'what would that do to you from the psychological standpoint?'" (Schulz, *Cruel and Unusual Punishment* (Apr. 24, 1997) N.Y. Review of Books, p. 51 (Schulz).) (*People v. Mar, supra*, at p. 1227, fn. 8.)

> be used in the courtrooms of that state at all, because other forms of restraint "can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated." (*Wrinkles v. State* ... [Ind. 2001] 749 N.E.2d 1179, 1194-1195.) (*People v. Mar, supra*, at pp. 1226-1227.)

"[T]he 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. (*People v. Mar, supra*, at pp. 1219-1220; accord *United States v. Durham, supra,* 287 F.3d at p. 1306.)

Because of the significant psychological consequences of the compelled use of a stun belt, this Court found parallels in the assessment of forced administration of antipsychotic medication governed by *Riggins v. Nevada* (1992) 504 U.S. 127 [118 L.Ed.2d 479, 112 S.Ct. 1810]. There the requisite inquiry is whether the prosecution demonstrated that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. "[D]ue process principles required reversal of [Riggin's] conviction, because the trial court had 'failed to make findings adequate to support forced administration of the drug.'" (*People v. Mar, supra*, at pp. 1227-1228, quoting *Riggins, supra*, at p. 129.)

This Court's second point was its concern over the excessive risk of accidental activation of the device; a concern quadrupled with four defendants each wearing a device and the not unlikely misdirected activation caused by the panic of the moment. The Court provided an account from "a spokeswoman for the manufacturer of the REACT belt [who] stated that, as of [April 1997], the REACT belt had been unintentionally activated on nine occasions" with at least two in California courts. (*People v. Mar, supra*, at pp. 1228-1229.) The court in *Gonzalez v. Pliler, supra,* 341 F.3d at p. 899 also noted that accidental activations of the device are not unknown. (*Ibid.*, citing *United States v. Durham* (N.D.Fla. 2002) 219 F.Supp.2d 1234, 1239 [reporting a survey that showed 11 out of 45 total activations (24.4%) were accidental, but noting the low percentage of accidental activations on general usage].)

This Court's third point was its concern over the danger to persons with particular medical conditions, a danger acknowledged by the device's manufacturer. (*Id.* at pp. 1229-1230.)

The Court concluded that the trial court should not approve this novel type of security device as an alternative to more traditional physical restraints if the court finds that these features render the device more onerous than necessary to satisfy the court's security needs. (*Id.* at p. 1206.) The Court may only approve

the use of a stun belt if it determines that the use of the belt is safe and appropriate under the particular circumstances. (*Id.* at p. 1230.)

In *People v. Mar, supra,* the defendant "'was on trial for assaulting a guard; he had previously been convicted of escape and of assaulting a peace officer; [and] on two recent occasions he had threatened correctional officers and threatened his own defense attorney.'" (*Id.* at p. 1220.) This Court found that if these circumstances were "adequately established on the record and actually relied upon by the trial court, [they] might well support a trial court's determination of manifest need to impose restraints upon a defendant." (*Ibid.*) However, there had been "no on-the-record showing of any circumstances to support the imposition of a stun belt on defendant and the trial court failed to require any such showing. Moreover, the record did not demonstrate that the trial court actually determined that defendant posed the type of serious security threat at trial that would justify the imposition of restraints under the 'manifest need' standard of *Duran*." (*Id.* at pp. 1220, 1222.) The trial court failed to resolve whether the defendant posed a sufficient danger of violent conduct in the courtroom to demonstrate a manifest need for the use of restraint. (*Id.* at p. 1223.) The court could not compel the defendant to wear such a device over objection without the requisite showing and determination. (*Ibid.*)

In *Gonzalez v. Pililer*, *supra*, 341 F.3d 897, the Ninth Circuit held that it was improper to require the defendant to wear a stun belt where "[t]he record [was] completely devoid of any action taken by the defendant in the courtroom that could be construed as a security problem." (*Id.* at p. 902.)

D. Appellant Wheeler Was Prejudiced by the Extraordinary Security Precautions Employed As Well As Forcing Him to Wear A Stun Belt for Five Months

Parts B and C, above, demonstrated that Appellant Wheeler's federal and state constitutional rights to due process, an impartial jury, a fair trial, and to assist his counsel in his defense were violated by the extraordinary security precautions employed as well as requiring that he elect the hobson's choice between a leg brace with waste and leg shackles or the less visible stun belt that promised 50,000 volts to the left kidney if activated, whether intentionally for cause or inadvertently through neglect, accident, or other misadventure.

The prosecution cannot demonstrate that these errors were harmless beyond a reasonable doubt. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 306-307 [the *Chapman*[81] standard applies to "ordinary trial errors" implicating the federal constitution]; *People v. Jackson, supra,* 14 Cal.App.4th at p. 1830; *Dyas v. Poole,*

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81 *Chapman* v. *California, supra,*386 U.S. 18.

supra, 309 F.3d at pp. 588-589; *Parrish v. Small* (9th Cir 2003) 315 F.3d 1131, 1133; *United States v. Durham, supra,* 287 F.3d at p. 1308.)[82]

In *People v. Mar, supra,* this Court found the compelled use of a stun belt prejudicial. In the instant case, we have the extraordinary security precautions employed in addition to the use of a stun belt. In *Mar*, the record indicated that the evidence supporting the convictions was not totally one-sided. (*Id.* at p. 1224.) In the instant case, as detailed in Argument I, Part D, 5, and incorporated herein, the prosecution's case against Appellant Wheeler was weak and the length of the jury's deliberations and the inquiries they made plainly indicated that they considered the case a close one. There, as here, the resolution of the issues turned on the jury's evaluation of the credibility of the witnesses, in particular the demeanor of the defendant on the witness stand. (*Ibid.*) This Court observed:

> It is, of course, not unusual for a defendant, or any witness, to be nervous while testifying, but in view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict, it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial. (*Ibid.*)

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82 Should this Court find it necessary to address the impact these extraordinary security precautions had on the penalty phase of Appellant Wheeler's trial, the Eleventh Circuit in *Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439 has held that a trial court's unjustified decision to shackle a defendant at the penalty phase of a capital trial requires reversal without an evaluation of prejudice, because it conveys a message of future dangerousness that renders the penalty phase unconstitutionally arbitrary and capricious under the Eighth Amendment to the federal Constitution. (*Id.* at pp. 1450-1452.)

This Court reversed Mr. Mar's conviction, finding:

> On these facts, it is reasonable to conclude that defendant's being required to wear the stun belt had at least some effect on his demeanor while testifying. Given the above circumstances-the relative closeness of the evidence, the crucial nature of defendant's demeanor while testifying, and the likelihood that the stun belt had at least some effect on defendant's demeanor while testifying-we determine that even if the prejudicial effect of the trial court's error is evaluated under the *Watson* standard applicable to ordinary state law error (see *People v. Watson* (1956) 46 Cal.2d 818, 836-837 [299 P.2s 243] [under the *Watson* "reasonable probability" standard, reversal is required when there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result"]), [Fn. omitted] there is a reasonable probability that the error affected the outcome of defendant's trial. (*Id.* at p. 1225; accord *People v. Hill, supra,* 17 Cal.4th 800, 846 [use of restraints raises possibilities of prejudice additional to the jury's awareness of them, in that they may "affect a defendant's mental state during trial ..., 'the defendant may feel confused, frustrated, or embarrassed, thus impairing his mental faculties,'" quoting *Spain v. Rushan* (9th Cir. 1990) 883 F.2d 712, 723].)

An additional factor present in the instant case not present in *Mar* is the length of the trial and the impact those five months had on the jurors' lives; the opportunity that it provided for them to muse upon the reasons for the extraordinary security precautions employed and the risks to themselves by their service as jurors; and the opportunity it provided them to observe the minutiae of the day-to-day activity in the courtroom including the equipment employed to control the defendants. In fact, the trial court noted that the stun belt required a battery pack strapped to the wearer's lower back that provided a lump that would

be visible if the wearer moved forward or as he walked through the courtroom to take the witness stand. (RT 18789-18791.) The court acknowledged that he had never taken such extreme security measurers in any other case. (RT 1871-18792.) Undoubtedly it all had an impact on their subconscious if not conscious psyche, on the prosecution's burden of proof, and on appellant's presumption of innocence.

"Because the case was close, an otherwise marginal bias created by the [extraordinary security precautions employed] may have played a significant role in the jury's decision." (*Dyas v. Poole, supra,* 317 F.3d at p. 937.) The likely prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's testimony, all affected appellant's constitutional right to defend himself (*People v. Duran, supra,* 16 Cal.3d at p. 290 & fn. 12; *People v. Jackson, supra,* 14 Cal.App.4th at pp. 1828-1829.)

The cumulative impact of the extraordinary security precautions as well as forcing appellant to wear the stun belt affected Appellant Wheeler's presumption of innocence, deprived him of his right to an impartial jury, a fair trial, and so infected the trial with unfairness as to make his resulting convictions a denial of due process. As a result, his confinement and sentence are illegal and

unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

V. THE PROSECUTOR ASSERTED FACTS IN HIS ARGUMENT TO THE JURY THAT HE KNEW OR SHOULD HAVE KNOWN WERE FALSE, COMMITTING FLAGRANT PROSECUTORIAL MISCONDUCT THAT IMPROPERLY CAST DOUBT ON A KEY ELEMENT OF APPELLANT'S DEFENSE, AND THE TRIAL COURT IMPROPERLY REJECTED THE PROFFERED CURE FOR THE ERROR

Appellant Wheeler's confinement and sentence are illegal and unconstitutional under federal constitutional law and the due process clause of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by the prosecution, in their opening jury argument, debasing appellant's defense with facts the prosecutor knew or should have known were false.

A. The Facts and Procedural History

During the prosecution's case, Ladell Player, an employee of the Bryant organization, testified. His testimony placed Appellant Wheeler in the neighborhood of the Bryant organization as far back as 1986, when Player testified that Player and Appellant Wheeler were selling drugs around some apartments in the area. (RT 10253, 10308.) The import of Player's testimony to the prosecution was to provide more time for Appellant Wheeler to be involved in the organization and to rise in its ranks to make it more likely that he would have gained Appellant Bryant's confidence to a level that Bryant would trust him to participate in the homicides.

As more detailed in Argument I, Part D, 1, and incorporated herein, Appellant Wheeler's defense was that he was only a very recent arrival to the area, a relatively new employee of the organization, and a mere short-term, bit player in the organization. By his own testimony, he began working for Eddie Barber after appellant's mother died in February 1988. (RT 13919-13920, 13924-13925, 13927-13928, 14012-14013.) The charged offenses were committed six months later on August 28, 1988. Appellant Wheeler testified that he was not on duty or present at the crime scene when the homicides were committed. He was only 19 years old at the time of the instant offenses. (RT 13912)[83]

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[83] There was substantial additional evidence of Appellant Wheeler's deminimis and short-term role in the organization. Although the prosecution's theory was that Appellant Wheeler and Appellant Bryant were close, the latter does not appear in the photo album seized from Appellant Wheeler's apartment, although there are photographs of Eddie Barber. (People's exh. 131, RT 11028-11029, 12009-12011, 13920-13922, 14342-14344.) Detectives Lambert and Dumelle and organization distributor, William Anthony Johnson, did not include Appellant Wheeler in their recounts of the organizations' members. (RT 8142-8143, 9627-9631, 9635-9636, 9662-9664, 9670, 9703-9704, 9952-9953, 9949, 9993, 10041, 10088-10089; CT 2595-2600.).) Appellant Wheeler was never picked up in or arrested in any of the numerous drug raids that dominated the prosecution's theme during the trial for the motive for the homicides. He was described by one of the organization's players as a person who "wasn't shit" to the organization; he was stupid. (RT 11239-11241.)

The prosecution's evidence of telephone traffic readily demonstrates that appellant was not in the loop with organization's leaders. Appellant's minor role in the organization was also exemplified by the prosecution's opening and closing arguments where Appellant Bryant's role and that of the organization were the principal focus. In the 164 pages of the reporters' transcripts of those arguments (RT 16469-16565, 16783-16851), only 33 of the pages bear any reference to the prosecution's case against Appellant Wheeler (RT 16481-16482, 16486, 16501-16505, 16508-16509, 16523-15531, 16795, 16825-16834, 16838-16841, 16848-16850.)

During his defense, Appellant Wheeler testified that he (Appellant Wheeler) was never in the Pacoima or Los Angeles areas from October 1985 through November 1987 and thus could not have been selling drugs then. (RT 13915.) In fact, appellant testified that in 1985 he was in custody at Camp Aflabaugh [sic] in San Dimas, California. (RT 13914.) In mid 1986, he was transferred to a boy's school, El Paso de Robles, in Paso Robles, California where he stayed until November 1987. (RT 13914-13915.) When he was released, he returned to his grandmother's home in South Central Los Angeles. (RT 13916-13917.)

The prosecution did not refute this alibi in their rebuttal case; nor could they. By a transmittal of November 7, 1989, the Department of the Youth Authority had provided the District Attorney's Office with a certified copy of their "Master File" on Appellant Wheeler. (CT2 23-24.) Those records reflect that Appellant Wheeler was placed at Camp Afflerbaugh on December 13, 1985. (CT2 4, 85.) He was thereafter received at the Youth Authority on May 19, 1986 (CT2 2, 52, 68) where he remained until his release on October 29, 1987 (CT2 25, 27, 32, 36, 38, 42) and placement with his grandmother at her home on South La Salle, Los Angeles (CT2 42), just as appellant had testified.

In response to Appellant Wheeler's evidence that he was only a recent arrival to Pacoima and the organization, Deputy District Attorney Davidson, who

presented the prosecution's opening argument, made two assertions to the jury about Appellant Wheeler's alibi for 1986 and 1987. First, Mr. Davidson asserted:

> Well, that is a fine defense, but nonetheless, he went to juvenile camp, and the juvenile camp had him in and out of custody. (RT 16481.)

Counsel for Appellant Wheeler immediately objected, arguing that Mr. Davidson was misstating the evidence. (RT 16481.) The court responded that there was no evidence and admonished the jury to disregard the assertion. (RT 16481-16842.)

Undeterred, Mr. Davidson continued:

> There is no evidence, no records to show when Wheeler was in custody and when he was not. And if it was true he was in custody that entire time, how easy to show that. If there is any truth at all to that, how easy to show that. Oh, just take Leroy Wheeler's word for it. Leroy Wheeler, the man lied to the police with every word he said, and lied to you a number of times. But take my word for that. Yeah, right. (RT 16482.)

Thereafter, counsel for Appellant Wheeler informed the court that the prosecution had provided him the records that demonstrated that Appellant Wheeler had been in custody in 1986 and through October 1987 (RT 16649, 16656-16657) and lodged copies of them with the court (RT 16696, 18834-18836.) Counsel requested that the court alternatively declare a mistrial as to Appellant Wheeler, advise the jury that Appellant Wheeler had been in custody during this period, or permit the defense to introduce the evidentiary support. The court refused all three requests. The court faulted counsel for not resolving the

issue earlier by way of stipulation. (RT 16691-16696.) However, the error here was that the prosecution was arguing that the alibi was a fabrication. Appellant had no way of anticipating such misconduct. The fact of Appellant Wheeler's incarceration during that period should not have been in dispute; the prosecution knew or should have known that the supporting documents existed, after all, they had provided them to the defense.

Appellant Wheeler raised this issue in his subsequent motion for a new trial. (CT 16116.) The court denied the motion on October 19, 1995. (RT 18781.)

B. The Relevant Law

In *People* v. *Haskett* (1982) 30 Cal.3d 841 [180 Cal.Rptr. 640], the court defined prosecutorial misconduct as the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Id.* at p. 866.) This Court in *People v. Hill, supra,* 17 Cal.4th 800 reminded:

> Prosecutors... are held to an elevated standard of conduct. "It is the duty of every member of the bar to 'maintain the respect due to the courts' and to 'abstain from all offensive personality.' (Bus. & Prof. Code, § 6068, subds. (b) and (f).) A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. (*Id.* at pp. 819-820.)

The prosecutor's function is to seek justice, not convictions. "It is as much his duty to refrain 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, 88 [79 L.Ed. 1314, 55 S.Ct. 629]; *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 [137 Cal.Rptr. 476].) It is a prosecutor's duty to fairly present evidence material to the charges, and the trial judge's duty to see that facts material to the charge are fairly presented. (*In re Ferguson* (1971) 5 Cal.3d 525, 531 [96 Cal.Rptr. 594].) "Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*In re Ferguson, supra,* 5 Cal.3d at p. 531.) However, no showing of bad faith is required. (*People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1].)

A prosecutor's position is such that any improper acts "are apt to carry much more weight against the accused when they properly should carry none." (*Berger v. United States, supra*, at p. 88; *People v. Talle* (1952) 111 Cal.App.2d 650, 677 [245 P.2d 633].)

In deciding whether to reverse a decision based upon an allegation of misconduct, a reviewing tribunal need not find a prosecutor's conduct to have been intentional. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214 [152 Cal.Rptr. 141], citing Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case* (1954) 54 Colum.L.Rev. 946, 975.)

Additionally, "[i]n a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and the conduct of the trial." (*People v. Evans* (1952) 39 Cal.2d 242, 251 [246 P.2d 636].)

C. The Prosecutor's Argument of Facts He Knew or Should Have Known Were False Went to the Heart of the Defense and Thereby Prejudiced Appellant

It has been recognized that statements of the prosecutor improperly referring to matters not in evidence although worthless as a matter of law, can be dynamic to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence. (*People v. Bolton, supra,* 23 Cal.3d at p. 213.) Counsel's summation to the jury must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts. (*People v. Love* (1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777]; *People v. Perez* (1962) 58 Cal.2d 229, 241-242 [23 Cal.Rptr. 569].) Moreover, due process is denied when a prosecutor knowingly uses perjured testimony to obtain a conviction (*Napue v. Illinois* (1959) 360 U.S. 264, 269 [3 L.Ed.2d 1217, 79 S.Ct. 1173]; *In re Imbler* (1963) 60 Cal.2d 554, 560 [35 Cal.Rptr. 293]; *People v. Marshall, supra,* 13 Cal.4th 799, 829-830) or repeatedly and deliberately misquotes a witness' testimony (*Wallace v. United States* (4th Cir. 1960 281 F.2d

656, 667-668). No less a violation has occurred where the prosecutor asserts in jury argument a critical fact that he knows is false.

These improper tactics violated appellant's federal constitutional rights under the Sixth Amendment right of confrontation by the witnesses against him. (*People v. Bolton, supra,* 23 Cal.3d at p. 213.) The tactics violated the Eighth Amendment and the due process clause of the Fourteenth Amendment that require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [100 L.Ed.2d 575, 108 S.Ct. 1981], (Eighth Amendment); *Zant v. Stephens* (1983) 462 U.S. 862, 885 [77 L.Ed.2d 235, 103 S.Ct. 2733], (Fourteenth Amendment due process).) The due process clause of the Fourteenth Amendment protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process. Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308,

321 [112 L.Ed.2d 812, 111 S.Ct. 731], citing other cases.) Separate from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors that taint the fairness of the trial and present an "unacceptable risk, ... of impermissible factors coming into play." (*Estelle v. Williams, supra,* 425 U.S. 501, 505; *accord, Holbrook v. Flynn, supra,* 475 U.S. 560; *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828.)

As these errors were violative of the federal constitution, their prejudicial effect must be analyzed under the test set forth in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]. Under the *Chapman* standard, a constitutional violation is prejudicial unless it is shown to be harmless beyond a reasonable doubt. The prosecutor bears the burden of demonstrating that the error did not contribute to the verdict and was "entirely inconsequential." (*People v. Modesto* (1967) 66 Cal.2d 695, 712 [59 Cal.Rptr. 124].)

Here, Appellant Wheeler's defense was that he was a mere short-term, bit player in the Bryant organization and was not on duty or present at the crime scene when the homicides were committed. He had only been employed by the organization for about six months before the homicides. (RT 13916-13920, 14012-14013.) Thus, it was unlikely that he would have been trusted to participate in this critical mission. Yet, the prosecution in their case-in-chief called Ladell Player to testify that he met Appellant Wheeler in 1986 when

Appellant Wheeler was selling drugs around some apartments in the area. (RT 10253, 10308.) In response, Appellant Wheeler testified that he was never in the Pacoima or Los Angeles area from October 1985 through November 1987. (RT 13915.) He was in custody for that period. (RT 13914-13915.)

