SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, v. BERNARD ALBERT NELSON, Defendant/Appellant	S085193 Los Angeles County Superior Court BA162295

APPELLANT'S REPLY BRIEF

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Los Angeles Superior Court, Honorable Judge Jacqueline A. Connor presiding

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	S085193
Plaintiff/Respondent,	)	
	)	Los Angeles County
	)	Superior Court
v.	)	BA162295
	)	
BERNARD ALBERT NELSON,	)	
	)	
Defendant/Appellant	)	
	)	
	)	

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I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTIONS IN COUNT 2,3, 8 AND THE ALLEGATIONS OF THE SPECIAL CIRCUMSTANCES IN COUNT 1

A. Attempted Murder of John Doe in Count 8

Respondent argued that a jury could reasonably infer that there was both an attempt to kill "John Doe" and that said attempt was both premeditated and deliberate. To support its contention, respondent stated that the police officers'

observations that the person identified as appellant had a gun in his hand and at one point pointed it at an unknown person in the Jeep is dispositive.

Respondent cited to *People v. Chance* (2006) 141 Cal.App.4th 1164 to support its argument. However, this Court granted review in Chance and issued its own decision, superceding it.(*People v, Chance* (2008) 44 Cal.4th 1164.) Further, the issue before this Court in *Chance* was not the defendant's intent but rather his present ability to carry out his intended assault, a point not at issue in the present case.

If *Chance* can be said to stand for anything pertinent to this case, it is that the prosecutor overcharged appellant with an attempted murder charge unsupported by the circumstances of the incident. As seen in *Chance*, not every case that involves the brandishing, or even the aiming, of a gun constitutes an attempted murder. Even as argued by the respondent, the facts in the instant case are so ambiguous that it requires a great deal of speculation and an unduly broad reading of the law to argue that they constituted premeditated, deliberate attempted murder.

The entire incident appears to have been a chance encounter between two cars of rivals. There is no evidence that the occupants of the Monte Carlo were aware of the presence of the Jeep before it moved into the intersection. The Jeep's slow pulling out into the intersection with its headlights off just as the

Monte Carlo appeared, however, suggests that the occupants of the Jeep may have been waiting, perhaps in an ambush, and that the occupants of the Monte Carlo may have showed a gun in an effort to create a distraction and avoid an attack.

Significantly, even when the man in the Monte Carlo fired shots in the direction of the police car which had been following the Monte Carlo, none of the bullets fired from the Monte Carlo struck the police car, even though it was only one car length away. To entirely miss something as large as a the side of a another car, from such a short distance can hardly be attributed to bad aim. The only reasonable inference is that the shooter in the Monte Carlo was firing above the cars, not at them, possibly to create a diversion and effect an escape.

That the incident clearly did not involve an attempted homicide is further supported by testimony of Officer Buttanfusco that even after the bullets were fired, the police car which had been following the Monte Carlo continued following it with only its lights on, but without a siren. (5 RT 772-775.)

As stated in Appellant's Opening Brief, a criminal defendant's state and federal rights to due process of law, a fair trial, and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 632; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35; *People v. Rowland* (1992) 4

Cal.4th 238, 269.) This rule follows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, when the sufficiency of evidence of a given count is challenged on appeal, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence, that is evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could find that the defendant is guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701,758.) In support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence, including reasonable inferences based upon the evidence but excluding inferences based upon speculation and conjecture, is presumed. (*People v. Tran* (1996) 47 Cal.App. 4th 759,771-772.)

The reviewing court similarly inquires whether a " reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Memro* (1985) 38 Cal.3d 658, 694-695 [quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576].) The evidence supporting the conviction must be substantial in that it "reasonably inspires confidence" (*People v Basset* (1968) 69 Cal.2d 122, 139; *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value." (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Bolden* (2002) 29 Cal.4th 515, 533.) Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not ... limit its review to the evidence favorable to the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577 [internal quotations omitted].) Instead, it "must resolve the issue in light of the whole record - i.e., the entire picture of the defendant put before the jury - and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (Ibid.); see *Jackson v. Virginia, supra*, 443 U.S. at p. 319 ["all of the evidence is to be considered in the light most favorable to the prosecution"].) Finally, the rules governing the review of the sufficiency of evidence apply to challenges against a special circumstance finding. (*People v. Hillhouse* (2002) 27

Cal.4th 469, 496-497; *People v. Green* (1980) 27 Cal.3d 1, 55.)

When the reviewing court determines that no reasonable trier of fact could have found the defendant guilty, it must afford the appellant relief. (*People v. Guiton* (1993) 4 Cal.4th 1116,1126-1127.) For the reasons stated above, such is the case here.

B. Deliberate and Premeditated Attempted Murder Allegation as to Count 8

There is no evidence at all that the shooter in the Jeep committed the crime of premeditated, deliberate attempted murder . As acknowledged by respondent, an intentional killing is premeditated and deliberate only if the act is the result of thought and reflection rather than rash impulse. (RB at p. 35; *People v. Stiteley* (2005) 35 Cal.4th 514, 543.) While respondent can speculate all that it wants, from the evidence in this case no jury could conclude beyond a reasonable doubt that such deliberation and premeditation existed.

Further, as respondent also acknowledged, the three facts that appellant court most often consider in determining this issue is the motive, planning activity, and manner of killing. (*Stiteley, supra,* 35 Cal.4th at p. 543.) In the instant case there was no evidence of a pre-planned motive or planing activity. There was no evidence of anything but a chance encounter between two vehicles and the ensuing rash reactions, including the firing of a gun into the air above the cars.

Respondent 's argument is not based upon legitimate inference from the

evidence presented at trial. Rather, it is based upon the speculative creation of a scenario to justify the jury's verdict, a verdict that certainly was not supported from the evidence in this case.