This apparently prompted Mr. Davidson to suggest to the jury in his argument that Appellant Wheeler had not been in custody during that period, otherwise Appellant Wheeler would have produced supporting documentation, documentation that Mr. Davidson knew or should have know existed. The actions of Mr. Davidson here fully encompass the term misconduct. Obviously, he made these improper remarks for the very purpose of improperly influencing the jury. Otherwise, he would not have made them. To conclude that the jury was not prejudicially influenced by them is to ignore the very reason for which the remarks were made. The trial court herein erred by not easily curing this misconduct with either of the defense's reasonable solutions—instruct the jury that Appellant was in custody as he had testified or admit into evidence the defense proffered supporting documentation.

Mr. Davidson's successful effort to undermine appellant's defense so infected the trial with unfairness as to make Appellant Wheeler's resulting convictions a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [40 L.Ed.2d 431, 94 S.Ct. 1868]; *Darden v. Wainwright* (1986) 477 U.S.

168, 181 [91 L.Ed.2d 144, 106 S.Ct. 2464].) This error violated appellant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as detailed above, prejudiced the jury against appellant's alibi defense, and thereby reduced the prosecution's burden to prove this element beyond a reasonable doubt. (*See, e.g., People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 [112 Cal.Rptr. 565].) Absent proof beyond a reasonable doubt that the cumulative effect of this error had no effect in bringing about the guilty verdicts, appellant's convictions must be reversed. (*Ibid.*)

VI. THE PROSECUTION WAS IMPROPERLY PERMITTED TO DEVELOP ARMSTRONG'S BLACKMAIL OF THE BRYANTS AND THEREBY THE PROSECUTION'S THEORY FOR THE MOTIVE FOR THE HOMICIDES BY DEPRIVING APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO CONFRONT THEIR ACCUSER

Prior to the commencement of appellants' trial, the prosecution provided written notice that they intended to introduce the July 23, 1983 taped interview of Andre Armstrong by Los Angeles Police Detectives Kevin Harley and Russ Lyons. (CT 14235-14236, 14296-14315.)[84] In 1982 Mr. Armstrong was convicted of assault with a deadly weapon as a result of shooting Mr. Goldman in April 1982. (RT 9398-9400.) In 1983 he was convicted of first degree murder for his role in the murder of Kenneth Gentry, and at the time of the interview,

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[84] A transcript of the taped interview was attached to the prosecution's motion. (CT 14317-14390.)

Armstrong was serving his sentences. Although Appellant Bryant and his brother Jeff Bryant had also been charged with the murder, only Armstrong's case went to trial. (RT 9104-9105, 9130-9131, 9337, 9344, 9398-9400.)

In the interview, Armstrong told the detectives that the Bryants hired him and he was paid $2,000 for the Goldman shooting and $15,000 for the Gentry shooting. (RT 9405-9408, 9413, 9439-9440, 9442.)[85] Armstrong told them that "the Bryants" were going to take care of his wife and child while he was in custody. (CT3 10505, 10518.) "They have to. 'Cause I, see I'm holdin' threats on them, you know." (CT3 10506.) "The fact that I can tell on them any day, and the fact that I can have them killed any day." (CT3 10506, 10519.) Armstrong told them that the Bryants had provided his wife with money to move out to Southern California. (CT3 10518.) Armstrong told them that the Bryants were lightweights and that anyone could come and take what they had away from them. (CT3 10512.) Armstrong said he intended to bring his people out there and "squeeze them" (CT3 10512), letting the Bryants know to save some for when Armstrong got out (CT3 10512-10513.)

Armstrong's conviction was later reversed on appeal. Thereafter, he pled guilty to voluntary manslaughter and assault with a deadly weapon and received a

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[85] A tape of the interview was ultimately played to the jury. (RT 9414-9415, 9417-9418, People's exh. 216, CT3 10473-10545.)

sentence of nine years in state prison. (RT 9398-9402, CT 14510.) The prosecution apparently made no attempt to use his 1983 statement to the detectives against him. (CT 14510.)

Appellants Wheeler and Bryant filed written oppositions and provided oral argument in opposition to the prosecution's motion to introduce Armstrong's taped interview. (CT 14496-14534, RT 7970-7980, 13819.) They argued that the statements were not trustworthy, did not meet a hearsay exception, did not bear the indicia of reliability, and did not satisfy the Confrontation Clause of the United States Constitution. (CT 14496-14534, RT 7970-7980.) Shortly after the jury had been impaneled (RT 7841-7955), the court addressed the issue briefly without explicitly resolving it, but implicitly finding that the statements and tape were admissible since the court nevertheless permitted the prosecution in their opening statement to repeat the substantive content of the interview, detailed above. (RT 7970-7980.) Eighteen days later, the court discussed with counsel certain deletions, not relevant here, that would be made from the tape of the interview. (RT 9390-9397.) Shortly thereafter, Detective Harley testified about his interview with Mr. Armstrong and the edited tape of that interview was played to the jury.

On March 8th of this year, the United States Supreme Court decided *Crawford v. Washington* (2004) ___ U.S. ___ [2004 WL 413301, 2004 Daily Journal D.A.R. 2949]. Mr. Crawford stabbed a man who allegedly tried to rape

his wife. (*Id.* at p. ___ [WL 413301 at p. 2].) The State was permitted to introduce a recorded statement that Mr. Crawford's wife made during police interrogation, as evidence that the offense was not in self-defense. She did not testify at trial because of the State's marital privilege. (*Id.* at p. ___ [WL 413301 at pp. 2-3].) At the time of Crawford's trial, *Ohio v. Roberts* (1980) 448 U.S. 56 [65 L.Ed.2d 597, 100 S.Ct. 2531] governed and held that the Confrontation Clause did "not bar admission of an unavailable witness's statement against a criminal defendant if the statement bore 'adequate "indicia of reliability."'" (*Crawford, supra,* at p. ___ [WL 413301 at p. 3], quoting *Ohia v. Roberts,* at p. 66.) "To meet that test, evidence must either fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.'" (*Ibid.*) The trial court in *Crawford* admitted the statement on the ground that it bore "particularized guarantees of trustworthiness." The jury convicted Mr. Crawford of assault. (*Crawford, supra,* at p. ___ [WL 413301 at p. 3].) The Supreme Court found that "the principal evil at which the Confrontation Clause was directed was ... [the] use of *ex parte* examination as evidence against the accused." (*Id.* at p. ___ [WL 413301 at p. 9].) This includes "'witnesses' against the accused—in other words, those who 'bear testimony.'" (*Id.* at p. ___ [WL 413301 at p. 10].) The Court held that interrogations by law enforcement officers fall squarely within this class

of "testimonial" hearsay. (*Id.* at p. ___ [WL 413301 at pp. 10-11].) The Court reasoned:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." ... [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. (*Id.* at p. ___ [WL 413301 at pp. 14].)
>
> [T]he only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. (*Id.* at p. ___ [WL 413301 at pp. 19].)

Thus, the Court held the State's use of the wife's statement, untested by cross-examination, violated the Confrontation Clause and reversed Crawford's conviction. (*Ibid.*)

Crawford compels a similar result here. Although it appears that a violation of the Confrontation Clause may still be subject to harmless-error analysis (*id.* at p. ___ [WL 413301 at pp. 22], dissenting opn., Rehnquist, CJ; *Delaware v. Van Arsdall* (1986) 475 U.S. 673 [89 L.Ed.2d 674, 106 S.Ct. 1431]), the prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 306-307; *Chapman* v. *California, supra,* 386 U.S. 18.)

As reflected in the Statement of the Facts and incorporated herein, half of the prosecution's case was crafted to establish a motive for the homicides. (See

Statement of the Facts, Part 1, a, above.) In brief, Armstrong was discontent with how the organization failed to shield him from prosecution for his acts in the Goldman shooting and the Gentry murder. The organization ran a large, lucrative drug sales organization that could provide the requital Armstrong sought for the time he served and for his continued silence. However, without Armstrong's taped statement, the prosecution only had evidence that Armstrong was the shooter in the Goldman incident and the Gentry murder and that Appellant Bryant and/or his organization had a motive to commit each of those offenses. Without the fruit of Armstrong's interrogation, the prosecution had no evidence that the organization had any motive to kill Armstrong or Armstrong's companions thereby eviscerating the prosecution's theory for the principal motive for the homicides charged in the instant case.

Armstrong's interrogation provided the prosecution with the only evidence that it had that Armstrong held any ill feelings or animosity toward Stanley Bryant or that he felt that Bryant was vulnerable game to any pressure Armstrong might apply. Although the prosecution presented no evidence that Appellant Bryant, or others in his organization, were aware of Armstrong's feelings and intentions, the prosecution encouraged the jury to assume that they did on the strength of Armstrong's statements.

Mr. Davidson's opening argument consumed 122 pages of reporters' transcript. (RT 16430B-X, 16431-16460, 16469-16510, 16523-16555.) Early in his presentation, he referred the jury to Mr. Armstrong's interrogation and reminded them, "Armstrong was the primary person they wanted to kill here for the reasons you know." (RT 16430L.) Mr. Davidson continued:

> You know that Andre Armstrong had a plan to get a piece of their action because they owed him for this fall he took. ¶ He talks on the tape. And you were told this earlier. It isn't often that a jury hears the voice from the grave of one of the victims explaining the motive and why what happened here happened. (RT 16430L.)

Mr. Davidson repeatedly reminded the jury that they had the "lengthy tape" of Armstrong's interview (RT 16430L-M, O, 16456) and his admission thereon of killing Ken Gentry. (RT 16430L-M.] Mr. Davidson continued:

> He explains exactly what happened at the Ken Gentry murder, why he did it and who he did it for and exactly what he was going to do when he got out, that they owed him. ¶ The Bryants owed him. They owed him for taking this fall for them. And when he got out, which he did, got his case reversed, he gets out and his guys from St. Louis come out an he is going to get a piece of their operation because they own him. (RT 16430M.)
>
> Armstrong was the guy they were looking for primarily. (RT 16431.)
>
> [T]he one thing [Armstrong] holds against them is that they let him go to jail for 28 to life and they owed him for that .... (RT 16446.)

The importance of motive to the prosecution's case is best reflected in the effort they made to establish it. It made up half of their case (see Statement of the Facts, Part 1, a) and it played a predominant role in Mr. Davidson's opening

argument to the jury (RT 16430L-M, O, 16431, 16446, 16456.) Without this evidence of motive, the reason or reasons for the homicides becomes an anomaly. The likelihood of Appellant Bryant's presence and participation is substantially lessened. With the weakening of this latter link, comes even the greater attenuation of the likelihood of Appellant Wheeler's presence and participation. On this record, the prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt (*Chapman* v. *California, supra,* 386 U.S. 18) and Appellant Wheeler's convictions must be reversed (*Crawford, supra,* at p. ___ [WL 413301 at pp. 19].)

VII. THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

As reflected in the Statement of the Facts and in the preceding argument, and incorporated herein, half of the prosecution's case was crafted to establish a motive for the homicides. (See Statement of the Facts, Part 1, a.) Thus the court's instruction to the jury on how to use this evidence had particular poignancy.

The court adopted the language of CALJIC 2.51 to address this point, yet as it was given, it was constitutionally infirm because it placed a burden on the defense to show absence of motive in order to demonstrate innocence. Further, it was defective because it did not clearly tell the jury that motive alone is insufficient to prove guilt. The jury was told:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled. (RT 16396, CT 15492.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of a motive in order to establish innocence. The instruction therefore violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

CALJIC 2.51 stated that motive may tend to establish that the defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia, supra,* 443 U.S. 307.) Motive alone does not meet this standard (*State v. Dreiling* (Kan. 2002) 54 P.3d 475, 491; *Dolvin v. State* (Ala.. 1979) 391 So.2d 129, 133; *State v. Doyle* (Kan. 1968) 441 P.2d 846, 859-860; *Holland v. Com.* (Va. 1949) 55 S.E.2d 437, 440; *People v. Isby* (1947) 30 Cal.2d 879, 888 [186 P.2d 405]; *Helton v. Commonwealth* (Ky. 1936) 93 S.W.2d 824-825; *State v. Waddell* (Minn. 1932) 245 N.W. 140-141; *Vancel v. State* (Tex.. 1925) 272 S.W. 130; *People v. Holtz* (Ill. 1920) 128 N.E. 341, 345; *State v. Miller*

(Mo. 1918) 204 S.W. 6, 8) because a conviction based on such evidence would be speculative and conjectural (see, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury in this case. (CALJIC No. 2.00, *et seq.*) Notably, the other instructions that covered an individual category of evidence included an admonition that that category of evidence was insufficient to establish guilt. (See RT 16385, CT 15471 [CALJIC No. 2.06 {Efforts To Suppress Evidence}: "However, this conduct is not sufficient by itself to prove guilt ...."]; see also CALJIC 2.03 [Consciousness of guilt—Falsehood], 2.05 [Efforts Other Than By Defendant to Fabricate Evidence], 2.06 [Efforts to Suppress Evidence] and 2.52 [Flight After Crime] all containing similar language RT 16384-16385, 16396, CT 15469-15471, 15493.)

Because CALJIC No. 2.51 was startlingly anomalous in this context coupled with the significance it carried in the prosecution's case, it prejudiced appellant during deliberations. The instruction omits any caution about the sufficiency of motive evidence and allows the jury to determine guilt based solely upon motive. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would have said so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [68 Cal.Rptr.2d

648] (conc. opn. of Brown, J.)[deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557 [334 P.2d 852]; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [129 Cal.Rptr. 871] [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, in the context of the use that could be made of various categories of evidence, CALJIC 2.51, as used herein, regarding motive evidence highlighted the omission from the instruction that it was insufficient to establish guilt. Thus the jury would have understood that if it found the defendants had a motive to commit any or all of the charged offenses that motive alone could establish guilt.

Indeed, the prosecution certainly spent a substantial part of their case trying to make that point. It made up half of their case (see Statement of the Facts, Part 1, a) and it played a predominant role in Mr. Davidson's opening jury argument. (RT 16430L-M, O, 16431, 16446, 16456.)

Accordingly, the instruction violated appellant's constitutional rights to due process of law and a fair trial by jury. (U.S. Const., 5th, 6th and 14th Amends.) The instruction also rendered the resulting verdicts unreliable in violation of the Eighth and Fourteenth Amendments.

CALJIC 2.51 told the jury that the absence of motive could be used to establish innocence. Unfortunately, that language effectively placed the burden of proof on appellant to show a motive other than that postulated by the prosecution's theory of the case. That is, the instruction confirmed that the jury could establish or defeat the charges through the presence or absence of motive.

The instructional error was particularly prejudicial in this case because motive was such a large part of the prosecution's case against Appellants Bryant and Smith and thereby against Appellant Wheeler, an employee of the organization. This made it highly probable that the jury improperly applied this instruction to find Appellant Wheeler guilty.

As discussed previously, the trial court's error implicated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. As used in this case, CALJIC 2.51 also deprived appellant of his constitutional rights to due process and fundamental fairness. (*In re Winship, supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth and Fourteenth Amendment requirements for

reliability in a capital case by allowing appellant to be convicted without the prosecution submitting the full measure of proof. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) For the reasons discussed above, the error is not harmless beyond a reasonable doubt. Reversal of appellant's convictions and death sentence is required.

VIII. THE TRIAL COURT IMPROPERLY REFUSED TO ORDER THE JURY TO RECONSIDER THEIR VERDICT WHEN IT BECAME CLEAR THAT THEY HAD NOT UNDERSTOOD THEIR INSTRUCTIONS

After the jury had returned their guilty verdicts against appellants, but prior to reaching any decision regarding Codefendant Settle, the jury submitted seven questions to the court that in them, and as developed through discussion, reflected that they had mistaken the law and their role in determining appellants' guilt or innocence. Yet, the trial court immediately rejected the defense request that they be ordered to reconsider their verdicts against appellants. (RT 17105e, 17105cc.)

As a result, Appellant Wheeler's confinement and sentence are illegal and unconstitutional under state statute and constitutional law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because his convictions are based on insufficient evidence, a lowered burden of proof, and the denial of due process.

A. The Facts and Procedural History

In Argument III, the issue is raised that James Williams was an accomplice as a matter of law, his testimony required corroboration, and there was none. The

prosecution and trial court took the position that whether he was an accomplice was for the jury to decide. The factual and procedural backdrop for that issue is detailed in Part A of Argument III and are incorporated herein.

After the jury had returned verdicts against appellants, but were still deliberating on the charges against Codefendant Settle, they submitted seven questions set forth at pages 183 through 184, above. Among them, the jury inquired:

> [3] If one is charged with the same crime but not brought to trial is he automatically an accomplice? (CT 15440, RT 17101.)
>
> [4] Can there be aiding and abetting after the crime was committed? (CT 15440, RT 17101.)
>
> [6] ... Page 56 of the instructions states "A defendant cannot be found guilty based upon the testimony of an accomplice unless corroborated by other evidence." Doesn't this constitute reasonable doubt if there is no corroboration of same in your mind? (CT 15441, RT 17102.)
>
> [7] If you have reasonable doubt, you are required to vote not guilty. Is that the law? (CT 15441, RT 17102.)

In the court's responses to the jury, in regard to question number 4, the court provided two hypothetical sets of facts. In one a defendant agreed before a murder to permit a body to be buried in his yard to facilitate the commission of a murder. In the second, the defendant agreed after the murder. The court instructed the jury that in the first scenario, the defendant, "in all likelihood, [is] an aider and abettor in the crime of murder." In the second scenario he would not be. (RT 17105s-u.)

Whereupon, juror 247 inquired, "In that second scenario, would he be an accomplice?" (RT 17105u.) The court clarified that the juror meant an accomplice to murder. (RT 17105u-v.) The court reminded the juror that an accomplice "is a person who is a principal or aider and abettor shown by the preponderance of the evidence in the commission of a crime." (RT 17105v.)

Shortly thereafter, Juror 113 inquired, "Now, you still are saying, no, that the juror has the—the final decision as to whether or not they consider someone to be an accomplice or an accessory? (RT 17105y.) The court replied that "accessory" is not a word that the court had used. (RT 17105z.) Juror 113 replied, "I think that was part of the problem we were having." (RT 17105z.) The juror then asked, "What if someone has decided that someone is an accomplice? (RT 17105z.) The court then clarified that the juror's question was whether it was up to them to determine whether somebody is or is not an accomplice. (RT 17105z.)

Immediately thereafter, juror 412 asked, "I also said I wanted to clarify in my mind, if you find a person is an accomplice and his testimony is not corroborated that goes beyond a reasonable doubt, the law says you cannot find him guilty." (RT 17105aa.) Juror 261 then asked, "what if the jurors don't agree whether or not someone is an accomplice or not? (RT 17105aa.)

Twice during the above exchange, Mr. Novotney moved pursuant to section 1161 (set forth below) that the deliberations be reopened because the jury's questions demonstrated that they misunderstood the law and the instructions they had been provided. (RT 17105e, 17105bb-cc.) In each instance, the court immediately denied the motion. (RT 17105e, 17105cc.) The court explained:

> I don't see a misunderstanding. What I see is the fact as to Mr. Settle, one defendant, one juror is apparently having problems with the issue of whether there is sufficient corroboration, assuming Mr. Settle is an accomplice. And that in no way exists with any verdict re your client's case, and does not evidence a confusion as to the law regarding accomplices whatever as to render a verdict against your client mildly suspect. (RT 17105cc-dd.)

B. The Relevant Law

Section 1161 provides in pertinent part:

> When there is a verdict of conviction, in which it appears to the Court that the jury may have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict....

The court retains the power to implement the provisions of section 1161 so long as the jury has not been discharged. (*People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282].) This is also true in a capital case. (*People v. Cain* (1995) 10 Cal.4th 1, 54 [40 Cal.Rptr.2d 481].) The procedure may be employed in any criminal case involving a bifurcated trial as long as the jury has "not lost their character as jurors, for example, discharge or receiving information inadmissible in the relevant phase of the proceeding." (*People v. Cain, supra,* at pp. 54-55.)

This procedure may be employed when the jury has made a mistake in a returned verdict. (*People v. Fields, supra; People v. Holmes* (1897) 118 Cal.444, 448 [50 P. 675]) Indeed, the section imposes a duty on the court, "where there is a verdict of conviction, to explain to the jury, if they have mistaken the law, and direct a reconsideration of the verdict...." (*People v. Holmes, supra,* at p. 448.)

C. The Court Failed to Grasp The Jury's Mistaken View of Their Instructions and Confusion of Their Task and Thereby Improperly Rejected the Defense Motion that They Be Ordered to Reconsider Their Verdicts

Parsing the court's explanation for the denial of the defense motion, several errors emerge. First, four jurors (247, 113, 412, 261) were "having problems," not one. (RT 17105u–aa.)

Second, the remaining part of the court's explanation is unclear. The court's assumption that "Mr. Settle is an accomplice" does not provide an explanation for how the jury's misunderstanding could not involve appellants' cases.

Third, the jury had more "problems" than merely "the issue of whether there is sufficient corroboration."

- A juror or jurors did not understand whether being charged with the same crime, but not brought to trial, equated with being an accomplice. (RT 17101, CT 15540.)

- A juror or jurors had failed to differentiate their task to resolve whether an accomplice's testimony was corroborated from their task to determine whether the prosecution had met

their burden of proof beyond a reasonable doubt. (CT 15541, RT 17102.)[86]

- A juror or jurors did not understand the difference between an accomplice and an accessory and that an accessory was not a concept they were to consider. (RT 17105y.) Once the court had corrected that misconception, Juror 113 replied, "I think that was part of the problem we were having. (RT 17105y-z.)

- A juror or jurors did not understand whether their could be aiding and abetting after the crime was committed. (CT 15440, RT 17101.)

- A juror or jurors did not understand the implications of a finding that "someone is an accomplice. (RT 17105z.)[87]

- A juror or jurors did not understand their role if they could not agree "whether or not someone is an accomplice or not." (RT 17105aa.)

- A juror or jurors did not understand their role if they had a reasonable doubt. (CT 15441, RT 17102.)[88]

From the content it is clear that one or more of the jurors had yet to resolve whether Williams was an accomplice, despite the fact that that had been part of

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[86] The jury asked, "Page 56 of the instructions states 'A defendant cannot be found guilty based upon the testimony of an accomplice unless corroborated by other evidence.' Doesn't this constitute reasonable doubt if there is no corroboration of same in your mind? (CT 15441, RT 17102.)

Another juror added, "I also said I wanted to clarify in my mind, if you find a person is an accomplice and his testimony is not corroborated that goes beyond a reasonable doubt, the law says you cannot find him guilty. (RT 17105aa.)

[87] During an exchange with the jury, one of the jurors inquired, "What if someone has decided that someone is an accomplice?" (RT 17105z.)

[88] The jury asked, "If you have reasonable doubt, you are required to vote not guilty. Is that the law?" (CT 15441, RT 17102.)

their charged duty and a pivotal point in the determination of criminal liability. One or more had not understood how to determine if one was an accomplice. One or more had not understood their role once they concluded that Williams was an accomplice. And, even more troubling, one or more jurors had not understood their role once they had arrived at a reasonable doubt of the defendant's guilt.

Such fundamental misunderstanding of the law and their charge made a mockery of any decision that they had reached. Confronted with this misunderstanding, it was the court's duty to direct a reconsideration of the verdicts they had reached. (*People v. Holmes, supra,* at p. 448.)

The result produced a trial that was fundamentally unfair, and the prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 306-307 [the *Chapman*[89] standard applies to "ordinary trial errors" implicating the federal constitution].) James Williams' status as an accomplice or unwilling dupe was pivotal to the prosecution's case against Appellant Wheeler, as demonstrated in Argument III, Parts C and D, and incorporated herein. From the jury's questions and the comments of four of its members, it is clear that they were inadequately prepared, misinformed, and mistaken on how they were to approach their task.

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89 *Chapman* v. *California, supra,* 386 U.S. 18.

The result produced a gross unfairness amounting to a denial of due process and a fair trial in violation of appellant's rights under the Fifth, Eighth, and Fourteenth Amendments and requiring reversal of his convictions and judgment of death. The result here effectively lightened the state's burden of proof and violated Appellant Wheeler's constitutional right to federal due process. (*Carella v. California, supra,* 491 U.S. 263.) Furthermore, misapplication of a state law that leads to a deprivation of a liberty interest, here that no conviction shall be had on uncorroborated accomplice testimony (§ 1111), may violate the Due Process Clause of the 14th Amendment to the federal constitution. (*Ballard* v. *Estelle, supra,* 937 F.2d 453, 456.; *Vitek v. Jones, supra,* 445 U.S. 480.)

In addition, the court's refusal to implement section 1161 has arbitrarily denied appellant's application of this state's own domestic rules in violation of Fourteenth Amendment due process principles. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *People v. Marshall, supra,* 13 Cal.4th 799, 850-851.) This too was reversible error. (*People v. Robinson, supra* (1964) 61 Cal.2d 373, 394; *People v. Zapien, supra,* 4 Cal.4th 929, 982.)

IX. THE CUMULATIVE AND INTER-RELATED GUILT PHASE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF APPELLANT'S TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, MANDATING REVERSAL

Reversal is mandated on each of the errors alleged above. Assuming, arguendo, that this Court finds each error individually harmless, the cumulative

effect of all these errors demonstrates that a miscarriage of justice occurred. Reversal may be based on grounds of cumulative error, even where no single error standing alone would necessitate such a result. (*See People v. Ramos* (1982) 30 Cal.3d 553, 581 [180 Cal.Rptr. 266], revd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992 [77 L. Ed. 2d 1171, 103 S.Ct. 3446]; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470 [174 Cal.Rptr. 67]; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 388 [158 Cal.Rptr. 6]; *People v. Buffum* (1953) 40 Cal.2d 719, 726 [256 P.2d 317]; and *see Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791.)

When errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed together under a *Chapman* standard. In *People v. Williams* (1971) 22 Cal.App.3d 34, 50 [99 Cal.Rptr. 103] the court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, or was not harmless error. [Citations.] (*Id.* at pp. 58-59.)

Appellant has demonstrated that a number of errors of federal constitutional dimension occurred during or related to the guilt phase and that each such error mandates reversal. These errors variously deprived appellant of his rights to liberty, fair trial, counsel, an unbiased jury, confrontation, present a defense, trial

where the prosecution's burden of proof is not impermissibly lightened, effective assistance of counsel, due process, heightened capital case due process, reliable determinations of guilt, death eligibility, and penalty, and equal protection under the law, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Notwithstanding premising Appellant Wheeler's convictions on the insufficient evidence of an uncorroborated accomplice (Arg. III) and the statements of a key prosecution witness to whom appellant had been denied the right of confrontation (Arg. VI), it began by forcing appellant, an adolescent, short-term, bit player in the Bryant organization, to stand trial for multiple homicides with the organization's founders and key lieutenants. Their defenses were antagonistic to his. He was willing to stipulate that the organization was in the drug sales business. His codefendants were not. The latter fact provided justification for the prosecution to put on approximately 100 witnesses, ostensibly to prove the motive for the homicides, that described six years of criminal activity of the organization involving murder, attempted murder, assault, and witness intimidation as well as the business' core, all occurring long before Appellant Wheeler was employed by them. (Arg. I.)

To this seemingly endless parade of horribles was coupled extraordinary security precautions employed throughout the trial that included cloistering the jury from the moment they parked their cars in the parking lot in the morning until

they returned to their cars at night, large numbers of security personnel in the courtroom, multiple metal detectors for all to pass through, and structural changes in the courtroom, all providing constant reinforcement of how dangerous Appellant Wheeler and his employers were. In short, the jury was constantly reminded from the beginning of the trial until its end, directly and indirectly, that this was a very bad organization made up of bad men doing bad things covering appellant in an aura of guilt before even the first witness testified. Exacerbating the impact of these precautions, appellant was forced to endure the five month trial strapped to a stun belt with 50,000 volts ready to be sent to his kidney if activated intentionally or by accident. (Arg. IV.)

In addition, the court permitted Codefendant Settle to manipulate the order of the trial. Through Settle's gamesmanship, he repeatedly assured the court that he was waiving his right to testify and rested his case. Then he waited until he had the opportunity to weigh his codefendants' cases and, with the court's acquiescence, he took the stand and wove a tail that inculpated Appellants Wheeler and Bryant and that exculpated himself. (Arg. II.)

In addition, the prosecution was permitted to construct a motive for the homicides on the fruits of a five-year-old interrogation that deprived appellant of his Sixth Amendment right of confrontation. (Arg. VI.) Exacerbating this error, the jury was authorized to find appellant guilty based on motive alone. (Arg. VII.)

In addition, the prosecution in argument to the jury improperly sought to undermine Appellant Wheeler's alibi that supported his defense that he was only a recent employee of the organization, and thus would have been an unlikely participant in an action, according to the prosecution's theory, that was so critical to the organization. The prosecutor asserted that there were no records that supported that alibi, although the prosecutor knew or should have known that they existed and that the prosecution had in fact provided them to the defense. (Arg. V.)

Finally, the trial court refused to order the jury to reconsider their verdict when it became abundantly clear that they were inadequately prepared, misinformed, and mistaken on how they were to approach their task on fundamental issues in the case. (Arg. VIII.)

In the end, the cumulative impact was such that it overpowered the jury's resolve to require the prosecution to prove beyond a reasonable doubt each element of the charged offenses and appellant's involvement in them. Taken together, these errors undoubtedly produced a fundamentally unfair trial setting and a new trial is required. (*See Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Derden v. McNeel* (5th Cir. 1992) 978 F.2d 1453; *cf. Taylor v. Kennedy* (1978) 436 U.S. 478 [56 L.Ed.2d 468, 98 S.Ct. 1930] [several flaws in state court proceedings combine to create reversible federal constitutional error].)

The above errors overran appellant's defense that he was not present during the homicides and further reduced the prosecution's burden to prove these cases beyond a reasonable doubt. Respondent can not show these errors to have been harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Assuming, arguendo, that this Court determines there was no constitutional error, it is reasonably probable that a result more favorable to appellant would have been reached, absent the above errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) These errors mandate reversal.

As discussed further in a separate argument, *post*, reversal of the death sentence is mandated, because the state will fail in any effort to show that all the foregoing constitutional and non-constitutional violations had no effect whatever on the jury.

Moreover, the effect of each and all of these guilt phase errors must be added to the subsequent penalty phase errors in the evaluation of cumulative error in both guilt and penalty phases. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [276 Cal.Rptr. 874] [court weighs prejudice of guilt phase instructional error against prejudice in penalty phase].) The jury was instructed at the penalty phase to consider all of the evidence that had been received during any part of the trial. (RT 18426, CT 15820.) However, because the issues resolved at the guilt phase

are fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still prejudicial to the penalty determination. (*Smith v. Zant* (11th Cir. 1988) 855 F.2d 712, 721-722 [admission of confession harmless as to guilt but prejudicial as to sentence].)

X. THE USE OF SIX UNADJUDICATED OFFENSES AS EVIDENCE IN AGGRAVATION VIOLATED APPELLANT'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS

As detailed in the Statement of the Facts, Penalty Phase, and incorporated herein, Appellant Wheeler was not a hardened criminal with a string of prior convictions. Before his arrest in this case, Appellant Wheeler had a single Youth Authority commitment for attempted robbery. (RT 17299-17300.) Thus, the prosecution was reduced to arguing that six relatively minor altercations, the majority of which occurred in the violent milieu of the jail during the first half of his incarceration while he was awaiting trial, equated to a history of menacing violence.[90]

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[90] The incidents are a 1987 fight during a Youth Authority commitment between Appellant Wheeler and another juvenile; a 1988 incident when appellant brandished a revolver to extricate himself from an argument; an incident in the Los Angeles County Jail in 1989 involving an assault on another inmate; two fights in the Jail in 1991, one in which appellant was reported to be the victim; and a 1992 fight in Jail with another inmate in which the inmate suffered stab wounds.

The use of these unadjudicated alleged offenses deprived appellant of a fair penalty phase hearing and undermined the reliability of the death penalty determination. Their admission into evidence at the penalty phase of his trial violated Appellant Wheeler's right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as his Eighth and Fourteenth Amendment rights to a reliable penalty phase determination. In *Gardner v. Florida* (1977) 430 U.S. 349 [51 L.Ed.2d 393, 97 S.Ct. 1197] the United States Supreme Court stated in relevant part:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. [Citations.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. [I]t is now clear that the sentencing process ... must satisfy the requirements of the Due Process Clause. (*Id.* at pp. 357-358.)

Thus, for a death decision to be based on reason, due process requires that it be based on accurate and reliable information. (*Id.* at p. 359.) Moreover, the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [64 L.Ed. 2d 398, 100 S.Ct. 1759] [plur. opn.].)

In the instant case, the prosecution will be unable to establish beyond a reasonable doubt that Appellant Wheeler's death verdict was not based in substantial part on inadmissible evidence of the unadjudicated "crimes," all but one of which occurred after the homicides. Four of these occurred during the seven years Appellant Wheeler was in custody following his arrest for the instant offenses and which apparently never even resulted in an arrest. Although California required individual jurors to find beyond a reasonable doubt that appellant committed these unadjudicated crimes before the jurors could consider them as aggravating evidence,[91] the beyond a reasonable doubt requirement does not go far enough to eliminate undue prejudice. Appellant was still required to defend himself on these matters before a jury which had just convicted him of capital murder. Such a procedure was inherently unfair and prejudicial to appellant.

In *Ake v. Oklahoma* (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087], the Supreme Court stated "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." (*Id.* at p. 79.)

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[91] The jury instructions did not require juror unanimity as to alleged unadjudicated crimes before individual jurors could consider such alleged crimes as aggravating factors. The failure to require juror unanimity further undermined the reliability of the sentencing determination, and, as argued below in Argument XII, D, violated appellant's Sixth Amendment right to trial by jury.

The unreliability and unfair prejudice inherent in a system that allows the prosecution to introduce evidence about unadjudicated encounters to persuade the jury to vote for a death sentence creates a "strategic disadvantage" of the type condemned in *Ake*. Such a system places defendant at a disadvantage by creating a presumption that the allegations are true (rather than vice versa) and by forcing the defendant to "try" his alleged crimes before a biased jury on unrelated charges.

Finally, allowing the jury to consider evidence of unadjudicated "crimes" eroded the presumption of innocence to which appellant was entitled. (*Johnson v. Mississippi, supra,* 486 U.S. 578, 585.) When appellant was convicted of the capital murder charges in the instant case, his convictions only removed the presumption of innocence as to those murder charges. (*Herrera v. Collins* (1993) 506 U.S. 390, 399 [122 L.Ed.2d 206, 113 S.Ct. 853].) As a matter of law, appellant retained a presumption of innocence with regard to the unadjudicated crimes because the State failed to adjudicate and prove his guilt as to those crimes. Here, because they had just found appellant guilty of a capital murder, it is likely that the jurors were primed to presume that appellant was guilty of the unadjudicated offenses presented in the penalty phase. In *People v. Earp* (1999) 20 Cal.4th 826 [85 Cal.Rptr.2d 857], this court observed:

> In a state such as California that in capital cases provides for a sentencing verdict by a jury, "the due process clause of the Fourteenth Amendment of the federal constitution requires the sentencing jury to be impartial to the same extent that the Sixth

> Amendment requires jury impartiality at the guilt phase of the trial." (*Id.* at p. 852, quoting *People v. Williams* (1997) 16 Cal.4 635, 666 [66 Cal.Rptr.2d 573].)

A jury which believes itself well-acquainted with appellant's ability to commit a capital murder would be more predisposed to believe in his ability to commit other crimes than would a new jury untainted by prior knowledge. (*State v. Bartholomew* (Wash. 1984) 683 P.2d 1079, 1086 [a jury which has convicted a defendant of a capital crime is unlikely to fairly and impartially weigh evidence of prior alleged offenses].) In the instant case, jurors who just convicted appellant of first degree murder could not remain impartial with regard to the unadjudicated offenses.

Because the ultimate penalty of death is irreversible, the Constitution requires that a state seeking to execute one of its citizens take every step to ensure that its process is free from inaccurate and unreliable results. The use of inadmissible evidence of unadjudicated crimes in the penalty phase of appellant's trial was inherently flawed and does not comport with the Eighth and Fourteenth Amendments' mandate of accuracy and reliability. (See *Cook v. State* (Ala. 1979) 369 So.2d 1251, 1257 [the presumption of innocence "prohibits use against an individual of unproven charges in this life or death situation"]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 281 ["the risk that the previously tainted jury will react in an arbitrary manner [when unadjudicated offenses are introduced] is

infinitely greater" than when such offenses are "presented to an impartial, untainted jury"]; *Commonwealth v. Hoss* (Pa. 1971) 283 A.2d 58, 69 ["it is imperative that the death penalty be imposed only on the most reliable evidence ...; piecemeal testimony about other crimes for which appellant has not yet been tried or convicted can never satisfy this standard"]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-953 ["to permit the State to present evidence [of unadjudicated offenses] ... before the very jury that has just returned a guilty verdict for first degree murder, violates the concept of fundamental fairness embodied in due process of law"]; *Scott v. State* (Md. 1983) 465 A.2d 1126, 1135 [state law permits admission of prior convictions only, not evidence of unadjudicated offenses]; *Provence v. State* (Fla. 1976) 337 So.2d 783, 786 [same]; *United States v. Carranza* (1st Cir. 1978) 583 F.2d 25, 27 [when separate non-capital charges are at issue, "a defendant has a constitutional right not to be tried by any jurors who participated in his conviction in a prior case. [Citations.]]"; see also *Leonard v. United States* (1964) 378 U.S. 544, 545 [12 L.Ed.2d 1028, 84 S.Ct. 1696] [*per curiam*]; *United States v. McIver* (11th Cir. 1982) 688 F.2d 726, 728-731.)[92]

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[92] This Court apparently did not consider the principles announced in these cases when it decided *People v. Balderas* (1985) 41 Cal.3d 144 [222 Cal.Rptr. 184]. It, therefore, should not have rejected the defendant's argument on the ground that the argument would "of course" also prohibit "all efforts to try more than one crime to the same jury." (*Id.* at p. 204.) The constitutional prohibition recognized in the federal cases is not a prohibition against two charges being tried together; it is a prohibition against a second charge being tried by biased jurors

Allowing the jury to consider evidence of six unadjudicated crimes as factors in aggravation violated both the state and federal constitutions. It bolstered the prosecution's theme that appellant was a violent and threatening person. And, because the prosecutor heavily relied upon that evidence during jury argument, (RT 18451, 18453, 18457-18458, 18477-18481), these violations cannot be deemed harmless beyond a reasonable doubt. (*Johnson v. Mississippi, supra*, 486 U.S. at p. 586; *Chapman v. California, supra*, 386 U.S. at p. 24.) Therefore, appellant's death sentence should be vacated.

XI. THE TRIAL COURT'S DENIAL OF DEFENSE REQUESTED APPLICABLE AND ESSENTIAL JURY INSTRUCTIONS COUPLED WITH OTHER ERRONEOUS AND INADEQUATE INSTRUCTIONS, RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

At appellant's penalty trial, the trial court committed prejudicial error both in the jury instructions it gave (RT 15800-15849) and in the jury instructions it refused or failed to give (RT 15628-15665, 15758-15767, 15850.) The instructions misinformed the jury about its central task in deciding appellant's fate. They misled the jury about their sentencing discretion and the applicability and

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who have already made up their minds that the defendant is guilty of an earlier charge. (See e.g., *Virgin Islands v. Parrott* (3d Cir. 1977) 551 F.2d 553, 554 ["A juror who has made up his mind that a defendant has committed an offense cannot be open-minded in another case involving a similar charge when the trials are near in time"].)

inter-relation of the sentencing factors. In addition, the instructions contained several procedural and substantive defects. These errors and deficiencies taken individually or in combination, rendered appellant's death sentence unconstitutional.

Most penalty phase errors implicate a defendant's federal constitutional rights. (1) The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585 [8th Amendment]; *Zant v. Stephens, supra,* 462 U.S. 862, 885 [14th Amendment due process].) (2) The due process clause of the Fourteenth Amendment also protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process. (3) Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger, supra,* 498 U.S. 308, 321, citing other cases.) (4) Separate

from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors that taint the fairness of the trial and present an "unacceptable risk ... of impermissible factors coming into play." (*Estelle v. Williams, supra,* 425 U.S. 501, 505; *accord, Holbrook v. Flynn, supra,* 475 U.S. 560; *Norris v. Risley, supra,* 918 F.2d 828.)

A. The Trial Court Erred in Instructing the Jury over Defense Objection that Sympathy for Appellant's Family Could Not Be Considered As a Factor in Mitigation

Appellant Wheeler's confinement and sentence are illegal and unconstitutional because the trial court, over defense objection, specifically instructed the jury that it was foreclosed from consideration of sympathy for appellant's family as a factor in mitigation.