II. THE EVIDENCE WAS INSUFFICIENT FOR A CONVICTION AS TO COUNTS II AND III, THEREFORE THERE ARE NO SPECIAL CIRCUMSTANCES UPON WHICH TO SUPPORT A DEATH JUDGMENT

A. Summary of Appellant's Argument

Appellant argued that the jury was presented insufficient evidence to prove that appellant robbed Richard Dunbar. The only evidence presented was that an hour prior to his death, Mr. Dunbar left his house with a set of keys to his car, his identification and some money. Mr. Dunbar never carried a wallet. (6 RT 1046.) While the police returned Mr. Dunbar's identification, driver's licence and thirty dollars in cash to Mr. Dunbar's sister, they did not return the car keys to her (6 RT 908-912.)

Appellant argued that the above evidence was insufficient to satisfy the elements of robbery as per Penal Code section 211.

B. Summary of Respondent's Response

Respondent claimed that the jury could infer that the keys were taken from Mr. Dunbar's person after he parked and got out of his car, as he had his car keys with him when he left his apartment and the keys were never recovered. (RB at pp. 37-38.) Respondent further stated that Mr. Dunbar parked and exited his car

and was then murdered while standing by it. As the only item of personal property that was missing from Mr. Dunbar was missing were the car keys, the jury could reasonably infer that Dunbar's car keys were taken during the murder Respondent relied upon *People v. Harris* (1994) 9 Cal.4th 407, 420-421 to support its argument.

C. Appellant's Reply

Respondent's response is nothing more than a series of guesses as to what might have happened to Mr. Dunbar. However, "A conviction of robbery cannot be sustained absent sufficient evidence that the defendant conceived his intent to steal either before committing the act of force against the victim, or during the commission of that act. If the intent arose only after the use of force against the victim, the taking at most constitutes a theft." (*People v. Morris* (1988) 46 Cal.3d 1, 19, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5; *People v. Green* (1980) 27 Cal.3d 1, 52-54.)

There was neither direct nor circumstantial evidence from which the jury could infer that there was an intent to steal formulated either before the shooting or during it. In fact, robbery does not seem to be a motive at all as the thirty dollars in Dunbar's possession was not taken. Further, as the keys have no value in and of themselves, the perpetrator would not have taken the keys for any other purpose than to steal the car. Therefore, there would have been no purpose for the

perpetrator to even take the keys from the person of the victim if he was not going to drive off with the car.

If the shooting was the act of force needed to effect the theft, the only assumption that could be made was the perpetrator would have immediately secured the keys and driven off. There was no evidence at all that the perpetrator made any attempt to steal the car even though he had more than enough time to start the car and drive off with it without any interference by anyone. The testimony of Christie Hervey confirmed this. She indicated that between 10:30 and 10:45 the evening of the shooting she was about to enter her apartment when she heard two shots. She told her son to call 911. Between the time of the call and when the dispatcher answered, Ms. Hervey heard a third shot. She made certain observations of the perpetrator leaving the scene of the crime and spoke to the dispatcher and then went downstairs to the security guard shack where she noticed the security guard moving toward the victim. (AOB at pp. 12-13.)

This testimony made it perfectly clear that there was no interference from the security guard or anyone else that would have forced the perpetrator to abandon an attempt to steal the car. According to Ms. Hervey, the security guard did not arrive at the crime scene until after the passage of substantial time. Taking all of the evidence as a whole, it is far more likely that the keys were simply lost in the confusion of the crime scene. As there was insufficient evidence to sustain a

conviction for robbery or carjacking, there was no evidence to sustain the true finding of the special circumstances.

No reasonable trier of fact could have found the special circumstances to be true. Essentially, appellant was sentenced to death because the police failed to find a set of car keys. The special circumstance findings and sentence of death should be reversed.

III. INSUFFICIENT EVIDENCE WAS PRESENTED FOR CONVICTION AS TO COUNT I, THE MURDER OF RICHARD DUNBAR

A. Summary of Appellant's Argument

Appellant argued that the facts of Christine Hervey's eyewitness identification of appellant as the individual running away from the scene after the shooting and the facts surrounding her later photo identification of appellant clearly indicate that her courtroom identification of appellant was inherently improbable. Coupled with the fact that the only other evidence against appellant was a prior inconsistent statement of a violent felon, there was insufficient evidence upon which to base a conviction of murder for Count I.

B. Summary of Respondent's Argument

Citing largely to Ms. Hervey's testimony, respondent argued that there was nothing inherently improbable about Ms. Hervey's identification.

C. Appellant's Reply

In *People v. Mayberry* (1975) 15 Cal. 3d 143, 150 citing to *People v. Headlee* (1941) 18 Cal.2d 266, 267-268, this Court discussed the "requisite quantum of evidence to meet a challenge of 'improbability.'" The *Headlee* Court stated "To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed."

Such is exactly what occurred in this case. Respondent has simply ignored appellant's argument that undisputed facts of the progression of the shooting incident, the actions by Hervey before making her observations and the actions of the shooter and security guard, rendered Ms. Hervey's testimony that she had "two minutes" to clearly observe the shooter (6 RT 1064) utterly ludicrous.

Appellant's Opening Brief clearly set forth this time line. (AOB at pp 86 et seq.) The inescapable facts are that Ms. Hervey first heard the shots before she even entered her apartment, having come home from an errand. She told her son, who was in the apartment, to dial 911. She then took the phone from her son and conversed with the 911 dispatcher She then observed the security guard approach the victim. It was only then that she turned her attention to the shooter, whom she said she saw for two minutes, moving away at a rapid pace.(6 RT 1049 et seq.)

Common sense and human experience renders this testimony not only

improbable but impossible. The body was found only 300 feet from Ms. Hervey's balcony. Someone who had just committed a murder would certainly not loiter on the street after the shots were fired so a witness might observe him at the scene. Nor would they leisurely stroll away from the scene. The shooter would have fled from the scene, distancing himself from his deed as fast as he could. Ms. Hervey could not possibly have seen the shooter for two minutes.

Further, the security guard indicated that when he reached the victim he saw no one else in the vicinity. He did not testify that he observed anyone running away.

Not only was it impossible for Ms. Hervey to have seen the shooter for more than a few fleeting seconds, she was not even able to determine whether the shooter was wearing a beard or other facial hair. (7 RT 1079-1080.) If Ms. Hervey was clearly able to observe the shooter for more than a few seconds and she had the powers of observation that the prosecutor stated she had, she certainly would be able to tell, at very least, if the shooter had a beard.

If this was not improbable enough, Ms. Hervey is not even approached by the police to make an identification for two years. As stated in the Appellant's Opening Brief, she is shown a photo array and after *ten minutes* of observation the best she could do was state that appellant's photo "kind of looked like" the man who ran away from the scene. (AOB at pp. 87-88.) It then took another ten

minutes of looking at the array, in the presence of the police, who believed appellant did the shooting, to "upgrade" her identification to a "belief" that appellant's photo represented the shooter. However, she was not "sure" of anything until she saw appellant at the preliminary hearing, in custody, at counsel table, already identified by the authorities as the killer.

It is not necessary for appellant to resort to inferences or deductions to show the inherent improbability of this identification. Nor is this testimony simply conflicted or subject to justifiable suspicion. (See *People v. Huston* (1943) 21 Cal.2d 690, 693 citing by *People v. Mayberry, supra,* 15 Cal.3d at 150.) This testimony is temporally and logically fatally flawed.

None of the cases that respondent cited to support its argument even remotely referenced a case with a fact pattern similar to the instant case[1], a fact pattern that renders the identification of appellant as inherently improbable and therefore insufficient to sustain a conviction.

Respondent further argued that the testimony of Detective Cade as to the prior statements of Glenn Johnson support the testimony of Ms. Hervey. In

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1. As to *People v. Abercrombie*, cited by respondent, is no longer citable on the issue of sufficiency of the evidence. The section of that opinion discussing the sufficiency of the evidence was decertified by the Court of Appeal after a grant of rehearing in the case. (*People v. Abercrombie*, 59 Cal Reptr. 920 (2007). (Thereafter, this Court granted review on an issue regarding sentencing. (*People v. Abercrombie* (2007) 73 Cal.Rptr. 595) and later dismissed review and remanded the case to the Court of Appeal.

making this argument, respondent focuses only upon what was said and not at all on the innate incredibility of Johnson. Johnson was a violent criminal who met four times with the police before he figured out exactly what was in his best interest, that being to implicate appellant.

Respondent stated that there was no proof of a *quid pro quo* deal between the authorities and Johnson for Johnson's testimony against appellant. Unfortunately for respondent there is once again the matter of timing. Johnson was facing serious charges at the time he finally "gave up" appellant. Until his interests were on the line, he had absolutely no interest in helping the police. In fact, once he got what he wanted, he testified that he knew nothing about appellant's involvement in the crime.

Appellant is on death row because of the testimony of an inherently unbelievable "eyewitness" and the bought cooperation of a street thug. This is not what the United States Constitution envisioned as due process of law. The conviction on Count 1, along with the death judgment must be reversed.

IV. THE TRIAL COURT IMPROPERLY ADMITTED THE "STATEMENT FOR JAYE BERNARD NELSON" RECOVERED FROM THE BACKPACK FOUND IN APPELLANT'S WHITE JEEP CHEROKEE

A. Summary of Facts and Appellant's Argument

During the guilt phase of the trial, outside of the presence of the jury,

appellant's counsel announced to the court that he had been informed by the prosecutor that she wished to admit into evidence the contents of a "backpack that Mr. Nelson had or owned at one point in time." (8 RT 1359.) After a discussion of the contents of the backpack, the trial court excluded from evidence in the guilt phase all items in the backpack except for a statement that appeared to set forth an alibi for appellant as to the shooting incident on Glasgow Street. Counsel objected to the admission of that statement because it was not in appellant's handwriting, but the court overruled that objection. (8 RT1361.)

In his opening brief, appellant argued that there was no proof that appellant caused this alibi statement to be written or that he even knew about it. He further argued that for this statement to serve as consciousness of guilt evidence, there must be proof that appellant took some sort of action with the specific intent of diverting suspicion from himself. There being no such connection between this statement and appellant, the evidence should never have been presented to the jury.

He further argued that the court's error was compounded by its failure to instruct the jury along the lines of CALJIC 2.05.

B. Summary of Respondent's Response

Respondent argued that the claim that the statement was inadmissible hearsay is forfeited because trial counsel's only objection to the testimony at trial

was that the statement was not in appellant's handwriting. (RB at pp.60-61.)

Further, respondent argued that because the statement in question was found amongst appellant's possessions , the jury could reasonably infer a consciousness of guilt on the part of the appellant, regardless of who authored the statement. (RB at p.60.).

Respondent additionally claimed that the trial court did not err in failing to instruct the jury as to CALJIC 2.05, as that instruction does not apply to the facts of this case. (RB at p.61.)

Finally, respondent argued that even if there was error, it was not prejudicial. (RB at pp.61-62.)

C. Appellant's Reply

1. Reply to Forfeiture Claim

Appellant's trial counsel objected to the "so-called alibi statement" on the grounds that it was not in appellant's handwriting. The court responded by stating "But it's among his possessions. Whose handwriting is it, do we know?" The prosecutor told the court that the statement was written by appellant's girlfriend. The court then specifically inquired "Your specific objection is it's not in his handwriting" and trial counsel answered in the affirmative. The court then overruled the objection (8 RT 1361.)

The purpose of the statutory rule [2] that requires objection to the admission of evidence to preserve the issue for appeal is to allow the prosecution an opportunity to cure the defect at trial. (*People v. Rogers* (1978) 21 Cal. 3d 548.) The rationale most frequently advanced for the requirement is that a contrary rule would permit a defendant to remain silent about trial errors and gamble on an acquittal, knowing that if he is convicted his conviction would be reversed on appeal. (*Ibid.*)

However, this Court has recently re-interpreted the *Rogers* line of cases. In *People v. Partida* (2006) 37 Cal.4th 428, this Court stated that in order to properly further the purposes of the statute, the requirement for objection must be interpreted "reasonably, not formalistically." (*Id.* at p.432.) This Court proceeded to state that section 353 does not exalt form over substance and does not require any particular form of objection. The objection simply must be "made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis upon which exclusion is sought, and to afford the People an opportunity to establish its admissibility." (*Id.* at p. 435 quoting from *People v. Williams* (1988) 44 Cal.3d 883, 906.)