This Court has rejected claims similar to that raised herein. (*People v. Ochoa* (1998) 19 Cal.5th 353, 456 [79 Cal.Rptr.2d 408]; *People v. Smithey* (1999) 20 Cal.4th 936, 1000 [86 Cal.Rptr.2d 243]; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856 [94 Cal.Rptr.2d 840].) However, the federal courts have not explicitly resolved them. Appellant asserts these claims to give this Court an opportunity to reconsider its prior rulings in light of the facts of appellant's case and to permit him to preserve the claims for federal review.

1. THE FACTS AND PROCEDURAL HISTORY

Appellant had the strong support of numerous of his family members who were intimately familiar with the extraordinary hardships he had been forced to confront and endure as a child and young adolescent. The jury heard that support through the testimony of his father, Leroy Wheeler, Senior (RT 17803); Appellant Wheeler's brother, Forrest (RT 17783); Appellant Wheeler's half-sister, Tenika Luster (RT 17757); Appellant Wheeler's mother's two sisters, Priscilla Gray (RT 17717) and Mamie Trimble (RT 17730); his paternal grandmother, Norma Skaggs (RT 17763); his father's sister, Carzet Wheeler McKenzie (RT 17769); and one of Appellant Wheeler's mother's boyfriends, Charlie Luster (RT 17744.) Tenika told the jury through tears that she loved her brother and asked them not to kill him. (RT 17761), a wish expressed by all of his family (RT 17726, 17738, 17751, 17767-17768, 17807.)

Midway through the penalty phase of the trial and after Appellant Wheeler's numerous family members had testified, the court expressed its intention to instruct the jury that they could not consider their sympathy for the defendant's family members or friends in weighing the sentence alternatives. (RT 17941-17942.) The defense had requested that the court instruct the jury that they could consider such sympathy and had proposed the following special instruction:

> In arriving at your verdict, you may consider, take into account, and be guided by sympathy for family members or friends

of the defendant or by the effect your verdict may have on any such person. (CT 15850.)

The court asked the parties to ponder its contrary proposal. (RT 17944.)

A week later, the court returned to the issue. (RT 18293.) The court reflected that as of the date of this point in the trial, July 1995, the California Supreme Court had not ruled on whether sympathy for a family member was an appropriate mitigating factor.[93] (RT 18293-18296, 18379, 18386-18387.) The court reflected that since the prosecution was permitted to introduce victim impact evidence, there may come a time when the federal courts would find that the defendant is similarly entitled to introduce evidence about how his family and friends would be impacted by the outcome of the jury's penalty selection. (RT 18296, 18299-18301, 18387-18390.)

Yet, the court concluded that although the defendant's character was appropriate for the jury's consideration, the character of his family and friends was not. (RT 17944, 18378-18381, 18386-18389.) The defense objected to the court's proposal. (RT 17941-17942, 17952-17953, 18380-18381, 18385, 18390, 18404-18405.) Nevertheless, the trial court instructed the jury:

> You may not consider mere sympathy for a family member or friend of a defendant, or the opposite feelings, or the effect that your

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[93] Three months earlier, this Court in *People v. Beeler* (1995) 9 Cal.4th 953, 991-992 [39 Cal.Rptr.2d 607] recognized, but did not decide, the question of whether the impact of the death penalty upon the defendant's family would be "constitutionally pertinent mitigation."

> verdict may have on anyone other than the defendant, except to the extent that such matters may bear upon your determination of any sympathetic or other aspect of the character and background of the defendant himself. (CT 15823, RT 18428.)[94]

During the prosecution's argument to the jury, the jury was repeatedly implored that any sympathy they felt should be limited to the victims and their families. (RT 18455-18456, 18469-18470, 18494-18495.)

Appellant Wheeler raised the issue raised in this argument in his motion for a new trial. (CT 16116.) The court denied the motion on October 19, 1995. (RT 18781.)

2. THE RELEVANT LAW

The Eighth and Fourteenth Amendments provide that a sentencing authority in a capital case may not be precluded from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed.2d 973, 98 S.Ct. 2954] [plur. opn. Of Burger, C.J.]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1,102 S.Ct. 869].) It includes both "mitigating aspects of the crime" (*Lowenfield v.*

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[94] The instruction was promulgated by the trial court on its own motion, and only subsequently requested by the prosecution. (CT 15895.)

Phelps (1988) 484 U.S. 231, 245 [98 L.Ed.2d 568, 108 S.Ct. 546]) and mitigation that is unrelated to the crime. (*Lockett, supra*, 438 U.S. at p. 605.) The Constitution prohibits limiting the scope of mitigating evidence to only that evidence which relates specifically to the defendant's culpability for the crime he or she has committed. It requires that a defendant be allowed to present any relevant mitigating evidence, and that a sentencer be allowed to listen and consider that evidence. (*Sumner v. Shuman* (1987) 483 U.S. 66, 76 [97 L.Ed.2d 56, 107 S.Ct. 2716].) "Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so," (*South Carolina v. Gathers* (1989) 490 U.S. 805, 817 [104 L.Ed.2d 876, 109 S.Ct. 2207][95] [dis. Opn. of O'Conner, J.]), in that Eighth and fourteenth Amendment jurisprudence requires that a defendant be given the opportunity to present any reason why the death penalty should not be imposed.

California Penal Code section 190.3 also commands a jury to consider all relevant mitigating evidence. Section 190.3, subdivision (k), requires consideration of "any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In compliance with *Lockett* and its progeny, this Court has interpreted this statutory provision to allow a jury to consider, as a mitigating factor, any aspect of the defendant's character,

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95 Overruled on other grounds in *Payne v. Tennessee* (1991) 501 U.S. 808, 830 [115 L.Ed.2d 720, 111 S.Ct. 2597].)

or record, and any of the circumstances of the offense that a defendant proffers, as a basis for a sentence less than death. (*People v. Easley* (1983) 34 Cal.3d 858, 878 [196 Cal.Rptr. 309]; see CALJIC No. 8.85 (5th ed. 1988).)

In *Payne v. Tennessee* (1991) 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597], the prosecutor introduced to the jury, during sentencing, testimony from the murder victim's mother about the impact the murder of her daughter and granddaughter had upon her surviving grandson.

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says I'm worried about Lacie. (*Id.* at pp. 814-815.)

In arguing for the death penalty, the prosecutor in *Payne* commented on the continuing effects of the grandson's experience, stating:

> Somewhere down the road [the grandson] is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer. (*Id.* at p. 815.)

In affirming the Tennessee Supreme Court's decision to permit the introduction of victim impact evidence for aggravating purposes, the Supreme Court found that "the sentencing authority has always been free to consider a wide range of relevant material" (*Payne v. Tennessee, supra,* at pp. 820-821), and that "if the State chooses to permit the admission of victim impact evidence and

prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar" (*id.* at p. 827.) The Court went on to say that "a State may legitimately conclude that evidence about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Ibid.*)

California courts have permitted the introduction of victim impact evidence for aggravating purposes. (*People v. Edwards* (1991) 54 Cal.3d 787, 833 [1 Cal.Rptr.2d 696].) In *Edwards* this Court held that victim impact evidence is evidence of the circumstances of the crime and is admissible under California Penal Code section 190.3, subdivision (a). A year later in *People v. Pinholster* (1992) 1 Cal.4th 865, 959 [5 Cal.Rptr.2d 765], this Court held that no error was committed by the trial court by permitting the victim's mother, who wept openly in front of the jury, to identify her deceased son through photographs which had been taken of him. This Court held that such testimony was properly admitted evidence of the impact on the family of the victim. (*Ibid.*)

Payne and *Edwards* establish that sympathy for a victim's family is relevant evidence, and may be considered by the jury for aggravating purposes. As the Court observed in *Payne*, "There is no reason to treat such evidence differently than other relevant evidence is treated." (*Payne*, at p. 827.) Such

inquiry does not even require that the victim's family's sympathy be rationally based. (*People v. Boyette* (2002) 29 Cal.4th 381, 444-445 [127 Cal.Rptr.2d 544].)

Sympathy is the byproduct of the empathy a jury develops for the impact that the offense had on the lives of the families involved. Telling the jury to ignore mere sympathy for appellant's family members would be interpreted as an admonition to ignore the emotional responses that are rooted in the aggravating and mitigating evidence introduced during the penalty phase. (*California v. Brown* (1987) 479 U.S. 538, 542 [93 L.Ed.2d 934, 107 S.Ct. 837].) Given the fact that sympathy for a victim's family is relevant and may be used by a prosecutor for aggravating purposes, a point the prosecutor here made to the court (RT 17980), so too should sympathy for a defendant's family be considered relevant and weighed by the jury as mitigating evidence. Due process requires a balance of forces between the accused and his accuser. (*Wardius v. Oregon* (1973) 412 US 470, 473, fn 6 [37 LEd2d 82; 93 S.Ct. 2208].)[96]

3. SYMPATHY FOR APPELLANT'S FAMILY SHOULD HAVE BEEN CONSIDERED BY THE JURY

As detailed in the Statement of the Facts, Part B, 2, and incorporated herein, Appellant Wheeler's penalty phase case was predominantly based upon the

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96 Here, the trial court rejected the defense request that the jury be instructed that they could not base their decision upon sympathy for the victims' families. (CT 15762, RT 17941-17944, 17980-17981.)

testimony of his family that described the conditions under which he and his siblings were raised, conditions which would engender sympathy in all but the most hardened. This testimony also showed that despite his convictions of the instant offenses, his family continued to have affection for him and did not wish him to be executed.

In considering sympathy for the defendant's family the jury is weighing the relationship of the defendant with his family. They weigh the affection these family members have for the defendant as an individual whom they know, perhaps better than anyone else. They weigh the effect he has had upon their lives and the commentary this provides upon his character. The sympathy that these family members engender in the jury is the natural byproduct of or sum of all the factors the jury has considered in the defendant's relationships with his family. It was this byproduct or sum that the judge told the jury they must disregard. That could not be accomplished without also consciously or subconsciously disregarding or diminishing the factors that made up that sum.

The *Payne* and *Edwards* line of cases demonstrates that the relationship of a victim with his or her family is compelling; it generates a strong emotional response from a jury and is a powerfully persuasive tool. Because such evidence is so compelling, the Eighth and Fourteenth Amendments dictate that a defendant be permitted to present to the jury and to have the jury consider, the relationship

that a defendant has with his family and the impact that his death would have upon them. A contrary rule would result in the jury imposing the death penalty without considering all relevant mitigating evidence proffered as a basis for a sentence less than death, in violation of a defendant's right to a fair trial, to a reliable determination of sentence, due process, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, *Lockett v. Ohio, supra,* and *Eddings v. Oklahoma, supra.*

The constitutional mandate requires that a jury may consider sympathy for a victim's family when it is introduced for mitigating purposes. Sympathy for appellant's family was a substantial reason why the death penalty should not have been imposed in this case. Had the jury not been instructed to ignore such sympathy, it is reasonably probable that they would have reached a verdict of less than death. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

B. CALJIC 8.88 as Given Is Impermissibly Vague and Ambiguous

This Court has rejected the claims appellant asserts below. (*People v. Ochoa* (2003) 26 Cal.4th 398, 452 [110 Cal.Rptr.2d 324]; *People v. Johnson* (1993) 6 Cal.4th 1, 52 [23 Cal.Rptr.2d 593].) However, the federal courts have not

explicitly resolved those arguments. Appellant asserts these claims to give this Court an opportunity to reconsider its prior rulings in light of the facts of appellant's case and to permit him to preserve the claims for federal review. Given the extensive briefing which has been submitted to this Court on some of these issues in other cases and the Court's rulings, appellant will not offer detailed argument on them at this time. However, should the Court desire further briefing or conclude that appellant's arguments are insufficient to preserve these claims for federal review, appellant requests the opportunity to submit further written argument in the form of a supplemental brief.

The jury was instructed on its sentencing discretion pursuant to CALJIC No. 8.88 (1989 Revision).[97] (CT 15846; RT 18443-18444.)

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[97] The instruction provided:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant for each count of first degree murder.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an

1. THE INSTRUCTION ON THE JURY'S SENTENCING DISCRETION WAS IMPERMISSIBLY VAGUE AND MISLEADING

This instruction, which offered the core guidance for the penalty deliberations, was defective in several ways. First, it failed to inform the jurors that unless they found that the factors in aggravation outweighed the factors in mitigation, they could not impose a sentence of death. (*People v. Easley, supra,*

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extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. Your are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

In this case you must decide separately the question of the penalty as to each of the defendants and each count of first degree murder. If you cannot agree upon the penalty s to one or more of them, you must render a verdict as to the one or more on which you do agree.

You will soon retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom. (CT 15846-15847, RT 18843-18845.)

34 Cal.3d 858, 883-884.) Thus, appellant's jury was not adequately informed of "what they must find to impose the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362 [100 L.Ed.2d 372, 108 S.Ct. 1853].) Second, the instruction failed to inform the jurors of the statutory mandate that if mitigation outweighed aggravation, they were required to impose a sentence of life without possibility of parole. Third, the penalty charge failed to give any instruction at all on returning a life sentence. (Pen. Code § 190.3.) This error arbitrarily deprived appellant of a state-created liberty interest in violation of the due process clause of the Fourteenth Amendment (*Hicks v. Oklahoma, supra,* 447 U.S. 343) and his right to a reliable penalty determination under the Eighth Amendment (*Maynard v. Cartwriqht, supra*).

2. THE "SO SUBSTANTIAL" STANDARD CREATED A PRESUMPTION IN FAVOR OF DEATH

The error detailed above, was compounded by the additional error of using the "so substantial" standard of CALJIC 8.88 that provides,

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (CT 15846, RT 18444.)

The term is purely subjective, and so unconstitutionally vague that it invited each juror to engage in the standardless, arbitrary and unreliable decision-making condemned under the Eighth and Fourteenth Amendments in *Furman v. Georgia*

(1972) 408 U.S. 238, 288-289 [33 L. Ed. 2d 346, 92 S.Ct. 2726]; *Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362; s*ee, Stringer v. Black* (1992) 503 U.S. 222 [117 L.Ed.2d 367, 378, 112 S.Ct. 1130, 1136-1137].)

Irrespective of the meaning jurors might have given "so substantial," the standard does not convey the threshold requirement that aggravation outweigh mitigation. Additionally, by juxtaposing the substantiality of the aggravating evidence against mitigating circumstances, the instruction impermissibly skewed the jury's penalty decision in favor of death; that is, it effectively told the jury that the aggravating factors were *substantial*. As recognized by this Court, a defendant at the penalty phase has already been convicted of first degree murder with at least one special circumstance. (*People v. Brown* (1985) 40 Cal.3d 512, 541, fn. 13 [220 Cal.Rptr. 637].) Both the circumstances of the murder and the existence of the special circumstance will count in aggravation in the weighing process. Under these circumstances, the "aggravating evidence" will always remain substantial. From the starting point, then, it "... would be rare indeed to find mitigating evidence which could redeem such an offender or excuse his conduct in the abstract." (*Ibid.*)

Penalty phase mitigating evidence is therefore unlikely to make the aggravating evidence appear un*substantial.* This is particularly true when, as here, much mitigating evidence may be unrelated to the circumstances of the crime and

to the existence of the special circumstances, per section 190.3, subdivision (a). Consequently, merely being found death eligible gives rise to an imbalance in which pre-existing aggravating factors will necessarily, from the outset, appear *substantial* in comparison to all but the most extreme showing of mitigating evidence. (*Contra, People v. McPeters* (1992) 2 Cal.4th 1148, 1193-1194 [9 Cal.Rptr.2d 834].)

Therefore, CALJIC 8.88 unconstitutionally misled the jury to conclude that appellant bore the burden of proof that death was not appropriate and that aggravation was insubstantial in comparison to mitigation. This instructional defect created an impermissible presumption in favor of death and the imposition of a mandatory death sentence. Therefore, the resulting death judgment violated appellant's rights to due process, a fair trial, impartial jury, and individualized and reliable penalty determination in violation of the Fifth, Six, Eighth and Fourteenth Amendments and the California Constitution's analogous provisions (Art. 1, §§ 1, 7, 15, 16, 17) and must be reversed. (*Adamson v. Ricketts* (9th Cir. 1988) (en banc) 865 F.2d 1011, 1041-1044 [Eighth Amendment]; *Jackson v. Dugger* (11th Cir. 1988) 837 F.2d 1469, 1473-1474 [same].)

3. THE TERMS "AGGRAVATING" AND "MITIGATING" CIRCUMSTANCES ARE VAGUE AND AMBIGUOUS

The terms "aggravating" and "mitigating" are not commonly understood terms, and they are not adequately defined for jurors. This presents a serious

constitutional issue because the terms "aggravating" and "mitigating" are an integral part of the instructions given the jurors to make a penalty determination. The penalty determination is unreliable if jurors may not understand what the terms are supposed to mean, or if there is a reasonable possibility the terms will confuse jurors or fail to dispel fundamental misconceptions.

There is in fact a substantial body of literature to show that jurors are very likely not to know what those terms are supposed to mean or how to apply them, and are confused by those terms. (*See, e.g.,* Haney, Sontag and Costanzo, *Deciding To Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 J. Social Issues 149, 168-168; Haney and Lynch, "*Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*" (1994) 18 L. Hum. Beh. 411, *passim.*)

The trial court's attempts to define "aggravating factor" and "mitigating circumstance" were even more confusing than an absence of attempt at definition might have been. In particular, the trial court defined "mitigating circumstance" as "any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (CT 15846 RT 18444.) The court did not, however, define what an "extenuating circumstance in determining the appropriateness of the death penalty" was

supposed to be, and did not tell the jurors what "may be considered" as such, leaving the jurors to guess at that--and all that assuming the jurors could decipher all the terms. These are lawyers' terms, not lay terms, and they are unclear on their face for purposes of a lay jury determining matters of life and death.

As a matter of fundamental law, jury instructions should be clear, and not create the possibility of confusion or fundamental misconception, since jury instructions are the only guidance jurors will ever get on the law. California law requires jurors to make their determinations based on aggravating and mitigating circumstances. (§ 190.3, last paragraph.[98]) Because it is highly probable that the instructions as given in appellant's case led to juror confusion about the terms aggravating and mitigating circumstances, and because those terms are an integral part of California's capital sentencing scheme, the sentencing scheme on its face and as applied to appellant is unreliable and ambiguous, violates appellant's rights

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[98] The applicable section of 190.3 provides,

> After having heard and received all of the evidence and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. (§ 190.3.)

to due process, a fair trial, impartial jury, and individualized and reliable penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and violates the California Constitution's analogous provisions (Art. I, §§ 1, 7, 15, 16, 17.)

C. The Court Improperly Denied from Jury Consideration that No Mitigation Is Necessary to Reject a Sentence of Death

The defense requested an instruction that provided:

> A jury may decide, even in the absence of mitigation evidence, that the aggravating evidence is not comparatively substantial enough to warrant death. (CT 15640-15641, RT 17952-17953.)

The requested instruction was a correct statement of the law, was not argumentative, and is supported by the authority that follows. The trial court did not agree and believed that the weighing process described by the pattern instruction from CALJIC 8.88 adequately covered the issue.[99] (RT 17954-17955.) Of course, CALJIC 8.88 did not convey the specific point of the requested instruction.

The requested instruction is a correct statement of the law. (*People v. Duncan* (1991) 53 Cal.3d 955, 979 [281 Cal.Rptr. 273]; see also *People v. Nicolaus* (1991) 54 Cal.3d 551, 591 [286 Cal.Rprt. 628].) Instruction upon this

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[99] See footnote 97, pages 291-292, above, for the entirety of CALJIC 8.88 as it was given.

principle is necessary to assure that the jury does not improperly impose the burden on the defendant to present affirmative evidence in mitigation to overcome the existence of the special circumstance and any other aggravating factors. (See *Duncan* at 978-979.) Without a specific instruction on this principle, there is a danger that the jury will not understand from the standard CALJIC instructions that it may return a verdict of life even if no mitigation exists. The entire focus of the CALJIC instructions are upon a weighing and comparison of the aggravating circumstances with the mitigating circumstances. Without additional instruction, the jurors would conclude that if there is no mitigation then the existence of any aggravation at all would warrant imposition of death.

By promoting a reliable, non-arbitrary, and individualized sentencing determination, this instruction protects the defendant's federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. (Eighth and Fourteenth Amendments.) (See, e.g., *Sochor v. Florida* (1992) 504, 532 U.S. 527 [119 L.Ed.2d 326, 112 S.Ct. 2114]; *Penry v. Lynaugh* (1989) 492 US 302, 318 [106 L.Ed.2d 256, 109 S.Ct. 2934]; *Clemons v. Mississippi* (1990) 494 U.S. 738 [108 L.Ed.2d 725, 110 S.Ct. 1441]; *McCleskey v. Kemp* (1987) 481 U.S. 279 [95 L.Ed.2d 262, 107 S.Ct. 1756].)

In *People v. Jones* (1998) 17 Cal.4th 279, 314 [70 Cal.Rptr.2d 793] this Court concluded that this instruction was unnecessary because it is duplicative of

CALJIC 8.85, (k). However, it is respectfully submitted that the court's conclusion is erroneous for three reasons.

First, factor "k" does not include the concept set forth in the proposed instruction. Factor "k" merely informs the jury as to other matters which it may consider to be mitigating. (*Jones* at p. 314.) The proposed instruction, on the other hand, informs the jury that it may return a verdict of life even if there is no mitigating evidence at all. Because no other standard CALJIC instruction informs the jury of this rule, which is a correct construction of the California statute, the proposed instruction is necessary.

Second, the defendant has a federal constitutional right to have the jury instructed on his or her theory of the case. (*People v. Wharton* (1991) 53 Cal.3d 522, 570-571 [280 Cal.Rptr. 631]; *United States v. Escobar de Bright, supra,* 742 F2d 1196.) This rule should be equally, if not more, applicable when that theory of the case relates to the defendant's attempt to persuade the jury to return a verdict of life rather than death. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [65 L.Ed.2d 392, 100 S.Ct. 2382] [Eighth Amendment requires heightened reliability and scrutiny].) Therefore, the defendant should be permitted to clarify and pinpoint legal principles upon which the theory of the defense is founded when those principles, even though arguably included within a more general instruction, are not specifically stated to the jury in the instructions.

Third, it is now recognized that the jury may be given "unbridled" discretion in determining penalty under the federal constitution. (See *Buchanan v. Angelone* (1998) 522 U.S. 269, 276-277 [139 L.Ed.2d 702, 118 S.Ct. 757].) Obviously, such unbridled discretion would include the ability of the jury to reject death even in the absence of mitigation.

In *People v. Roybal* (1998) 19 Cal.4th 481, 525 [79 Cal.Rptr.2d 487] the court concluded that under the standard instructions no reasonable juror would assume that death could not be imposed unless there were mitigating circumstances, although it left it to chance whether the jury would see this implication in CALJIC 8.85, (k). (See also *People v. Ray* (1996) 13 C4th 313, 355-356 [52 Cal.Rptr.2d 296].)

However, because there is no question that the proposed instruction is a correct statement of the law, and because the point is not specifically and directly covered in the standard instructions, the instruction should have been given upon the defenses' request. Since the defense requested instruction accurately stated the law and supported a defense theory to avoid a death decree, the Fourteenth Amendment due process principles are implicated by the state's arbitrary denial of its own domestic rules. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *People v. Marshall, supra,* 13 Cal.4th at pp. 850-851.)

The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

D. The Refusal of the Defense Request that the Jury Be Instructed that a Single Mitigating Factor May Outweigh Multiple Aggravating Factors Impermissibly Conveyed to the Jury that Multiple Factors in Mitigation Were Required to Avoid a Death Verdict

The court refused trial counsel's request that the jury be instructed that any mitigating circumstance may outweigh all the aggravating factors. (CT 15636, RT 17952-17953.) The requested instruction was a correct statement of the law, was not argumentative, and is supported by the authority that follows.

In *People v. Boyde* (1988) 46 Cal.3d 212, 253 [250 Cal.Rptr. 83], affd. on other grounds sub nom *Boyde v. California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190] this Court acknowledged concern that the jury might confuse the nature of the weighing process, which is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. (*Ibid.*) In *Boyde* this Court noted with approval that counsel on both sides told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. In *People v. Grant* (1988) 45 Cal.3d 829 [248 Cal.Rptr. 444] this Court characterized as proper an instruction that stated, inter alia, that "'[o]ne mitigating circumstance may be sufficient to support a decision that death is not appropriate

punishment in this case.'" (*Id.* at p. 857, fn. 5.) In *People v. Visciotti* (1992) 2 Cal.4th 1, 64 [5 Cal.Rptr.2d 495] among the instructions that negated an inference that the weighing process was mechanical was an instruction that informed the jury that one factor alone could save the defendant's life even though all of the others were overwhelmingly aggravated, if by itself it weighed more than the other factors. (*Id.* at pp. 63-65.)

However, in the instant case the concluding instruction conveyed to the jury that *multiple* factors in mitigation were required to avoid a death verdict. The jury was instructed with the language of CALJIC No. 8.88 (1989 Revision):

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant for each count of first degree murder.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequence which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weight [sic] of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value

> you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with *the totality of the mitigating circumstances*. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the *mitigating circumstances* that it warrants death instead of life without parole. [Emphasis added.] (CT 15846-15847, RT 18443-18445.)

The italicized portion of the instruction provided the clear inference that more than one factor in mitigation was required to overcome aggravating circumstances and a verdict of death. The instruction told the jury that it must consider "the totality of the mitigating circumstances," whereas one mitigating factor is sufficient to outweigh all others. (*People v. Grant, supra,* 45 Cal.3d at p. 857, fn. 5; *People v. Boyde, supra,* 46 Cal.3d at p. 253; *People v. Hayes, supra,* 52 Cal.3d 577, 642-643; *People v. Cooper* (1991) 53 Cal.3d 771, 845 [281 Cal.Rptr. 90]; *People v. Visciotti, supra,* 2 Cal.4th at p. 64.)

In *People v. Hayes, supra* 52 Cal.3d 577 the jury was instructed,

> "It is not intended that you should decide the issue [of penalty] by the simple process of counting the factors that may tend to point in the direction of aggravation or mitigation and then decide the question by choosing the side with the greatest number of factors. You may decide that a certain factor or factors are entitled to greater weight than others. The weight to be given to any or all considered factors is entirely within the province of the jury. The final test is not in the relative number of factors, but in the relative weight to which you feel they are entitled." (*Id.* at p. 642.)

The saving result in *Hayes* was that the jury was told that the penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to decide the weight to be assigned to each individual factor. It was thus clear that this was a weighing process and not a counting process. (*Id.* at pp. 642-643.) In *People v. Cooper, supra,* 53 Cal.3d at p. 844 it was made even clearer for the jury,

> "For instance, you could find that one specific factor on one side weighs so heavily in your consideration that it outweighs all of the determined factors on the other side." (*Id.* at p. 845.)

In the instant case, the court's use of CALJIC 8.88 and the concept of "totality" without the defense's clarifying instruction was misleading. It left the jury with the inference that more than one factor in mitigation was required to avoid a verdict of death. The term "total" in common parlance means the adding of quantities to arrive at a statement of the aggregate of those quantities, or a sum. The use of the word "totality" implies that such quantities of factors be tallied to arrive at a "total" for each type of factor, aggravating or mitigating. It implies a counting mechanism and undermines the view that one mitigating factor can outweigh all other factors and warrant a sentence of life without possibility of parole.

In short, the instruction is death oriented because it tells the jury what warrants death, but does not inform the jury what warrants life without possibility of parole. The jury is not informed that one mitigating factor can be deemed

sufficient to outweigh all other aggravating factors no matter how substantial. If the law is to the effect that one mitigating factor can outweigh all other factors, then the jurors must be instructed in this manner. The subject should not be disguised in terms like "totality" from which the reasonable likelihood of the jury's interpretation cannot be determined in any meaningful review.

In *People v. Berryman* (1993) 6 Cal.4th 1100 [25 Cal.Rptr.2d 867], cert. den. 513 U.S. 1076 [115 S.Ct. 720] this Court addressed a similar challenge to the defect in CALJIC 8.88. The Court acknowledged that an instruction containing an implication that more than one factor in mitigation was required would indeed have been erroneous. (*Id.* at p. 1099.) However, the Court concluded that there was no reasonable likelihood that the jury misconstrued or misapplied the instruction in violation of the Eighth or Fourteenth Amendment to the United States Constitution or any other legal provision or principle. (*Id.* at pp. 1099-1100.) The Court believed that a juror would not have interpreted or used the instruction's language referring to the "totality" of the aggravating and mitigating circumstances in a "death oriented" fashion to relate solely to the quantity of the factors and not to their quality, or to entail a mere mechanical counting of factors on each side of the imaginary scale. (*Id.* at p. 1099.) But, that is not the complaint. The complaint here is that the use of the language referring to the "totality of mitigating circumstances" and the repetition of the plural in the next

sentence's use of "mitigating circumstances" provided the inference that more than one circumstance in mitigation was required. Thus, a juror may well have been cognizant of the fact that the quality of the factors was important, but nevertheless have believed that something more than one factor in mitigation was required. The refused defense instruction properly removed this impermissible inference. Notably, in *Berryman*, there was no comparable defense corrective request and the defense there had requested the faulted instruction.

Further, a criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court. (*United States v. Dove* (2nd Cir. 1990) 916 F.2d 41, 47; *People v. Turner* (1990) 50 Cal.3d 668, 690 [268 Cal.Rptr. 706].) Failure to instruct on the defendant's theory of the case where there is evidence to support the instruction violates the defendant's right to present a defense and to trial by jury as guaranteed by the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process. (*See United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372; *Bennett v. Scroggy* (6th Cir. 1986) 793 F2d 772, 777-79; *United States v. Escobar de Bright, supra,* 742 F2d 1196, 1201-02.)

Since the defense requested instruction accurately stated the law, corrected the impermissible implication of CALJIC 8.88 that more than a single factor in mitigation was required, and supported a defense theory to avoid a death decree,

the Fourteenth Amendment due process principles are implicated by the state's arbitrary denial of its own domestic rules. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *People v. Marshall, supra,* 13 Cal.4th at pp. 850-851.)

The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

E. The Court Improperly Denied from Jury Consideration as Mitigation that Appellant's Accomplice Received a More Lenient Sentence

The defense requested an instruction that provided:

> You may consider the fact that defendants [sic] accomplice received a more lenient sentence (or as in this case, was the recipient of a grant of immunity for the same crimes as which defendant was charged) as a mitigating factor. (CT 15654-15655, 17952-17953.)

The requested instruction was a correct statement of the law, was not argumentative, and was supported by *Parker v. Dugger, supra,* 498 U.S. 308.[100] The trial court did not agree that the instruction was appropriate, although the court acknowledged that there was supporting federal authority. (RT 17974-17975.)

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[100] This Court has rejected claims similar to that raised herein. (*People v. Gallego* (1990) 52 Cal.3d 115, 201 [276 Cal.Rptr. 679]. However, the federal courts have not explicitly resolved them. Appellant asserts these claims to give this Court an opportunity to reconsider its prior rulings in light of the facts of appellant's case and to permit him to preserve the claims for federal review.

Despite this Court's rejection of appellant's instruction on accomplice leniency, the United States Supreme Court has suggested that this factor is valid mitigation. In *Parker v. Dugger, supra,* 498 US 308, the Court concluded that there was "no question" the defendant had presented valid nonstatutory mitigating evidence in a case in which the defendant's attorney "emphasized to the jury that none of Parker's accomplices received a death sentence ... [and the defendant's accomplice], who admitted shooting [the victim], had been allowed to plead guilty to second degree murder." (*Id.* at p. 314.) The Court commented: [E]very court to have reviewed the record here has determined that the evidence supported a finding of nonstatutory mitigating circumstances .... We agree. (*Id.* at p. 316.)

Accordingly, the above instruction was required by the Fifth, Sixth, Eighth and Fourteenth Amendment, and the analogous provisions of the California Constitution (Art. 1, §§ 1, 7, 15, 16, 17), to jury consideration of any valid mitigation, due process, a fair trial, impartial jury, and reliable determination of penalty

F. The Court Improperly Denied from Jury Consideration that They Must Presume that the Elected Sentence Would Be Carried Out

The defense requested an instruction that provided:

> You are instructed that life without the possibility of parole means exactly what it says: [T]he defendant will be imprisoned for the rest of his life.

> You are instructed that the death penalty means exactly what it says: That the defendant will be executed.
>
> For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors. (CT 15759, RT 17952-17953, 17978-17979.)

The requested instruction was a correct statement of the law, was not argumentative, and is supported by the authority that follows.[101] The trial court did not agree, believing that it need not so advise the jury unless they specifically raised the question themselves. (RT 18369-18370.)

The trial court's failure to give the requested instruction clarifying the consequences of the penalty determination violated appellant's Sixth Amendment right to a fair jury trial, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his Fourteenth Amendment right to due process. "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida, supra,* 430 U.S. 349, 358.) The punishment in a capital case must be "tailored to [the defendant's] personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801 [73

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101 This Court has rejected claims similar to that raised herein, as will be discussed in this Part. (*People v. Hines, supra,* 15 Cal.4th 997, 1069; *People v. Mickey* (1991) 54 Cal.3d 612, 700-701 [286 Cal.Rptr. 801].) However, the federal courts have not explicitly resolved them. Appellant asserts these claims to give this Court an opportunity to reconsider its prior rulings in light of the facts of appellant's case and to permit him to preserve the claims for federal review.

L.Ed.2d 1140, 102 S.Ct. 3368].) The jurors must deliberate on the penalty choices with a full awareness of the gravity of their task "with due regard for the consequences of their decision." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330 [86 L.Ed.2d 231, 15 S.Ct. 2633].) Jurors must "assume that the sentence ... they imposed would be carried out." (*People v. Fierro* (1991) 1 Cal.4th 173, 250 [3 Cal.Rptr.2d 426].) The death sentence determination in petitioner's case failed to meet these requirements because there is a reasonable likelihood that at least some of the jurors failed to understand the consequences of their decision and believed that their sentence would not be carried out.

Petitioner's death sentence is invalid because of the likelihood that the jurors failed to understand the penalty instructions regarding the meaning of a sentence of "life without possibility of parole" (LWOP) and to assume that such a sentence would be carried out. "It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." (*Simmons v. South Carolina* (1994) 512 U.S. 154, 169 [129 L.Ed.2d 133. 114 S.Ct. 2187].) In *Simmons*, the Supreme Court noted that public opinion polls and juror surveys revealed that jurors were confused about the meaning of a life sentence and often assumed the possibility of parole. (*Id.* at p. 169, fn. 9.) But even in California where jurors are instructed in regard to a sentence of life without possibility of parole, empirical studies show a pervasive

mistrust that a sentence of LWOP really means no parole will be given. (Haney, Sontag, and Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death,* (1994) 50 J. of Social Issues 149, 170-171.)

The trial court's refusal here to counter the common misunderstanding regarding parole by directly informing the jurors explicitly of the consequences of their decision was contrary to well-established precedent interpreting the Due Process Clause. (See *Simmons v. South Carolina, supra,* 512 U.S. at p. 164.) This refusal in the face of the likelihood of juror confusion deprived appellant's jury of information crucial to the penalty determination. (*Id.* at pp. 163-164.)

Similar arguments have been rejected by this court in *People v. Smithey, supra,* 20 Cal. 4th 936, 1009. Since then, however, the United States Supreme Court decided *Shafer v. South Carolina* (2001) 532 U.S. 36 [149 L.Ed.2d 178, 121 S.Ct. 1263]. *Shafer* reaffirms *Simmons* and makes clear that in situations where the jury might not understand that a life sentence does not include the possibility of parole, the trial court has an affirmative duty to make sure the jury actually understands the defendant's parole ineligibility. (*Id.*. at pp. 52-53.) Significantly, the high court explained that is *not* enough to tell the jury that "life imprisonment means until the death of the defendant." The jury might still assume that there

were circumstances under which a convicted capital defendant might become eligible for parole. (*Id.* at p. 38.)

More recently in *People* v. *Prieto* (2003) 30 Cal.4th 226 [133 Cal.Rptr.2d 18], this court reaffirmed the validity of CALJIC 8.84 and distinguished *Shafer*. This court concluded that the ambiguity in *Shafer* which might allow a jury to assume the possibility of parole simply does not exist in the California instruction and that the language of CALJIC 8.84 is unambiguous--the jury's choice is either death or life without parole. (*Id.*, at p. 270.)[102] While it is certainly true that CALJIC 8.84 says that a defendant will be confined for "life without parole," the language of the defective South Carolina instruction [imprisonment until death] permits exactly the same conclusion.

The problem that neither instruction fully addresses is the empirical research showing that juries believe that through some formula even a capital defendant might become eligible for parole. That is, most citizens believe that a sentence "to life" means that technically there will be no parole. Nonetheless, similarly sentenced defendants are routinely paroled (e.g., "15 years to life").

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[102] At the time of appellant's and Prieto's trials (see respectively, CT 15801 and *People* v. *Prieto, supra,* 30 Cal.4th at pp. 270-271) CALJIC 8.84 provided in relevant part: "It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance alleged in this case has been specially found to be true."

Thus, there is great skepticism that any "life" sentence absolutely precludes parole. It is for that reason that *Simmons* and later *Shafer* require that a jury be instructed that a sentence of life without parole means that there is, in fact, no possibility of parole. CALJIC 8.84 does not resolve that fundamental problem. Additionally, since the empirical research indicates that the problem with misperception of the reality of the penalty is so widespread, there is certainly no drawback to requiring a better definition of life without parole. A better definition of "life without parole" would eliminate this problem once and for all.

While it is true that this Court has rejected proposed instructions stating that the defendant will never get out of prison or never be executed because they are technically inaccurate (i.e., the Governor could grant clemency or the defendant could escape.),[103] the defense proposed instruction avoids that problem. It merely instructs the jury that they may not rely on such "conjecture and speculation" in deciding what they believe to be the appropriate sentence.

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[103] See, e.g., *People v. Hines, supra,* 15 Cal.4th 997, 1069 (proposed instruction telling the jury that a sentence of life imprisonment without the possibility of parole meant that appellant could never get out, and a sentence of death meant that appellant would be executed was properly rejected since it is inaccurate); *People v. Osband* (1996) 13 Cal.4th 622, 715-716 [55 Cal.Rptr.2d 26] (trial court properly refused to instruct the jury that a sentence of life without possibility of parole meant that appellant would "remain in state prison for the rest of his life and [would] not be paroled at any time," and that a sentence of death meant that appellant would be executed, because such an instruction is not completely accurate)

It is respectfully submitted that the proposed instruction does not tell the jury that "death or life without the possibility of parole will inexorably be carried out ...," as this Court found in *People v. Mickey* (1991) 54 Cal.3d 612, 700-701 [286 Cal.Rptr. 801], but merely requires that the jury premise their decision on those specified assumptions and forecloses the jury from relying upon "conjecture and speculation" (*People v. Ramos* (1984) 37 Cal.3d 136, 159, fn. 12 [207 Cal.Rptr. 800] [improper for jury to consider commutation in determining the appropriate sentence]) that would lower the prosecution's burden.

The jury is not supposed to speculate about possible escapes or commutations. A rational and reliable determination of the appropriate sentence is best achieved if the jury refrains from such speculation and presumes that the sentences will actually be carried out. That is the choice the proposed instruction would have given the jury in this case.

Petitioner's death sentence is also invalid because of the likelihood that the jurors failed to also understand the penalty instructions regarding the meaning of a sentence of death. CALJIC 8.84 as it was given here suffered from the same flaws in its description of the imposition of a sentence of execution as it did with the sentence of life without parole. Indeed, since at the time of appellant's penalty trial in 1995, executions remained rare in California, the jurors, or at least some of them, were likely to doubt that a death sentence would be carried out. The

proposed instruction remedied that flaw by telling jurors that they were to presume that a sentence of execution would be carried out. (*People v. Kipp* (1998) 18 Cal.4th 349, 377-379 [75 Cal.Rprt.2d 716] [jury should be told to assume that whatever penalty it selects will be carried out if requested by counsel or if there is reason to believe the jury has some concerns or misunderstandings in this regard].)

Thus the proposed instruction corrected the federal due process problem that *Simmons* and *Schafer* addressed with respect to jurors perceptions of the efficacy of their sentencing decisions. The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

G. Six Days of Deliberation Manifest How Close the Case Was and that Appellant Was Prejudiced by these Errors

To determine whether a jury may have been misled to a defendant's prejudice, this Court examines the entire record. (*People v. Cooper, supra*, 53 Cal.3d at p. 845.) In *Boyde v. California, supra,* 494 U.S. 370 the Court held that where a jury instruction is ambiguous and therefore subject to an erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. The Court added,

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with

> the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. [Fn. omitted.] Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting. (*Id.* at pp. 380-381.)