There is no question that trial counsel's objection was clumsily made. However, there is also no question that the trial court fully understood that trial

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1. Evidence Code section 353.

counsel was seeking to exclude the statement in question because there was no proof that the statement could be attributed to appellant. When the objection was made, the court responded, "But it's among his possessions," and asked whose handwriting it was. When the prosecutor said that it was that of appellant's girlfriend, the court overruled the objection.

The exchange clearly shows that the judge understood counsel's objection to mean that the statement was not admissible against appellant because there was no evidence that it was his statement. The judge responded by pointing to evidence that suggested that appellant had a role in formulating the statement: its presence in his background and the fact that it was written by a close associate.

"[An] objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." *(People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Hovarter* (2008) 44 Cal.4th 983, 1007 [failure to object to statement as hearsay excused when trial judge referenced the hearsay ruling on defendant's motion to exclude statement].)

In *People v. Lewis* (2008) 43 Cal.4th 415, 497, fn. 21, this Court held that a hearsay issue regarding the admission of certain drawings had been preserved because the trial judge's ruling-that the drawings were admissible in part because they were found in the apartment where the defendant had been living before his arrest- indicated the court's awareness of the hearsay issue. The trial court's

remark in the present case that the statement "was among [appellant's] possessions" showed the same understanding. It is clear from the record that the trial judge and the prosecutor understood that the note presented a hearsay issue. The claim is therefore preserved.

Furthermore, the failure to object in the trial court will not waive any claim of error if the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. (*People v. Anderson* (1994) 26 Cal.App.4th 1241; see also *People v. Flood* (1998) 18 Cal.4th 470,482, fn. 7.) In the case of a substantial constitutional right, such as the right to a fair and impartial trial, an appellant "deserves" the review of the appellate court regardless of whether defense counsel objected below or not. (*People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1383-1384.)

2. Reply to Substantiative Response

Respondent argued that as the statement was found among appellant's other possession in his backpack, the jury could have inferred consciousness of guilt on the part of appellant regardless of who authored the statement.

Respondent does not mention that the statement was dated May 22, 1977, *fifteen days after* appellant was arrested in the Glasgow Street incident and that the Jeep in which the backpack and the document were found was seized by the

police over two months after appellant's arrest. Not only was appellant incarcerated at the time that this document was written, but other people, including defendant's girlfriend, the apparent author of the note, had access to the Jeep and the backpack in it for months while he was in custody.

The most that can be said about the statement's provenance is that appellant's girlfriend wrote it and she or some other unknown person put it into his backpack, while he was in jail. No evidence was presented that appellant had any role in composing it, that he endorsed or adopted it, or that he even knew of it. The statement does not even purport to be his; the narrator was someone else, and the appellant was referred to in the third person. The statement was hearsay and should not have been allowed before the jury.

The error in this case is much like that in *People v. Lewis, supra,* 43 Cal.4th at 498-500, in which this Court held that the trial court erred in admitting the evidence drawings found in the defendant's apartment after his arrest. Like the drawings in *Lewis*, the statement here was not made by the defendant. The statement was in someone else's handwriting, referred to the defendant in the third person, bore a date that postdated his arrest, and was found in a backpack that had been out of appellant's possession for two months. To be admissible, therefore, the statement would have to qualify as an adoptive admission.

"A statement by someone other that the defendant is admissible as an

adoptive admission if the defendant 'with knowledge of the content thereof, has by words or other conduct manifested his adoption [of] or his belief in the truth.' [Citations]."(*People v. Lewis, supra,* at p.498.) Absolutely no evidence was presented that appellant knew of the content of the statement or in any way manifested adoption of it. The statement was therefore inadmissible hearsay.

Respondent's further claim that CALJIC 2.05 does not pertain to the instant facts is factually wrong. Respondent argued that there were no facts to support the theory that someone else fabricated the evidence. It is hard to understand upon what facts respondent based this argument. The statement in question was not in appellant's handwriting, appellant was in jail at the time of its composition, and appellant had no personal access to either the car nor the backpack. As such, the only theory that respondent could have logically relied upon was that envisioned by CALJIC 2.05.

The statement was prejudicial to appellant both the guilt and penalty phases.

The prosecution offered the statement as evidence that appellant attempted to fabricate an alibi for the May 7, 1997, shooting incident. Even though appellant's trial counsel conceded that appellant was the shooter, arguing that appellant did not intend to kill during the incident, the jury could, and surely did, consider it as evidence that appellant was guilty as charged of willful, deliberate,

and premeditated attempted murder. (See *People v. San Nicolas* (2004) 34 Cal.4th 614,667, fn. 11 [evidence that defendant fabricated evidence was relevant to the degree of the charged murder, even though defendant confessed to the homicide].) The evidence also created the impression, clearly intended by the prosecutor, that appellant was a powerful gangster and particularly dangerous because he could, even from jail, command his associates to concoct an alibi for him. The admission of this evidence was prejudicial and deprived appellant of due process of law and a fair trial on both guilt and penalty and denied him his right to a reliable and non-arbitrary penalty verdict. (U.S. Const. Amends. VI, VIII and XIV.)

V. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES

Appellant respectfully relies upon his Arguments in the AOB.

VI. THE $10,000.00 RESTITUTION FINE UNDER PENAL CODE SECTION 1204.4 WAS INCORRECTLY IMPOSED IN DISREGARD OF APPELLANT'S ABILITY TO PAY

A. Summary of Appellant's Argument

In his AOB, appellant argued that the trial court erred by imposing the maximum $10,000.00 restitution fine under Penal Code section 1204 without consideration of appellant's ability to pay.