In *Wade v. Calderon* (9th Cir. 1994) 29 F3d 1312, cert den. 513 U.S. 1120, the 9th Circuit criticized the use of the "reasonable likelihood" standard in evaluating the failure to instruct upon an element of a special circumstance allegation. The Ninth Circuit held:

> *Boyde* does not sanction use of the "reasonable likelihood" standard when the disputed instruction is erroneous on its face. Where a jury instruction omits a necessary element of a special circumstance, constitutional error has occurred. [Citation] We are not free to assume that the jurors inferred the missing element from their general experience or from other instructions, for the law presumes that jurors carefully follow the instructions given to them. (*Id.* at pp. 1320-1321.)

That is the instant case. It cannot be assumed that a juror would have inferred that no mitigation was necessary to reject a sentence of death or that a single mitigating factor may outweigh all aggravating factors where the jury was

repeatedly advised that comparison was required with the totality of the mitigating circumstances.

Coupled with at least the reasonable likelihood that the jury was misled to appellant's prejudice are the other instructional errors cited in the preceding parts that have individually and collectively resulted in a fundamentally unfair and unreliable death sentence. In Argument XIV, Part D, below, and incorporated herein, it will be demonstrated that comparison of the length of the jury deliberations at the conclusion of the penalty phase[104] with other capital cases compels the conclusion that this was a very close case and that appellant was prejudiced by these errors.

In a close case any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62 [123 P.2d 478]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [15 Cal.Rptr.2d 112].) In these circumstances neither *People v. Watson, supra* 46 Cal.2d 818 nor *Chapman v.*

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[104] The penalty phase of the trial began on June 21, 1995. (CT 15604.) A portion of four days of the penalty trial was roughly equally divided between the prosecution's case for aggravating factors for Appellant Wheeler and his case for mitigation. (RT 17186-17434, 17693-17931.) Jury deliberations began at 9:00 a.m. on Friday, July 7, 1995. (CT 15778.) On Friday, July 14, 1995, after six days of deliberations, the jury fixed the penalty at death for Appellant Wheeler on counts one through four. (CT 15256-15259, 15793-15794, RT 18599-18671.)

California, supra, 686 U.S. 18 standard for harmless error can be satisfied. (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [28 Cal.Rptr.2d 335].) Appellant's sentence of death must be reversed.

Even if there is some doubt or uncertainty as to the prejudice suffered by appellant due to these errors, such uncertainty or doubt must be resolved in his favor. (See *Eddings v. Oklahoma, supra,* 455 U.S. at p. 119 [O'Connor, J., concurring].) The precise point which prompts the death penalty in the mind of any one juror is not only unknowable to the reviewing court, but may even be unknown by the juror. *People v. Hines* (1964) 61 Cal.2d 164, 169 [37 Cal.Rptr. 622].) "Thus *any* substantial error in the penalty [phase] of the trial ... must be deemed to have been prejudicial. (*Id.* at pp. 169-170.)

XII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach. (See Part A, below.)

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. (See Part B, below.)

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the

imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death. (See Parts C-E, below.)

A. The Death Penalty Statute Is Invalid Because it Fails to Narrow Eligibility for the Death Penalty

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33

> L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia*, (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].) (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [254 Cal.Rptr. 586].)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468 [24 Cal.Rptr.2d 808].)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant, the statute contained

28 special circumstances[105] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, under the dominion of a mental

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[105] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-two.

breakdown, or acts committed by others. (*People v. Dillon, supra,* 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515 [117 Cal.Rptr.2d 45]; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575 [257 Cal.Rptr. 64].) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1324-1326.)[106] It is quite clear that these theoretically possible noncapital first

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[106] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a

degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842 [42 Cal.Rptr.2d 543], this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53 [79 L.Ed.2d 29, 104 S.Ct. 871]. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself

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defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[107] (See Argument XIII, *post*).

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[107] In a habeas petition to be filed after the completion of appellate briefing, assuming that habeas counsel is ever appointed to represent appellant, appellant intends to present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant intends to present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia, supra,* 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. The Death Penalty Statute Is Invalid As Applied Because it Allows Arbitrary and Capricious Imposition of Death in Violation of the United States Constitution.

Section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[108] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence,[109] or had a "hatred of religion,"[110] or threatened witnesses after

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[108] *People v. Dyer* (1988) 45 Cal.3d 26, 78 [246 Cal.Rptr. 209]; *People v. Adcox* (1988) 47 Cal.3d 207, 270 [253 Cal.Rptr. 55]; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[109] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10 [253 Cal.Rptr. 863], *cert. den.*, 494 U.S. 1038 (1990).

his arrest,[111] or disposed of the victim's body in a manner that precluded its recovery.[112]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California, supra,* 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

> a. Because the defendant struck many blows and inflicted multiple wounds[113] or because the defendant killed with a single execution-style wound;[114]

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110 *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [286 Cal.Rptr. 628], *cert. den.*, 505 U.S. 1224 (1992).

111 *People v. Hardy* (1992) 2 Cal.4th 86, 204 [5 Cal.Rptr.2d 796], *cert. den.*, 506 U.S. 987 (1992).

112 *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[115] or because the defendant killed the victim without any motive at all;[116]

c. Because the defendant killed the victim in cold blood[117] or because the defendant killed the victim during a savage frenzy;[118]

d. Because the defendant engaged in a cover-up to conceal his crime[119] or because the defendant did not engage in a cover-up and so must have been proud of it;[120]

e. Because the defendant made the victim endure the terror of anticipating a violent death[121] or because the defendant killed instantly without any warning;[122]

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[113] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[114] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[115] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[116] 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).

[117] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[118] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[119] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (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).

[120] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

f. Because the victim had children[123] or because the victim had not yet had a chance to have children;[124]

g. Because the victim struggled prior to death[125] or because the victim did not struggle;[126] or

h. Because the defendant had a prior relationship with the victim[127] or because the victim was a complete stranger to the defendant.[128]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

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

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[121] 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.

[122] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[123] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[124] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[125] 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).

[126] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[127] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[128] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

> a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[129]
>
> b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire.[130]
>
> c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[131]

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[129] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (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, 711 P.2d 423, 444 (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 4715-16 (victim was "elderly").

[130] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[131] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People*

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day.[132]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[133]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[134]

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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).

[132] 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 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[133] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

[134] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a

In practice, section 190.3's broad "circumstances of the crime" aggravating factor 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. 356, 363 [discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420.)

C. The Death Penalty Statutes Unconstitutionally Permits Unbounded Prosecutorial Discretion

In this State, the prosecutor has sole authority to make what is literally a life or death decision, without any legal standards to be used as guidance. Irrespective of whether prosecutorial discretion in charging is constitutional in other situations, the difference between life and death is not at all analogous to the usual prosecutorial discretion situation, *e.g.*, the difference between charging something as a burglary or a theft.

As it stands, an *individual prosecutor* has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox*

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reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See Part C, below.)

(1988) 47 Cal.3d 207, 275-276 [253 Cal.Rptr. 55], this creates a substantial risk of county-by-county arbitrariness. Under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, or simple arbitrariness.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme—in charging, prosecuting and submitting a case to the jury as a capital crime—merely compounds, in application, the effects of vagueness and arbitrariness inherent on the face of the California statutory scheme. For example, under this Court's expansive interpretation of the lying-in-wait theory of first-degree and special circumstance murder, discussed *ante*, p. 324, prosecutors are free to seek the death penalty in the vast majority of murder cases, which further enhances the potential for abuse of the unbridled discretion conferred on prosecutors under the law.

Just like the "arbitrary and wanton" discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. at p. 303, such unprincipled discretion is contrary to the principled decision-making mandated by the Sixth, Eighth and Fourteenth Amendments. (*Furman v. Georgia, supra,* 408 U.S. 238.)

In general, state action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358 [75 L.Ed.2d 903, 103 S.Ct. 1855].) This standard applies to prosecutors as much as other state actors. (*Ibid.*)

Here, the offenses with which appellant was charged, four murders and an attempted murder, were certainly awful ones. So is any charge that is potentially capital. However, prosecutors sometimes do not seek the death penalty for capital offenses, including multiple murders. (*See, e.g., People v. Walker* (1993) 17 Cal.App.4th 1189 [21 Cal.Rptr.2d 880] [negotiated plea bargain to two counts of first-degree murder, with sentence of 25 years to life]; *People v. Bobo* (1990) 229 Cal.App.3d 1417,1421-1422 [3 Cal.Rptr.2d 747] [defendant convicted of arson and three counts of first-degree murder (by stabbing); death penalty not sought]; *People v. Moreno* (1991) 228 Cal.App.3d 564, 567-568 [279 Cal.Rptr. 140] [defendant convicted of two counts of first-degree murder, burglary and attempted robbery; death penalty waived].) The absence of standards to guide such decisions falls under *Kolender* and other vagueness cases.

For these reasons as well, appellant's death sentence violates the Sixth, Eighth and Fourteenth Amendments.

D. The Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it Therefore Violates the United States Constitution.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, subdivision (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire

process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [69 Cal.Rptr.2d 784], this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors …." But, these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348] [hereinafter *Apprendi*] and *Ring v.*

Arizona (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S. Ct. 2428] [hereinafter *Ring*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

a. In the Wake of *Ring*, Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

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

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a

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[135] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); 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); State v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; State v. Simants (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [14 Cal.Rptr.2d 133] [penalty phase determinations are "moral and .... not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[136] According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107 [121 Cal.Rptr.2d 106]), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (*Id.* at p. 177, CALJIC No. 8.88; emphasis added.)

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[136] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility; 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* (1988) 46 Cal.3d 432, 448 [250 Cal.Rptr. 604].)

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 outweigh mitigating factors.[137] 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.[138]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589 [106 Cal.Rptr.2d 575], this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [132 Cal.Rptr.2d 271] [hereinafter *Snow*], and *People v. Prieto, supra,* 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of

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

138 This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277 [232 Cal.Rptr. 849]; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541 [230 Cal.Rptr. 834].)

aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subd. (a)[139] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict..... This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, 124 S.Ct. at p. 2431.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special

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[139] Section 190, subd. (a) provides: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 122 S.Ct. at p. 2440.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 864 [134 Cal.Rptr.2d 602] [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating

circumstances substantial enough to call for leniency,[140] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[141]

There is no meaningful difference between the processes followed under each scheme. "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*, 124 S.Ct. at pp. 2439-2440.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the

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[140] Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[141] California Penal Code Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn.19 [230 Cal.Rptr. 512], the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).)

penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. 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." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.)

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. The finding of an aggravating factor is an essential step before the weighing process begins.

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. 967, 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*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 been present – otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring*, *supra*, 122 S.Ct. at pp. 2439-2440.)

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

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence. (*Ring*, *supra*, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [141 L.Ed.2d 615, 118 S.Ct. 2246] ["the death penalty is unique in its severity and its finality"].)[142] As the high court stated in *Ring*, *supra*:

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142 In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* (1982) 455 U.S. 745, 755 [71 L.Ed.2d 59, 102 S.Ct. 1388] rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. ... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. (*Ring, supra*, at pp. 2432, 2443.)

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity

This court has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor*

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magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

(1990) 52 Cal.3d 719, 749 [276 Cal.Rptr. 391]; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336 [75 Cal.Rptr.2d 412].) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[143] And, it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance

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[143] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [116 L.Ed.2d 371, 112 S.Ct. 466,] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*.)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure ... [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [65 L.Ed.2d 159, 100 S.Ct. 2214].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at p. 732;[144]

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144 The *Monge* court developed this point at some length, explaining as follows:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See

accord, *Johnson v. Mississippi, supra,* 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [115 L.Ed.2d 536, 111 S.Ct. 2680]), and certainly no less (*Ring*, 122 S.Ct. at p. 2443).[145] See Part D, below.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[146] To apply the requirement to findings carrying a

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Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding") (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

[145] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[146] The first sentence of article 1, section 16 of the California Constitution provides: "Trial 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 *People v. Wheeler*

maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764 [47 Cal.Rptr.2d 165]) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

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

(1978) 22 Cal.3d 258, 265 [148 Cal.Rptr. 890] [confirming the inviolability of the unanimity requirement in criminal trials].)

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes, supra,* 52 Cal.3d 577, 643.) However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521 [2 L.Ed.2d 1460, 78 S.Ct. 1332].)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The

burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra,* 397 U.S. 358, 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. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14 [58 L.Ed.2d 207, 99 S.Ct. 235].) 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.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [60 L.Ed.2d 323, 99 S.Ct. 1804].) 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. (*Winship, supra*, 397

U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors ...: the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [71 L.Ed.2d 599, 102 S.Ct. 1388]; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335 [47 L.Ed.2d 18, 96 S.Ct. 893].)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value" (*Speiser*, *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 *Winship*, *supra* [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [121 Cal.Rptr. 509] [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [121 Cal.Rptr. 488] [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [139 Cal.Rptr. 594] [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [152 Cal.Rptr. 425] [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*, *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. ... The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected ..., 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. [Citations omitted.] (*Santosky, supra,* 455 U.S. at p. 756.)

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*, *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." (*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*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California, supra,* 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Stantosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that … they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'

([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, [*supra*] 441 U.S. 418, 423-424....)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with

proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1856) 59 U.S. (18 How.) 272, 276-277 [15 L.Ed. 372] [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – was erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely

than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*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 and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [124 L.Ed.2d 182, 113 S.Ct. 2078].) Accordingly, the death judgment must be reversed.

4. SOME BURDEN OF PROOF IS REQUIRED IN ORDER TO ESTABLISH A TIE-BREAKING RULE AND ENSURE EVEN-HANDEDNESS.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be

imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. 104, 112.) It is unacceptable – "wanton" and "freakish" (*Profitt v. Florida* (1976) 428 U.S. 242, 260 [49 L.Ed.2d 913, 96 S.Ct. 2960]) – the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. 367, 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.

5. EVEN IF THERE COULD CONSTITUTIONALLY BE NO BURDEN OF PROOF, THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY TO THAT EFFECT.

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

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

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in

penalty phase would continue to believe that. Such jurors do exist.[147] 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 the proper burden of proof is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

6. CALIFORNIA LAW VIOLATES THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra,* 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195 [49 L.Ed.2d 859, 96 S.Ct. 2909].) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful

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147 See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 697.

appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [9 L.Ed.2d 770, 83 S.Ct. 745].) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber, supra,*2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258 [113 Cal.Rptr. 361].) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the

reasons therefore." (*Id.*, 11 Cal.3d at p. 267.)[148] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [229 Cal.Rptr. 131] [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* 486 U.S. 367, for example, the

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[148] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[149]

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[149] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); 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(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); 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); 42 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.

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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§ 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

7. THE DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 [77 L.Ed.2d 1134, 103 S.Ct. 3418] [plurality opinion, alterations in original], quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 [49 L.Ed.2d 913, 96 S.Ct. 2960] [opinion of Stewart, Powell, and Stevens, J.].)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra,* 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not

pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley, v. Harris*, *supra,* 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Part A, above.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Part C herein), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Part B, above). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes

warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia, supra,* 536 U.S. 304 [153 L.Ed.2d 335, 122 S.Ct. 2242, 2248-2249]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831 [101 L.Ed.2d 702, 108 S.Ct. 2687]; *Enmund v. Florida, supra,* 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596 [53 L.Ed.2d 982, 97 S.Ct. 2861].)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether "the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726]..." (*Gregg v. Georgia, supra,* 428 U.S. 153, 198.) Toward the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida, supra,* 428 U.S. 242, 259].) Twenty states

have statutes similar to that of Georgia, and seven have judicially instituted similar review.[150]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173 [3 Cal.Rptr.2d 426].) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall, supra,* 50 Cal.3d 907, 946-947.)

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[150] 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, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(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).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.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]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 [White, J., conc.].) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3, subdivision (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, as explained in detail in Argument X, above, the prosecution presented extensive of unadjudicated misconduct. Indeed, a significant portion of the prosecution's case in aggravation consisted of unadjudicated misconduct largely involving incidents during the first half of Appellant Wheeler's pretrial incarceration.

The United States Supreme Court's recent decisions in *Ring v. Arizona, supra,* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were

constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d)[151] and (g)[152]) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.) The inclusion of the qualifier "substantial" in the language of factor (g) was particularly prejudicial in appellant's case, since Appellant Wheeler was only 19 years old at the time of the offenses and substantially younger than Appellants Bryant and Smith and Codefendant Settle. (RT 10539-10544, 13912, People's exh. 113.) A juror or jurors may well have

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[151] Section 190.3, factor (d) provides: "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."

[152] Section 190.3, factor (g) provides: "Whether or not defendant acted under extreme duress or under the substantial domination of another person."

considered the likely domination that they exerted over the adolescent had not the qualifying bar for factor (g) been risen to "substantial." The factor (g) requirement that domination of another person be "substantial" before it can be considered mitigating had the effect of improperly undermining the penalty phase defense.

10. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVENHANDED ADMINISTRATION OF THE CAPITAL SANCTION.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701]; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15 [245 Cal.Rptr. 185]; *People v. Melton* (1988) 44 Cal.3d 713, 769-770 [244 Cal.Rptr. 867]; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289 [221 Cal.Rptr. 794].) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the

basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Zant v. Stephens, supra,* 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [100 L.Ed.2d 575, 108 S.Ct. 1981].)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235 [117 L.Ed.2d 367, 112 S.Ct. 1130].)

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

cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California, supra,* 512 U.S. 967, 973 quoting *Gregg v. Georgia, supra,* 428 U.S. 153, 189 [joint opinion of Stewart, Powell, and Stevens, J.]) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.)

E. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants which Are Afforded to Non-capital Defendants

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp.

731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, 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* (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55] (emphasis added).) "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* [(1958) 356 U.S. 86, 102 [2 L.Ed.2d 630, 78 S.Ct. 590]." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668 [367 Mass 440].)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839].) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose.

(*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [86 L.Ed. 1655, 62 S.Ct. 1110].)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[153] as in *Snow*,[154] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death

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153 "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at p. 275.)

154 "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, 30 Cal.4th at p. 126, fn. 32.)

significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See Part C, 1-5, above.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See Part C, 6, above.) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288 [232 Cal.Rptr. 849].) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen*, *supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

(1) The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, 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 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp, supra,* 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida, supra,* 458 U.S. 782; *Ford v. Wainwright*, *supra*; *Atkins v. Virginia*, *supra*.) Juries, like trial courts and counsel, are not immune from error. 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.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in

prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794 [230 Cal.Rptr. 667].) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the 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 p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "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, supra,* 428

U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.]; see also *Reid v. Covert* (1957) 354 U.S. 1, 77 [1 L.Ed.2d 1148,77 S.Ct. 1222] [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [4 LEd.2d 268, 80 S.Ct. 297] [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.]; *Gardner v. Florida, supra,* 430 U.S. 349, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama, supra,* 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [90 L.Ed.2d 27, 106 S.Ct. 1683] [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 103 S.Ct. 3446]; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[155] The qualitative difference between a prison sentence and a

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155 The *Monge* court developed this point at some length:
> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073,

death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects 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 as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98 [148 L.Ed.2d

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80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding"). (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

388, 121 S.Ct. 525, 530].) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at p. 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*)[156] California *does* impose on the

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[156] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. … The right to trial by jury guaranteed by the

prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra,* 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443.)

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and as a Result Violates the United States Constitution

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. ... The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. ... Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The elimination of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [106 L.Ed.2d 306, 109 S.Ct. 2969] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist

Countries" (Dec. 18, 1999), on Amnesty International website www.amnesty.org].)[157]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227 [40 L.Ed. 95, 16 S.Ct. 139]; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [31 L.Ed. 430, 8 S.Ct. 461]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman*

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157 These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Ibid.*)

v. Georgia (1972) 408 U.S. 238, 420 [33 L.Ed.2d 346, 92 S.Ct. 2726] [dis. opn. of Powell, J.].) The Eighth Amendment in particular "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. 86, 100; *Atkins v. Virginia*, *supra*, 122 S.Ct. at 2249-2250.) It 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 antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 122 S.Ct. at 2249, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 315-316.) Furthermore, inasmuch as

the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]; See Argument XIII.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

XIII. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND APPELLANT'S CONVICTIONS AND PENALTY MUST BE SET ASIDE

Appellant was denied his right to a fair trial by an independent tribunal and his right to minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). For reasons set forth previously, appellant contends that his rights under the state and federal constitutions have been violated. However, he further submits that these errors also violate principles of international law and provisions of treaties which are co-equal with the United States Constitution and binding upon the judges of the courts of all the states pursuant to the Supremacy Clause. (U.S. Const., art. VI, cl. 2.) In addition, these

contentions are being raised here as the first step in exhausting administrative remedies in order to bring appellant's claim in front of the Inter-American Commission on Human Rights on the grounds that the defects in the judgment are violations of the American Declaration of the Rights and Duties of Man.

A. The United States and this State Are Bound by Treaties and by Customary International Law

1. BACKGROUND

The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with the constitution and federal statutes as the supreme law of the land.[158] Customary international law is equated with federal common law.[159] International law must be considered and administered in United States courts whenever questions of a right which depends upon it are presented for determination. (*The Paquete Habana, supra,* 175 U.S. 677, 700].) To the extent possible, courts must construe American law so as to avoid violating principles of international law.

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158 Article VI, section 1, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

159 Restatement Third of the Foreign Relations Law of the United States (1987), p. 145, 1058; see also *Eyde v. Robertson* (1884) 112 U.S. 580, 597-600 [28 L.Ed. 798, 5 S.Ct. 247].

(*Murray v. The Schooner, Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118 [2 L.Ed 208].) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33 [71 L.Ed.2d 715, 102 S.Ct. 1510].) The United States Constitution also authorizes Congress to "define and punish ... offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corporation* (1984) 466 U.S. 243, 252 [80 L.Ed 2d 273, 104 S.Ct. 1776].)[160]

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[160] See also *Oyama v. California* (1948) 332 U.S. 633 [92 L.Ed 249, 68 S.Ct. 269], which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* At 673.) See also *Namba v. McCourt* (1949) 185 Or. 579 [204 P.2d 569], invalidating an Oregon Alien Land Law. "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed.... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[161] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[162]

This doctrine was further developed in the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[163] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual

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without distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (*Id.* at p. 604.)

[161] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973), p. 137.

[162] Buergenthal, International Human Rights (1988), p. 3

[163] *Id.* at pp. 7-9.

human rights of nationals as well.[164] It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[165]

2. TREATY DEVELOPMENT

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations Charter which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[166] By adhering to this multilateral treaty,

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[164] Restatement Third of the Foreign Relations Law of the United States. (1987), Note to Part VII, vol. 2 at p. 1058.

[165] *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco* (1923) P.C.I.J., Ser. B, No. 4

[166] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, became effective October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world. (Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).)

state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights[167] and the Convention on the Prevention and Punishment of the Crime of Genocide.[168] The Universal Declaration is part of the International Bill of Human Rights,[169] which also includes the International Covenant on Civil and Political Rights,[170] the Optional Protocol to the ICCPR,[171] the International Covenant on Economic, Social and Cultural Rights,[172] and the human rights provisions of the UN charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing

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[167] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[168] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, became effective January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. (See generally, Buergenthal, International Human Rights, *supra*, p. 48.)

[169] See generally Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[170] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, became effective March 23, 1976.

[171] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, became effective March 23, 1976.

[172] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, took effect January 3, 1976.

human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[173] In 1948 the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[174]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting

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[173] OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

[174] OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[175] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[176]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human

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[175] Buergenthal, International Human Rights, *supra*. As previously indicated, this appeal is a necessary step in exhausting appellant's administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

[176] Buergenthal, International Human Rights, *supra*.

rights.[177] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and through the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[178]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[179] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[180] were ratified on October 20, 1994. These instruments are now binding international obligations for

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177 Sohn and Buergenthal, International Protection of Human Rights (1973), pp. 506-509.

178 Buergenthal, International Human Rights, *supra*, p. 230.

179 International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, took effect January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. (See, http://www.hri.ca/

180 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, became effective on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong. 2d Sess., 136 *Cong. Rev.* 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 21, 1994. (See http://www.un.org/Depts/Treaty/ final/ ts2/newfiles/part_boo/iv_boo/iv_9.html.)

the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[181] All of these treaties were ratified and in effect at the time of appellant's trial and comprise part of "the supreme Law of the Land" which is binding upon "the Judges of every State." (U.S. Const, art. VI.)

3. CUSTOMARY INTERNATIONAL LAW

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[182] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified a treaty it cannot ignore this

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181 Buergenthal, International Human Rights, *supra*, p. 4.

182 Restatement Third of the Foreign Relations Law of the United States, section 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state and empirical evidence of the extent to which the customary law rule is observed.

codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[183]

Customary international law is "part of our law." (*The Paquete Habana*, *supra*, 175 U.S., at p. 700.) According to 22 U.S.C. section 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[184] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[185] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga* v. *Pena-Irala* (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights ...." (*Id.* at p. 882.) The United States, as a member state of the OAS, has international obligations under the OAS Charter and the

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183 Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731, 737.

184 22 U.S.C. section 2304(a)(1).

185 *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts and Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[186] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[187]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation (MFN) trade status with the United States unless China improved its record on human rights. Though President Bush vetoed this legislation,[188] in May 1993 President Clinton tied

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[186] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[187] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

[188] See Michael Wines, "Bush, This Time in Election Year, Vetoes Trade Curbs Against China," *N.Y. Times*, September 29, 1992, at A1.

renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal Declaration.[189]

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the covenant though we in the United States are not bound."[190]

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[189] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China* (1993) 14 Nw. J. Int'l L. & Bus. 66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to influence China's compliance with recognized international human rights. (See Kent, *China and the International Human Rights Regime: a Case Study of Multilateral Monitoring, 1989-1994* (1995) 17 H. R. Quarterly, 1.)

[190] Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L.Rev. 1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

B. The Numerous Due Process Violations and Other Errors which Occurred in this Case Are also Violations of International Law

The factual and legal issues presented in this brief demonstrate that appellant was denied his right to a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights[191] as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[192] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is incompatible with the object and purpose of the treaty."[193] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[194]

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191 The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

192 Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

193 Vienna Convention, *supra*, 1155 U.N.T.S. 331, took effect January 27, 1980.

194 Restatement Third of the Foreign Relations Law of the United States, (1987) section 313 cmt. b. With respect to reservations, the Restatement lists "the requirement ... that a reservation must be compatible with the object and purpose of the agreement."

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-executing or have been implemented by legislation.[195] The United States declared that the articles of the ICCPR are not self-executing.[196] The first Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."[197]

But under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.

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[195] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) p. 579. See also, *Sei Fujii* v. *California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

[196] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

[197] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess. at 19.

It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (*Asakura v. Seattle* (1924) 265 U.S. 332, 341 [68 L.Ed. 1041, 44 S.Ct. 515].)[198] Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (1992) 808 F. Supp. 791.) In *Noriega*, the court noted, "It is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs-- not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests .... Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at p. 798.)

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[198] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with the express language in Article 6, section 2 of the United States Constitution that all treaties shall be the supreme law of the land. (See generally Jordan L. Paust, *Self-Executing Treaties* (1988) 82 Am.J. Int'l L. 760.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life .... [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[199] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[200]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[201] The Committee further

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199 International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

200 American Declaration of the Rights and Duties of Man, *supra.*

201 *Report of the Human Rights Committee*, p. 72, 49 UN GAOR Supp. (No. 40) p. 72, UN Doc. A/49/40 (1994).

observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.'"[202]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[203] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[204] Implicit in the court's opinion linking non-derogability and incompatibility is the view that the

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202 *Ibid.*

203 International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

204 Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[205]

Appellant's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration and customary international law, were violated throughout his trial and sentencing phase. For example, the trial court's failure to observe the statutory procedures for severance of his case from that of his codefendants; the trial court's failure to control the order of the trial and improperly enhance the rights of a codefendant at appellant's expense; appellant's convictions premised on insufficient evidence; the trial court's improper use of extraordinary security precautions that tainted appellant with an aura of guilt; the flagrant prosecutorial misconduct in argument;

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[205] Edward F. Sherman, Jr. *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation* (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction." (Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am. Ct.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983).) These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

and the other due process violations enumerated herein all violated petitioner's right to a fair hearing as guaranteed by Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article XXVI of the American Declaration, and Article 8 of the American Convention.

Accordingly, appellant is entitled to relief not only pursuant to individual provisions of the United States and California Constitutions, but also pursuant to international treaties which are co-equal with the United States Constitution and binding upon the judges of this state through the Supremacy Clause. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable.

XIV. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS WHICH OCCURRED DURING THE GUILT AND PENALTY PHASES OF TRIAL COMPELS REVERSAL OF THE DEATH SENTENCE EVEN IF NO SINGLE ISSUE, STANDING ALONE, WOULD DO SO.

As was true of the guilt phase errors in this case, the cumulative impact of the numerous penalty phase errors requires reversal of the death penalty even if no single error does so independently. (*Taylor v. Kentucky, supra,* 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459 [208 Cal.Rptr. 547]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) In addition, a number of guilt-phase errors also had a considerable impact on the penalty determination and the impact

of these errors must also be assessed in evaluating the prejudice resulting from the penalty phase errors.[206]

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of a conviction based on sufficient evidence, of his right to confront the witnesses against him, of his right to trial by a fair and impartial jury and to a unanimous jury verdict, and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

A. Introduction

As more fully detailed in the Statement of the Facts, Penalty Phase, Part 2, and incorporated herein, Appellant Wheeler's mitigating evidence was compelling. By all accounts, he suffered through an impoverished youth with the

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206 An error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [3 Cal.Rptr.2d 727].) Indeed, the effect of guilt phase errors on the penalty phase must be considered. (Pen. Code, § 190.4, subdivision (d)) and as a matter of federal law (*Magill v. Dugger, supra,* 824 F.2d 879, 888.)

only constant in his life being that of deprivation, an unstable environment, and inadequate supervision and tutelage. The few moments in his young life when there was any assurance of a roof over his head and food on the table were during brief periods when he was in the care of one of his grandmothers or aunts, when he was in the care of his mother's physically abusive boyfriend, Charlie Luster, or when he was in juvenile camp.

His mother was a high school dropout and a runaway teenager when appellant's father picked her up off the street. (RT 17717-17719, 17769-17770, 17813, 17855.) She was addicted to drugs and continued taking them while she was pregnant with appellant. (RT 17717-17719, 17773.) She was only 17 years old and his father was 19 years old when appellant was born. (RT 17717-17718, 17809-17810.) Appellant's younger brother was born within the following two years. (RT 17728, 17785, 17804, 17807-17808.)

Appellant's mother continued to "party" and his father would disappear from time to time. (RT 17772-17773.) Appellant's father was very violent with her and their children saw this. (RT 17805-17806, 17808.) Appellant's father finally left them when appellant was almost two (RT 17803-17806, 17855-17856) and when appellant was six, told him that he did not want appellant contacting him anymore (RT 17720-17721, 17804-17805.) Appellant thereafter had no further contact with his father. (RT 17804, 17807-17808.)

Appellant's mother could not cope. (RT 17719, 17734.) Her children suffered as a result and were often without food. (RT 17719, 17734-17735, 17785-17786.) Appellant Wheeler's mother frequently was forced to change residences, usually the result of eviction, and frequently stayed in residences that were not her own. (RT 17718, 17721-17722, 17731, 17734-17735, 17774, 17778, 17785-17786, 17791-17792.) Appellant and his brother were moved from one school to another; this was the constant theme of his life. (RT 17735, 17856-17857, 17785-17786, 17792-17793.) There were no protective factors to offset these risk factors. (RT 17864-17865.) The help that came from his grandmother and aunts was too brief and inconsistent. (RT 17865.)

There were a lot of men in and out of appellant's mother's life, but none were appropriate role models for her sons. (RT 17736.) In 1977 or 1978, Charlie Luster moved in with them and maintained a five-year relationship. (RT 17744-17745, 17857.) They never married, but produced twin daughters, Tanisha and Tenika. (RT 17728, 17744-17745.) They initially lived in Los Angeles and then moved to West Covina to a town-home and then to a single-family residence. (RT 17747.) Appellant Wheeler and his brother perceived this as a positive period because it provided for the first time regular meals and a roof over their heads. (RT 17786.) But, Mr. Luster went to prison for a year and one-half during 1978

and 1979, fulfilling the theme in Appellant Wheeler's life that the positive influences did not last long. (RT 17857-17858.)

Charlie Luster also came with a negative side. He was a self-described hustler and compulsive gambler that led to serious arguments between him and appellant's mother. (RT 17747-17748, 17859.) In Mr. Luster's own words, Appellant Wheeler would have seen him as a person that "ripped and ran the streets, played the horses, and basically hung out." (RT 17749.)

In addition, Mr. Luster was also quite abusive to appellant and his brother. He beat them and was indiscriminate where he hit appellant. (RT 17748, 17786-17787, 17860.) It was a constant thing and appellant, being the oldest, got more of it than his brother. (RT 17787.) Luster made them stand in front of him with no clothes on. He would get a limb from the Peach tree in the yard and hit them on their backside, legs, and back. If they were loud, he would hit them on the head and tell them to "Shut up." He beat them until he got tired. (RT 17793.) Their mother would be in the other room and do nothing. (RT 17793.)

When appellant was 12 or 13 years old, he decided that he had to rely upon himself and moved back and forth between his mother's house, his maternal grandmother's house, and his aunts' houses until he finally got his own place when he was 15. (RT 17719, 17725, 17787-17788, 17866, 17866.) His aunts spoke well of him. (RT 17719-17720, 17725, 17731-17732.)

Appellant visited and counseled his brother and assured him that he would help him do what he wanted to do. (RT 17789-17790, 17796.)

At 15, Appellant Wheeler came into contact with the juvenile justice system. (RT 17787-17788.) In November 1986, appellant was sent to the Youth Authority's El Paso de la Robles school for his participation in a robbery. (RT 17696-17697, 17708-17709, 17714-17715.) Although he had some minor altercations when he first arrived, his prompt successful adjustment permitted his transfer to the school's San Simeon Cottage, whose residents were enrolled in a college program to further their education. (RT 17697-17702.)

A youth counselor at the facility during appellant's stay testified that appellant did pretty well in school and earned A's and B's in his classes. (RT 17697-17700, 17704, 17706, 17709, Wheeler's exh. 9.) Appellant was one of the workers on the cottage where he was assigned, and did these jobs very well. (RT 17704-17705.) He was a polite, determined kid and was respected by the counselors that knew him. (RT 17704.) He had no gang affiliation and that occasionally got him into altercations with other juveniles who wanted him to pick a side; but he rejected gang activity. (RT 17705-17706.)

After appellant was paroled from the Youth Authority, he lived with his maternal grandmother. (RT 17725.) His mother lived in Pacoima at the time, but

later she moved to Las Vegas (RT 17725-17726) and died of cancer in 1988 (RT 17717.)

Adrienne Davis, a clinical psychologist and former staff psychologist at CYA evaluated appellant and testified for the defense. (RT 17846-17847, 17850.) She believed that his life experiences drove him to desperately align himself with adult males who he felt liked him, would protect him, take care of him, and provide him the secure environment he had not had. (RT 17863.) He was predisposed by his early years to inappropriate values and this led him to his involvement in the Bryant Organization. (RT 17873.)

All of Appellant Wheeler's family members asked the jury to permit him to live. (RT 17726, 17738, 17750-17751, 17757-17758, 17761, 17767-17768, 17807.)

The prosecution's case for death rested on the circumstances of the offenses, i.e., multiple homicides. The remainder of the case for aggravation consisted principally of the altercations appellant had been in during the first half of his seven years of pretrial custody.

The fact that there were multiple homicides is not dispositive. Juries frequently reject the ultimate sanction in multi-homicide cases and in cases with horrific facts. (*see, e.g.,* Welsh S. White, *Effective Assistance Of Counsel In Capital Cases: The Evolving Standard Of Care* 1993 U. Ill. L. Rev. 323, 365, fn.

290 [defendant Giles in Alabama case shot out the eye of a small child, shot and killed the child's two parents, and shot the child's grandmother in the jaw {*Ex Parte Giles* (1993) 632 So.2d 577} and defendant Pruett in Mississippi case where jury received in evidence Pruetts' convictions for four other murders, four bank robberies, and other crimes {*State v. Pruett*, Circuit Court of Hinds County, Mississippi, case number T0358}]; Claire Cooper and Maria E. Camposcco, *Jury Urges Life Term In Good Guys Case*, Sacramento Bee (Mar. 29, 1995) part A, p. 1 [Loi Nguyen convicted of three counts of murder, 10 counts of attempted murder, and 38 counts of kidnapping (*People v. Nguyen*, San Francisco County Superior Court, California, case #156754)]; Wayne Wilson, *Jurors Deadlock; Puente To Get Life*, Sacramento Bee (Oct. 14, 1993) part A, p. 1 [serial killer Dorothea Puente convicted of three counts of murder with six additional homicides alleged {*People v. Puente*, Monterey Superior Court, California, case number SS018056A}]; *Jurors Recommend Life Without Parole for Nanddi*, Los Angeles Times (July 10, 1990) part B, p. 3, col. 3 [Toufic Naddi killed his wife and four other relatives {*People v. Naddi*, San Diego County Superior Court, California, case number CR 76494}]; *Killer Of Four Elderly Women Given 4 Consecutive Life Terms*, Los Angeles Times (Nov. 22, 1986) part 2, p. 3, col. 1 [Brandon Tholmer suspected of 34 homicides of elderly women, charged with five, convicted of four {*People v. Tholmer*, Los Angeles County, California, case

number A396284}]; *Jury Votes To Spare Life Of Killer Of Women*, Los Angeles Times (Aug. 9, 1986) part 2, p. 3, col. 1 [same].)[207]

The penalty phase of appellant's trial was tainted by the errors, set forth in Arguments X and XI. The discussion of each error briefly identifies the way in which the error prejudiced appellant and so requires reversal of the death judgment. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; *see generally* Goodpaster, *The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases* (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses And Their Penalty Phase Effects"].)

The Court must also assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Holt* (1984) 37 Cal.3d 436, 459 [208

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[207] Appellant's motion under Evidence Code section 452, subdivisions (d) and (h), to take judicial notice of the criminal cases referred to herein is being filed contemporaneously with appellant's opening brief.

Cal.Rptr. 547]; *People v. Buffum* (1953) 40 Cal.2d 709, 729 [256 P.2d 317]; *People v. Zerillo* (1950) 36 Cal.2d 222, 233 [223 P.2d 223]; *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1681 [1 Cal.Rptr.2d 778]; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470 [174 Cal.Rptr. 67]; *see also People v. Phillips* (1985) 41 Cal.3d 29, 83 [222 Cal.Rptr. 127] (lead opn.); *People v. Pitts* (1990) 223 Cal.App.3d 606, 815 [273 Cal.Rptr. 757].) Moreover, "the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Zant v. Stephens, supra,* 462 U.S. 862, 885; *Gardner v. Florida, supra,* 430 U.S. 349, 358.)

B. Prejudicial Federal Constitutional errors

Most penalty phase errors implicate a defendant's federal constitutional rights. (1) The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585 (Eighth Amendment); *Zant v. Stephens* (1983) 462 U.S. 862, 885 [77 L.Ed.2d 235, 103 S.Ct. 2733], (Fourteenth Amendment due process).) (2) The due process clause of the Fourteenth

Amendment also protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process. (3) Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321 [112 L.Ed.2d 812, 111 S.Ct. 731], citing other cases.) (4) Separate from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors which taint the fairness of the trial and present an "unacceptable risk, ... of impermissible factors coming into play." (*Estelle v. Williams* (1976) 425 U.S. 501, 505 [48 L.Ed.2d 126, 96 S.Ct. 1691]; *accord, Holbrook v. Flynn, supra,* 475 U.S. 560; *Norris v. Risley, supra,* 918 F.2d 828.)

The test for prejudice from federal constitutional errors is familiar: reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. 18, 24; *see generally Yates v.*

Evatt (1991) 500 U.S. 391, 402-406 [114 L.Ed.2d 432, 111 S.Ct. 1884]; *see also Clemons v. Mississippi, supra,* 494 U.S. 738, 754 [noting that state appellate courts are not required to consider the possibility that penalty phase error may be harmless, and recognizing that harmless error analysis will in some cases be "extremely speculative or impossible"].) "The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279 (Scalia, for a unanimous Court).) When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors, constitutional and otherwise, was harmless. (*People v. Williams, supra,* 22 Cal.App.3d 34, 58-59.)

C. Prejudicial Errors-Under-State Law

The errors in this case also compel reversal of the penalty on the basis of the state-law prejudice test for non--constitutional errors at the penalty phase.