B. Summary of Respondent's Argument

Respondent stated that Penal Code section 1204 presumes appellant's ability to pay and appellant failed to meet his burden under the stature to prove that he lack that ability.

C. Appellant's Reply

Respondent cited to *People v. Romero* (1996) 43 Cal.App.4th 440, 448-449 to support the above argument. However, *Romero* can be readily distinguished. In *Romero,* defendant was convicted of a drug offense and received a restitution fine of $1,000.00. As the fine was one tenth the amount of the statutory maximum and defendant was permitted to work in prison, the presumption and burden in section 1204 [3] make logical sense.

However, the instant case is a death penalty case. Appellant is not allowed to work and earn money while on death row and there can be no cogent argument that appellant could ever satisfy this fine.

As stated in Appellant's Opening Brief, the controlling case as to this issue should be this Court's decision in *People v. Vieiera* (2005) 35 Cal.4th 264, 305-306.) In *Vieiera,* the trial court imposed a $5,000.00 fine in a capital case. The Court remanded the case to the trial court to re-determine the restitution fine based

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3. Appellant was incorrect when it maintained that the fine imposed in part according to Government Code section 13967 (a). The fine was impose pursuant to Penal Code section 1204, only.(AOB at p. 113.)

upon defendant's ability to pay.

There was no mention in *Vieiera* of any burden of proof or presumptions, and there was no indication by this Court that the record revealed that defendant attempted to meet the burden and presumption set forth in the statute. Appellant argues that this Court recognized that a death penalty case can be distinguished from other cases in that due to the circumstances of incarceration a silent record can not be employed as a basis to impose a restitution fine over the minimum $200.00.

Therefore, appellant requests that, as in *Vieiera,* the issue of the amount of the restitution fine be remanded to the superior court for determination of the amount of the fine based upon appellant's ability to pay.

VII. THE TRIAL JUDGE COMMUNICATED TO THE JURY AN IMPROPER LEGAL STANDARD FOR THE WEIGHING PROCESS IN THE PENALTY PHASE[4]

A. Summary of Appellant's Argument

In his AOB, appellant argued that during voir dire, the trial court defined mitigating factors as "the good" and aggravating factors to the prospective jurors as "the bad." Over the course of the voir dire, the court repeated this instruction in substantially the same form 38 times. Since the prospective jurors were not

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4. There was an error in the Table of Contents of the AOB. Argument VII of the AOB starts on page 115.

sequestered, each sitting juror hear this definition, which was a *de facto* instruction, many times.

As stated in Argument VII of the opening brief, this definition was both legally incorrect and completely misleading. The mitigating factors in this case related to appellant's tragic upbringing. In no way this evidence be defined as "good" in the commonly understood sense of the word. However, under the Eighth Amendment and California statutory scheme, it was mitigating and highly relevant.

By repeatedly giving the jurors an instruction that limited the mitigating factors to something "good" that attached to appellant (i.e. some positive aspect of his character or conduct), the trial court violated appellant's constitutional right to a fair determination of penalty based upon full consideration of all mitigating evidence presented by appellant.

B. Summary of Respondent's Response

Respondent argued that the trial judge did instruct the jury that in order to find for death the aggravating had to so substantially outweigh the mitigating circumstances that death is the appropriate verdict. Respondent also argued that trial counsel's failure to raise this issue below precludes this Court from hearing the merits of this issue.

C. Appellant's Reply

In its response, respondent never addressed the issue raised by appellant in his opening brief. Appellant never argued that the trial court did not give the introduction that set forth the standard that the aggravating factors must "substantially outweigh" the mitigating factors. The argument that appellant urged upon this Court was that by substituting simplistic and vague words such as "bad" and "good" to replace the carefully constructed and defined terms "aggravating" and "mitigating", the trial court committed reversible instructional error for the reasons stated in the Appellant's Opening Brief.

As stated in Argument VII of Appellant's Opening Brief, appellant's penalty case consisted in greatest part of horrific accounts of his childhood involving an violently abusive father, a clinically depressed mother, the loss of a younger brother due to parental abuse and a childhood suffused with fear, hopelessness and abandonment. None of this could be defined as "good." Yet, due to the way that the voir dire was conducted, the sitting jurors heard up to three dozen times this misleading and inaccurate instruction. By the time that the jury was formally instructed the "bad" vs. "good" rubric has already been made part of their group consciousness.

Respondent's argument that this Court should not hear the merits of this argument in that it was forfeited is wrong. Penal Code section 1259 clearly allows

this Court to review this instructional error in that the substantial rights of appellant were affected.

The United States Supreme Court has repeatedly observed that mitigating evidence often includes facts about a defendant that, while sympathetic, may portray the defendant as damaged and anything but "good."(*Abdul-Kabir v. Quaterman* (2007) 550 U.S. 233; *Brewer v. Quarterman* (2007) 550 U.S. 286.) The Court has held repeatedly that the Eighth Amendment requires that juries be instructed in a manner that permits them to give mitigating effect to sympathetic evidence of a defendant's disadvantaged background and his disabilities. (*Id.*) The trial court's misinstruction to the jurors in this case imbued them with an unconstitutional narrow view of the role and relevance of mitigating evidence. The penalty judgment in this case must therefore be reversed.

VIII. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE AT THE PENALTY PHASE RELATING TO THE LISA LAPIERRE SHOOTING AND THE BANK ROBBERIES

A. Lisa LaPierre Shooting

1. Summary of Appellant's Argument

Appellant argued that respondent's use of the shooting of Lisa LaPierre and three bank robberies as factor (b) aggravating evidence in the penalty phase violated appellant's right to a fair determination of penalty in that the only

evidence of appellant's guilt of any of these acts was the testimony of accomplices, testimony unsupported by any corroborating evidence. Indeed, Leonard Washington's testimony was the only evidence that the bank robberies in which he implicated appellant took place at all.