In *People v. Brown (John), supra,* 46 Cal.3d 432, 446-448, this Court reaffirmed the "reasonable possibility" harmless error standard articulated in *People v. Hines* (1964) 61 Cal.2d 164, 168-170 [37 Cal.Rptr. 622], disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774-775, fn. 40 [175

Cal.Rptr. 738], and *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137 [32 Cal.Rptr. 4]. This is an extremely high standard under which it is, very difficult for the prosecution to establish that any error, let alone a combination of errors, was harmless with respect to the penalty verdict. It is "the same in substance and effect" as the "reasonable doubt" standard of *Chapman v. California*. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [2 Cal.Rptr.2d 112]; *see People v. Brown*, *supra*, 46 Cal.3d at p. 467 (conc. opn. of Mosk, J.).) It is a "more exacting standard" than the standard of *People v. Watson, supra,* 46 Cal.2d 818, 836, used for assessing guilt phase error. (*People v. Brown, supra*, 46 Cal.3d at p. 447.) While a trivial or hypertechnical possibility that an error affected the outcome is insufficient for reversal (*id.* at p. 448), only in an "extraordinary" case can a death sentence be affirmed under this test if penalty phase error has occurred. (*People v. Hines*, *supra,* 61 Cal.2d at p. 170.)

Given the nature of the decision entrusted to the jury at penalty phase, the standard for assessing prejudice could not be otherwise. The decision at penalty phase is different not in degree but in kind from the decision whether or not the defendant has been proven guilty; this difference significantly reduces the basis for a reasoned appellate judgment about the effect of errors. (*See* White, *The Death Penalty in the Nineties* (1991) pp. 74-76 (U. Michigan Press).) "Whatever intangibles a jury might consider in its sentencing determination, few can be

gleaned from an appellate record." (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 330.) "Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp, supra,* 481 U.S. 279, 311.) At the same time the need for reliability is heightened, because of the consequences of a judgment of death. As this Court stated in *People v. Hamilton, supra*:

> [I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other 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, the misconduct and other errors directly related in 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 the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming ... or that the crime involved was ... particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial. (*People v. Hamilton, supra*, 60 Cal.2d at pp. 136-137; *accord, People.v. Hines, supra,* 61 Cal.2d at p. 169; *see generally Mills v. Maryland* (1988) 486 U.S. 367 [100 L.Ed.2d 384, 108 S.Ct. 1860]; Traynor, *The Riddle of Harmless Error* (1970) pp. 72-73.)

To police the integrity of the statutory requirement for sentencing by unanimous verdict of a jury, this Court has recognized that reversal must be the rule and affirmance the extraordinary exception when error infects the penalty

phase. (*People v. Hamilton, supra*, 60 Cal.2d at p. 138.) If the test of penalty phase prejudice were any less stringent, the Court could not have confidence that its judgment necessarily would reflect the judgment of all twelve jurors at an error-free penalty trial. The Court would run the risk of consigning appellant to his death based on the conjecture of an appellate court that was not present at trial. (*See Carella v. California, supra,* 491 U.S. 263, 268-269 (conc. opn. of Scalia, I.).) As the Supreme Court put it, "No one on this Court was a member of the jury that sentenced [defendant], or of any similarly instructed jury." (*Mills v. Maryland, supra*, 486 U.S. at p. 383.)

Also apropos are the words of Justice Cardozo that this Court has quoted in evaluating the prejudice from guilt phase error in a death penalty case:

> "The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others." (*People v. Spencer* (1967) 66 Cal.2d 158, 169 [57 Cal.Rptr. 163], quoting *DeCicco v. Schweizer* (1917) 221 N.Y. 431,438 [117 N.E. 807]..)

In assessing prejudice, errors must be viewed through a juror's eyes, not the Court's. This conclusion is an implicit part of the rationale for the strict standard adopted in *Hines* and *Hamilton.* The Court necessarily brings to each case what it has learned about murder cases generally from the dozens of others it has seen (even if it does not conduct "proportionality review" of the type engaged in by many state appellate courts). A juror has no equivalent perspective. A juror's

exposure to the dynamics of murder is limited to the single case on which he or she serves.[208] Virtually any error or combination of errors which affects what the jurors learn about the case or the defendant therefore affects a sizeable part of the limited pool of information upon which they must act. Virtually any error or combination of errors therefore presents the reasonable possibility of significantly altering their individual weighing of aggravation and mitigation, even errors that might appear trivial from the Court's very different perspective.

As the language quoted from *People v. Hamilton* makes clear, a reasonable possibility that an error may have affected any single juror's view of the case compels reversal. (*See also Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669; *Mak v. Blodgett, supra,* 970 F.2d at pp. 620-621; *Kubat v. Thleret* (7th Cir. 1989) 867 F.2d 351,371; 2 LaFave & Israel, Criminal Procedure (1984) § 19.5(a), p. 535.) The decision to be made at penalty phase requires the personal moral judgment of each juror. (*People v. Brown* (1985) 40 Cal.3d 512, 541 [220 Cal.Rptr. 637], revd. on other grounds (1987) 479 U.S. 538.) The United States Supreme Court's decisions in *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443 [108 L.Ed.2d 369, 110 S.Ct. 1227], and *Mills v. Maryland, supra*, 486 U.S.

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208 In a related context, the Court of Appeal spoke of jurors as "well meaning but temporary visitors in a foreign country attempting to comprehend a foreign language." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 [240 Cal.Rptr. 516].)

367, are predicated on the fact that different jurors will assign different weights to the same evidence. (*See also Stone v. United States* (6th Cir. 1940) 113 F.2d 70, 77 ["If a single juror is improperly influenced, the verdict is as unfair as if all were"], quoted in *United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603; *People v. Cato* (1988) 46 Cal.3d 1035, 1057 [251 Cal.Rptr. 757] [no unanimity requirement for prior criminal activity under aggravating factor (b); some jurors may find and consider a particular incident which others do not]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1111-1112 [269 Cal.Rptr. 530] [exposure of a single juror to prejudicial extrajudicial information requires reversal].)

Intrusion of improper considerations into a discretionary sentencing decision usually requires reversal of the sentence, even in noncapital sentencing by a judge. (E.g., *People v. Morton* (1953) 41 Cal.2d 536, 545 [261 P.2d 523]; *see* also *United States v. Tucker* (1972) 404 U.S. 443, 447-449 [30 L.Ed.2d 592, 92 S.Ct. 589]; *People v. Smith* (1980) 101 Cal.App.3d 964, 967-968 [161 Cal.Rptr. 787]; *People v. Lawson* (1980) 107 Cal.App.3d 748, 758 [165 Cal.Rptr. 764]; *People v. Brown* (1980) 110 Cal.App.3d 24, 41 [167 Cal.Rptr. 557].) These cases recognize that determining whether improper considerations affect the sentencing decision is impossible. The resultant uncertainty compels reversal. A fortiori, a conclusion of harmlessness is far less appropriate, and less likely, in a capital case in which the jury imposes sentence.

Use of a standard more forgiving of error than the one adopted in *People v. Hamilton, supra*, 60 Cal.2d at pp. 135-137, would also violate a defendant's federal due process rights under *Hicks v. Oklahoma, supra,* 447 U.S. 343. The *Hamilton* rule itself is part of the procedural scheme created by California law for judicial deprivation of life, so under the doctrine of *Hicks*, a California defendant's right to the benefit and protection of the *Hamilton* rule is protected by the federal due process clause.

Hicks dictates this result for a second reason as well. Although *Hicks* does not use the phrase "harmless error," its holding is that an excessively speculative harmless error analysis, or one which relies on the mere fact that the result could have been the same in the absence of error, establishes a federal due process violation. *Hicks* rose out of a jury sentencing scheme for non-capital cases. Hicks' jury was instructed that the mandatory sentence for his offense was 40 years, so that was the term they imposed. A subsequent decision held that the jury was entitled to impose any sentence of ten or more years. The state appellate court held that Hicks was not prejudiced by the mandatory-40-years instruction, because a properly instructed jury could have fixed the sentence at 40 years. The United States Supreme Court reversed, saying:

> In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an

> arbitrary disregard of the petitioner's right to liberty is a denial of due process of law. (*Id.* at p. 346; *see also Fetterly v. Paskett* (9th Cir. 1994) 15 F.3d 1472, 1479-1480 (conc. opn. of Trott, J.).)

People v. Hines and *People v. Hamilton* teach that a conclusion of harmless penalty phase error in any but an "extraordinary" case would be what *Hicks* calls a "frail conjecture." *Hicks* teaches that such a lax harmless error standard violates the Fourteenth Amendment due process clause. The narrow holding of *Hicks*, as well as its broader principle concerning state-created liberty interests, dictates as a matter of federal constitutional law the extremely strict standard for assessing penalty phase prejudice which this Court adopted in *People v. Hamilton* and *People v. Hines*.

Clemons v. Mississippi, supra, 494 U.S. at pp. 753-754, makes a different but related point: Affirmance on the basis that penalty phase error is harmless requires a "detailed explanation" from the reviewing court, not merely an unexplained assertion that the error was harmless.[209] (*See also Sochor v. Florida, supra,* 504 U.S. 524, 540-541 (conc. opn. of O'Connor, J.); *Pensinger v. California* (1991) 502 U.S. 930 [116 L.Ed.2d 290, 112 S.Ct. 351] (dis. opn. of

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[209] The principal holding of *Clemons*, that a state may, consistent with the Constitution, authorize appellate courts to reweigh aggravating and mitigating circumstances, has no application to California cases since California law makes no provision for such reweighing.

O'Connor and Kennedy, JJ.); *Jeffers v. Lewis* (9th Cir. 1992) 5 F.3d 1199, 1205-1208, reh'g en banc granted (9th Cir. 1994) 22 F.3d 199.)

D. This Court's Assessment of the Strength of the Evidence in Aggravation Cannot be Relied Upon to Conclude that Penalty Phase Error is Harmless

By its very terms, *Chapman* precludes a court from finding harmlessness based simply "upon [its own] view of 'overwhelming evidence.'" (*People v. Sims* (1993) 5 Cal.4th 405, 476 [20 Cal.Rptr.2d 537] (dis. opn. of Mosk, J.), quoting *Chapman v. California*, *supra*, 386 U.S. at p. 23.)

A conclusion by this Court that the strength of the evidence in aggravation renders the penalty phase errors harmless would violate federal constitutional principles. Such a result would essentially be a mandatory death penalty: It would amount to a conclusion that any trier of fact presented with this aggravating evidence would necessarily return a verdict of death. It would have the same effect as the statutory scheme held invalid in *Sumner v. Shuman, supra,* 483 U.S. 66, providing for a mandatory death penalty for murder when committed by a life-term prisoner. In *Sumner* the Court held that under the Eighth and Fourteenth Amendments, no aggravating fact or combination of aggravating facts justifies a refusal to consider mitigating evidence. Significant mitigating evidence was presented to the jury in this case. If penalty phase error could nevertheless be found harmless on a theory of overwhelming aggravating evidence, then, a fortiori, the invalidity of the statute in *Sumner* could have been found to be

harmless error based on the aggravating force of perhaps the most powerful aggravating evidence imaginable: that the defendant was a life-term prisoner when he committed murder.

Even apart from the legal considerations, this was a close case at penalty phase. This was not a case in which the relative strength of the evidence in aggravation would warrant a conclusion that errors were harmless. This case was particularly close because there was significant affirmative evidence in mitigation, as summarized herein in Part A. In addition, the prosecution conceded that appellant's relative youth was a mitigating factor. (RT 18469.)

The jury plainly considered the case a close one. The penalty phase of the trial began on June 21, 1995. (CT 15604.) A portion of four days of the penalty trial was roughly equally divided between the prosecution's case for aggravating factors for Appellant Wheeler and his case for mitigation. (RT 17186-17434, 17693-17931.) Jury deliberations began at 9:00 a.m. on Friday, July 7, 1995. (CT 15778.) On Friday, July 14, 1995, after six days of deliberations, the jury fixed the penalty at death for Appellant Wheeler on counts one through four. (CT 15256-15259, 15793-15794, RT 18599-18671.)[210] In *People v. Murtishaw* (1981) 29 Cal.3d 773, 775 [175 Cal.Rptr. 738], two days of deliberation at penalty phase

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[210] Verdicts for coappellants were returned after five days of further deliberations. (CT 15795, 15797-15799, 15857-15859.)

were indicative of a close case. In *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163, three days of penalty deliberations were descried as "lengthy" and indicative of a close case in which instructional error was not harmless.[211]

In *Mak v. Blodgett, supra*, 970 F.2d at pp. 620-622, the Ninth Circuit affirmed the grant of habeas relief to a defendant who had been sentenced to death for 13 murders. The prosecution argued that penalty phase error was harmless in

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[211] In *People v. Sandoval* (1992) 4 Cal.4th 155, 194 [14 Cal.Rptr.2d 342], affd. (1994) 511 U.S. 1, the jury reported deadlock after four days and then the next day returned LWOP verdicts on three counts and a death verdict on one count. The Court concluded that erroneous closing argument was not prejudicial. In the circumstances of *Sandoval*, which have no similarity to the present case, the lengthy deliberations and split verdicts, while indicating that the case was close, also demonstrated that the jury had not been stampeded by the improper closing argument.

Most of the reported cases on this point concern guilt phase deliberations of significantly shorter length than the penalty deliberations at issue here. (See *People v. Taylor* (1990) 52 Cal.3d 719, 732 [276 Cal.Rptr. 391] [10 hours not unduly lengthy in a case with felony special circumstances]; *In re Martin* (1987) 44 Cal.3d 1, 51 [241 Cal.Rptr. 263] [five days' deliberations "practically compels the conclusion" that the case was "very close"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [184 Cal.Rptr. 165] (plur. opn.) [deliberations of 12 hours "a graphic demonstration of the closeness of this case"]; *People v. Collins* (1968) 68 Cal.2d 319, 332 [66 Cal.Rptr. 497] [eight hours suggests a close case; not a special *circumstances* case]; *People v. Adcox* (1988) 47 Cal.3d 207, 242 [253 Cal.Rptr. 55] [deliberations of virtually identical length to those in *Collins* suggest the case was not close; special circumstances case].)

A penalty jury need not address numerous individual subordinate findings like a guilt phase jury considering multiple counts, enhancements, and special circumstances. Therefore, if a distinction is to be made, the threshold at which the length of deliberations is indicative of a close case should come earlier at penalty phase than at a guilt phase with special circumstances.

the face of such a strong case in aggravation, even though the error prevented the jury from learning about significant facts in mitigation. The federal district court and the Ninth Circuit disagreed. They concluded that there was a reasonable probability that the mitigating evidence might have prevented a unanimous verdict for death. *Mak* demonstrates that even overwhelming evidence in aggravation is an inappropriate basis on which to conclude penalty phase error was harmless, even in cases with many victims.

E. Summary

"The attempt to gauge prejudice at the penalty phase is always a hazardous task." (*People v. Easley, supra,* 34 Cal.3d 858, 885.) Here, commencing at the case's inception, the prosecution's case against appellant rested solely upon the uncorroborated testimony of an accomplice to the homicides. Compounding that constitutional shortcoming, the prosecution was permitted to try appellant, a mere short-term bit player in the Bryant Organization, with the organization's leader and principal lieutenants exacerbated by extraordinary security precautions that suggested if not compelled guilt by association with such dangerous men. The prosecution was permitted to construct a motive for the homicides on statements on which appellant had been denied his constitutional right of confrontation. The trial court permitted a codefendant to manipulate the order of the trial and to testify after the codefendant had already rested his case and construct an account

that exculpated himself while inculpating appellant in the homicides. Then, the prosecutor committed egregious misconduct by asserting facts in his opening argument that he knew or should have known were false that improperly cast doubt on a key element of appellant's defense. Finally, the trial court refused to order the jury to reconsider their verdict when it became abundantly clear that they were inadequately prepared, misinformed, and mistaken on how they were to approach their task on fundamental issues in the case.

These errors were compounded by permitting the jury that had found him guilty to resolve during the penalty phase whether he had committed additional unadjudicated alleged offenses. These errors were further compounded by the inaccurate and inadequate instructions to the jury at the conclusion of the penalty phase as well as the numerous systemic deficiencies in California's death penalty process which violate not only the state and federal constitutions, but also the provisions of numerous treaties and customary international law. The cumulative effect of these errors rendered the judgment here highly suspect and unreliable.

These errors variously deprived appellant of his rights to liberty, a fair trial, an unbiased jury, effective assistance of counsel, due process, present a defense, heightened capital case due process, a reliable and non-arbitrary determination of penalty, and equal protection under the law, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and the analogous provisions of the

California Constitution (Art. I, §§ 1, 7, 15, 16, 17). Taken together, these errors undoubtedly produced a fundamentally unfair trial setting and a new trial is required, due to the cumulative error. (*See Lincoln v. Sunn, supra,* 807 F.2d 805, 814, fn. 6; *Derden v. McNeel* (5th Cir. 1992) 978 F.2d 1453; *cf. Taylor v. Kennedy, supra,* 436 U.S. 478 [several flaws in state court proceedings combine to create reversible federal constitutional error].) Certainly it cannot be said that the errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 341.)

For reasons of both fact and law, the numerous errors committed during appellant's trial cannot be concluded to be harmless. Because the jury made no findings in the penalty phase, it is impossible to tell whether the verdict in the present case was based on the statutory factors listed in the Penal Code, or on the improper conclusion that no mitigation or a single factor in mitigation were insufficient to preclude death as the sentencing option. Because "the jury may conceivably [have] rest[ed] the death penalty upon any piece of introduced data or any one factor in this welter of matter," (*People v. Hines, supra,* at p. 169), this Court can neither know nor evaluate "[t]he precise point which prompt[ed] the penalty in the mind of any one juror," and "this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner."

(*Ibid.*) Furthermore, as the Eleventh Circuit stated in *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1269,

> [T]he rational appellate review of capital sentencing decisions contemplated by *Furman* and its progeny requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision, which depends on a rationale distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities. (*Ibid.*)

The cumulative effect of the foregoing errors and others detailed in this brief was prejudicial to appellant and requires reversal of the penalty judgment.[212]

As demonstrated, comparison of the length of the jury deliberations at the conclusion of the penalty phase with other capital cases compels the conclusion that this was a very close case. In a close case any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky, supra,* 20 Cal.2d 56, 62; *People v. Von Villas, supra,* 11 Cal.App.4th 175, 249].) In these circumstances *Chapman v. California, supra,* 386 U.S. 18 can not be satisfied. (*People v. Filson, supra,* 22 CA4th 1841, 1852.) The state cannot prove beyond a reasonable doubt

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[212] While the separate penalty verdicts on each count raise the possibility of error being harmless on one count and prejudicial on the other (*cf. People v. Roberts* (1992) 2 Cal.4th 271,327-328 [6 Cal.Rptr.2d 276]), that is not a realistic possibility in this case. All the aggravation and mitigation evidence concerned all counts equally, except for the aggravation evidence concerning the immediate circumstances of each victim's death. Nothing in the prosecutor's closing argument suggested that different evidence should be weighed, or the same evidence should be weighed differently, on each count.

that the error did not contribute to the jury's sentencing decision and appellant's sentence of death must be reversed.

Thus, in the event that this court does not overturn the guilty verdicts, the judgment of death must be reversed.

XV. APPELLANT WHEELER JOINS THOSE ARGUMENTS OF COAPPELLANTS THAT MAY BENEFIT HIM

Appellant was tried and convicted with Appellants Stanley Bryant and Donald Franklin Smith. Their appeals have been joined in this direct appeal. Appellant Wheeler hereby joins in those arguments of his coappellants that may benefit him.

CONCLUSION

For the foregoing reasons, appellant's convictions and death sentence must be reversed.

Dated May 20, 2004

Respectfully submitted,

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CASE NUMBER: S049596

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Los Angeles County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served APPELLANT LEROY WHEELER'S OPENING BRIEF by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Los Angeles, California. Said copies were addressed to the parties as follows:

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Attorney General's Office
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Los Angeles, CA 90012

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County of Los Angeles
For delivery to the Hon.
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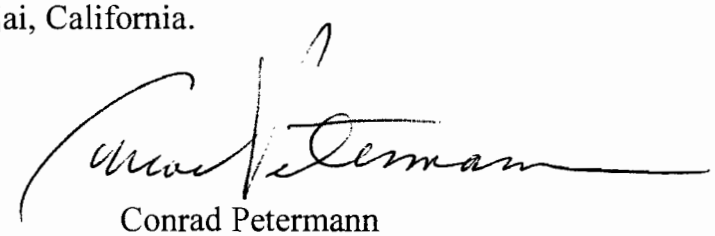
I declare under penalty of perjury that the foregoing is true and correct. Executed on May 25, 2004, at Ojai, California.



Conrad Petermann