Penal Code section 1111 provides in pertinent part, that "[a] conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

This Court has held that this provision of section 1111 applies to a 190.3 (b) factor in aggravation in the penalty phase of a capital case and governs the proof. (*People v. Williams* (1997) 16 Cal.4th 153, 244.) As such, the testimony of an accomplice to a violent crime cannot, in and of itself, allow for the admission of that crime as an aggravating factor under section 190.3 (b).

There was no such corroborating evidence in the record. Therefore, the evidence of the bank robberies should not have been admitted as evidence.

2. Summary of Respondent's Argument

Respondent claimed that the there was sufficient corroboration in that there was testimony that a casing recovered at the LaPierre crime scene was fired by the same gun that was recovered from Glasgow Street, which had been used in the

Cortez and Dunbar shooting.

3. Appellant's Reply

What respondent failed to mention in its argument, is the gun used to shoot Ms. LaPierre was gang owned gun that had been passed around to various persons for the purpose of the commission of crimes (8 RT 1379.) Glenn Johnson, a convicted robber, was in possession of this weapon for a period of time. Not coincidentally, it was Glenn Johnson that provided the only evidence that connected appellant to the gun on Glasgow Street. [5] While Johnson testified that he did not see appellant drop any gun on Glasgow Street, the prosecutor was allowed to introduce of a prior statement by Johnson to the police that he did make such an observation. This prior statement was the product of four separate police meeting with Johnson while Johnson was facing a serious prison sentence in Orange County.

Once again, a pattern emerges where respondent urges this Court to use the testimony of a highly unreliable individual who was heavily involved in crime to corroborate inherently unbelievable testimony. Frank Lewis was a violent criminal who indisputably committed a terrible crime. Glenn Johnson was a criminal who roamed the streets with a loaded weapon to avenge the shooting of

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5. The police officer on the scene when the gun was dropped described the person dropping the gun as 5 feet seven inches tall and about 120 pounds. This is a much smaller individual than appellant. (9 RT 1501)

his "homie." Neither corroborates the other because neither is at all believable.

Just as the prosecutor employed a violent, unbelievable felon to shore up eyewitness identifications that were inherently unbelievable in Count I, respondent uses the same felon to corroborate attempted murderer Frank Lewis to improperly establish a portrait of appellant as a cowardly criminal who puts younger people out in front of his criminal enterprises for his own protection.

B. Bank Robberies

1. Summary of Appellant's Argument

As with the shooting of Ms. LaPierre, there was no evidence to corroborate accomplice testimony. Therefore, the evidence of the bank robberies should not have been admitted as evidence.

2. Summary of Respondent's Response

Respondent argued that the evidence of the LaPierre shooting corroborated the testimony of the accomplice(s) in the bank robbery. It based this argument on the "remarkable" similarity of the way each crime was committed; that is appellant "using young, vulnerable teen-agers to 'do his dirty work.'" (RB at p. 66.)

Secondly, respondent claimed even if there was no corroboration, the error was harmless because the penalty jury was instructed by the court to disregard accomplice testimony unless it was corroborated. (2 CT 347,348, RB at p. 66.)

Finally, respondent claimed that even if there was error, respondent claimed that it was harmless because the bank robberies did not play a significant role in the decision of the jury. (RB at pp.67-68.)

3. Appellant's Reply

a. The LaPierre Incident is Not Corroboration of the Bank Robberies

While respondent never explained the legal basis of its rather far-fetched argument, it can only be assumed it is claiming that Evidence Code 1101(b) is the statutory authority that would support its argument of "*modus operandi.*"

Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including that in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion.

Subdivision (b) of section 1101 creates an exception to the general rule of section 1101(a) by stating that the general rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition, such as motive, intent, common plan or scheme or identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

In *People v. Thompson,* this Court explained

> In ascertaining whether evidence of other crimes has a tendency to prove the material fact, the court must first determine whether or not the uncharged offense serves "logically, naturally, and by reasonable inference" to

> establish that fact. (Citation) The court "must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." (Citation.omitted) If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.(*People v. Thompson* (1980) 27 Cal.3d 303, 316.)

Respondent's argument is without merit for several reasons. Firstly, it is factually incorrect. Respondent claimed that in the three bank robberies, appellant sent others into the bank to "do his dirty work" while he waited outside. This is incorrect. According to the alleged accomplice, Leonard Washington, during the July December 17, 1996 robbery of the Topa Savings Bank, appellant entered the bank was well. (12 RT 1936-1937, 1977-1978.)

Secondly, while appellant does not concede that the LaPierre shooting is sufficiently corroborated itself to allow for its admission, (see AOB Argument VIII), even if it was, there are insufficient similarities between it and the bank robberies to allow for the inferences permitted by section 1101 (b). The two sets of crimes were of a totally different nature. The only conceivable commonality that respondent was able to advance was that appellant was allegedly in the company of younger accomplices at the time of the alleged offenses who did the "dirty work."

As stated above, in one of the robberies, appellant did not use the accomplices for this purpose. In addition, even if there are some minor "similarities" between the two sets of the crimes, they are completely insufficient to support the inference sought by respondent. Presumably, respondent is arguing that the facts of the LaPierre case are so similar to the facts of the bank robberies that they permit an inference that if appellant was involved in the LaPierre shooting then he was also involved in the bank robberies.

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Miller* (1990) 50 Cal.3d 954, 987.) "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (*People v Ewoldt, supra*, 7 Cal.4th at p. 403)

This degree of similarity is clearly not present in this case. They were two totally dissimilar crimes. Further, Washington was hardly a naive young person cajoled into doing the "dirty work." He had been convicted of two previous bank robberies, and this conviction was his second "strike"(12 RT 1933), meaning he had a significantly longer and more violent criminal record than Mr. Nelson. Washington was an experienced gang member, and, in fact, was caught trying to

commit a murder with Mr. Cortez's gun the day after Mr. Cortez was shot. (8 RT 1393.)[6] Therefore, evidence of the LaPierre shooting cannot be used as corroborating evidence of the bank robberies under Penal Code section 1111.

b. The Fact that the Jury Was Instructed as to Penal Code section 1111 Did Not Cure the Trial Court's Error

Respondent claimed that as the trial court instructed the jury that they cannot find that defendant committed a criminal act based upon the uncorroborated testimony of an accomplice, the jury must be presumed to have understood this instruction therefore, it must be assumed that the jury did not consider the evidence of the bank robberies. (RB at pp. 66-77.)

However, the United States Supreme Court itself has cautioned against this assumption. "While juries ordinarily are presumed to follow the court's instructions, see *Greer v. Miller*, 483 U.S. 756, 766, n. 8, 107 S.Ct.3102, 3109, n.8, 97 L.Ed. 2d 618 (1987), we have recognized that in some circumstances 'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant that the practical and human limitations of the jury system cannot be ignored' *Bruton v. United States,* 391 U.S. 123,135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). See also *Beck v. Alabama,* 477 U.S. 625, 642, 100 S.Ct. 2382, 2392, 65 L.Ed. 2d 392 (1980); *Barclay v.*

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6. The record does not explain why he was not prosecuted for the assault on Cortez.

Florida 1983) 463 U.S. 939, 950, 103 S.Ct. at 3425; *Simmons v. South Carolina* (1994) 512 U.S. 154, 171.)

In *Simmons*, the Supreme Court concluded that an instruction telling the jury not to consider the defendant's eligibility for parole did not cure the trial court's error in refusing to advise the jury that the defendant, if given a life sentence, would be ineligible for parole. Similarly, in *People v. Bell* (2007) 40 Cal.4th 582, 607-609, this Court, in upholding the exclusion of hearsay relied upon by an expert, despite the availability of limiting instructions, recognized that jury instructions cannot be relied upon to cure the erroneous admission of evidence.

Respondent cites to this Court's decisions in *People v. Yeoman* (2003) 31 Cal.4th 93, 139 and *People v. Holt* (1997) 15 Cal.4th 619, 622 to support its argument.

However, neither of these two decisions resulted in the admission of inadmissible and prejudicial evidence. *Yeoman* involved a claim that the jury did not understand the wording of a stipulation and *Holt* involved the jury's understanding of the meaning of the word "sympathy" in the penalty phase of the trial.

In the instant case, the jury was allowed to hear inadmissible evidence that could have been easily used to draw the conclusion that appellant was a serial

criminal, who was so contemptuous of the law and the safety of others that he would commit two bank robberies in a single day.

Further, the instruction that was given to the jury did not identify Washington as an accomplice as a matter of law, nor did it even specifically direct the jury to Washington's testimony.

c. Prejudice Argument

Where the jury is allowed to consider invalid aggravating factors this puts the weight of those invalid factors improperly on death's side of the sentencing scale, a death sentence that results from the consideration of improper evidence in aggravation deprives the defendant of due process of law and violates the Eighth Amendment's requirement of reliability. (*Sochor v. Florida* (1992) 504 U.S. 527, 532.) Even when other aggravating factors exist, employing the invalid aggravating factors deprives the defendant of "the individualized treatment that would result from actual re-weighing of the mix of mitigating factors and mitigating factors." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 752.)

According to the recent United States Supreme Court case of *Brown v, Sanders* (2006) 544 U.S. 212, 220 "An invalidated sentencing factor ...will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and

circumstances."

The High Court continued

> This test is not..."an inquiry based solely on the admissibility of the underlying evidence." (Citation omitted). If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here. (Citation omitted.) The issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty. See, e.g., Stringer, 503 U.S., at 232, 112 S.Ct. 1130 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"). As we have explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor. (*Id.* at pp.220-221.)

In the instant case, without the inadmissible evidence of the LaPierre shootings or the bank robberies there is virtually no evidence that appellant led a criminal life style in addition to the instant crimes.[7] This evidence completely skewed the jury toward the death penalty in that it unconstitutionally portrayed appellant as a chronic violent criminal, deserving of no mercy.

Contrary to respondent's contention, substantial mitigating evidence was

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7.The only "other crime " evidence properly admitted at the penalty phase was appellant's conviction of a violation of Penal Code section 12031.5 in 1997 and a conviction of violations of Vehicle Code sections 2800 and 10851 in 1995, for which he received a sentence of probation.

presented on Mr. Nelson's behalf, and the facts of the charged offenses were not so egregious that the jury would inevitably have sentenced Mr. Nelson to death absent the erroneous admission of this evidence. Respondent has not proven, nor can it prove, beyond a reasonable doubt, that the errors had no effect on the verdict.

The death judgment must be reversed.

IX. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE AT THE PENALTY PHASE REGARDING THE RAP LYRICS FOUND IN DEFENDANT'S BACKPACK

A. Factual and Procedural Summary

During the guilt phase of the trial, the prosecutor attempted to introduce into evidence the contents of the backpack found in the back of the white Jeep Cherokee (Exhibit 17), specifically, the sheets of rap lyrics written by appellant and contained in a red note book. (Exhibits 47 and 48; 8 RT 1428.)

The prosecutor stated that the probative value of these lyrics outweighed the prejudicial impact because it demonstrated appellant's intent to shoot officers, commit a car jacking and his gang affiliation. (8 RT 1429-1430.) The court ultimately denied the prosecutor's request for admission of these lyrics but stated that they may be admissible in the penalty phase. (8 RT 1444-1446.)

During the penalty phase, the prosecutor proffered this same evidence for the jury's consideration in the penalty phase. The court addressed defense counsel;

"I did indicate that I thought it was more appropriate at the penalty phase? Do you want to address that issue? I am inclined to let it in. I think it does go to motivation under Evidence Code 352. Perhaps the prejudice outweighed the probative value at that time. I do not think that it does now." (11 RT 1869.)

Appellant's counsel objected to the admission stating that the evidence sought to be introduced was "nothing but lyrics, basically" and its admission would be very prejudicial to appellant. Counsel argued that the lyrics are simply an example of the field of music known as gangster rap and had no probative value, especially in that they were written years before the crimes. (Vol. 11 RT 1869)

The court overruled this objection, stating

> It seems to me it's relevant to the circumstances of the crime It goes to the state of mind, his attitude toward the police, his attitude toward crime, attitude toward carrying concealed weapons. Even if they were written in 1991, they were updated, and I think he was carrying them currently. Having looked through the rap lyrics, you can certainly argue to the jury that they don't have the same import and you might have a better argument today because it is more common today even when it was updated Perhaps in '96 or '97 when they were seized. Weighing them under 352, I think that the probative value in the circumstances outweigh the prejudice. (Vol 11 RT 1869-1870.)

B. Summary of Appellant's Argument

Appellant argued (AOB Argument IX, C) that the rap lyrics were not relevant to statutory factor in aggravation . They were not evidence of

"[c]riminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Penal Code section 190.3 (b).)

Appellant further argued that these lyrics went to appellant's character, not to his actions. They represented an attempt by the prosecutor to demonstrate that appellant was a person of bad character; a person predisposed to mistreating women, killing police officers and acting in a generally anti-social manner. As this evidence was not for the purpose of rebutting any defense evidence that appellant was a person of good character, it should not have been admitted.

Further, appellant argued that the United States Supreme Court held that pursuant to the First Amendment to the Constitution of the United States, evidence of a defendant's associations or beliefs cannot be used as an aggravating factor in the penalty phase of a death penalty trial.

C. Summary of Respondent's Argument

Respondent argued that appellant waived the issue raised on appeal because he did not make an objection in the trial court that the evidence constituted improper non-statutory aggravating factors. (RB at pp.89-90.)

Respondent further argued that the court did not err in admitting the rap lyrics. It argued that the rap lyrics were relevant under Penal Code

section 190.3 (a), in that they went to the circumstances of the offense, arguing that evidence that reflects directly on a defendant's state of mind contemporaneously with the capital murder is relevant under that section. (RB at p. 92.) Respondent also argued that the rap lyrics were admissible because they showed "overt remorselessness" which was also a circumstance of the offense. (RB at p.93.)

Finally, respondent argued that the admission of the rap lyrics was not prejudicial. (RB at pp. 95-96.)

D. Appellant's Reply Argument

1. Failure to Object

Regarding the claim of failure to object, appellant relies upon his legal argument in this Reply, Argument IV, C. 1. It was very clear to both the court and the prosecutor what trial counsel meant when he objected to the lyrics by stating that the evidence sought to be introduced was "nothing but lyrics, basically" and its admission would be very prejudicial to appellant. Further, trial counsel argued that the lyrics are simply an example of the field of music known as gangster rap and had no probative value, especially in that they were written years before the crimes . (Vol. 11 RT 1869)

Counsel was obviously referring to the fact that the evidence in

question was irrelevant to any statutory factor in aggravation in that the rap lyrics were nothing more than words that had no relevance to the crimes in question.[8]

Once again, trial counsel made a clumsily phrased objection. However, the nature of the objection was such that both the court and prosecutor were adequately noticed of its legal grounds.

2. Reply to Respondent's Substantive Argument

a. The Admission of the Evidence Violated Appellant's Right to a Fair Penalty Determination

Respondent argued that the evidence was properly admitted under factor (a) as evidence relating to the circumstances of the crime. Respondent further argued that appellant was incorrect when he stated that there is no existing case law which permits such evidence to be admitted as a circumstance of the crime. Respondent then urged upon this Court that the evidence of the rap lyrics "was relevant to (appellant's) state of mind and attitude toward the police and carrying weapons."(RB at pp 90-91.)

In making this argument, respondent relied upon *People v. Guerra* (2006) 37 Cal.4th 1067 , among other holdings of this Court, to stand

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8. The prejudicial effect of the rap lyrics, and their lack of probative value, is especially apparent with regard to the references in them to abusing women, dealing drugs, and evading the Internal Revenue Service, acts which none of the evidence at trial suggested appellant had committed.

for the position that the rap lyrics were admissible under section 190.3 (a), in that they were demonstrative of appellant's "overt callousness" that "reflect(s) directly on (appellant's) state of mind contemporaneous with the capital murder." (RB at pp. 91-92.)

Respondent is incorrect. This Court has never held that the type of evidence objected to in the trial court could be considered as an aggravating factor under section 190.3 (a). The cases that respondent cited did not expand the scope of that section to the point where it encompasses evidence such as a work of fiction told in rap lyrics written years before the alleged crime.

The cases referenced by respondent held only that evidence that "reflects directly on the (appellant's) state of mind contemporaneous with the capital murder" can be admissible even if they may also be relevant to a factor in mitigation. (*People v. Ramos* (1997) 15 Cal.4th 1133,1164.)

These cases all limited their holdings by stating that if there was evidence as to appellant's callousness or lack of remorse *during the commission of the capital murder* it is admissible evidence as a 190.3 (a) factor in aggravation. The Court never even attempted to expand factor (a) to evidence that might possibly demonstrate appellant's general beliefs or bad character unless the evidence was in rebuttal to evidence of good

character presented by defendant in his case in chief.

Respondent specifically cited to *People v Avena* (1996) 13 Cal 4th 394, 439 to support its argument. However, *Avena* cited directly to this Court's decision in *People v. Boyd*:

> In Boyd, we examined the 1978 death penalty law and concluded that not only must the jury "decide the question of penalty on the basis of the specific factors listed in the statute," but the evidence admitted at the penalty phase must be "relevant to those factors." (Boyd, supra, at pp. 773-774, 215 Cal.Rptr. 1, 700 P.2d 782.) Although evidence in mitigation is not limited to statutory factors (id. at p. 775, 215 Cal.Rptr. 1, 700 P.2d 782; see Lockett v. Ohio (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973), "[e]vidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and [would] therefore [be] irrelevant to aggravation." (Boyd, supra, 38 Cal.3d at p. 774, 215 Cal.Rptr. 1, 700 P.2d 782.) Thus, "[aggravating] evidence irrelevant to a listed factor is inadmissible" (id. at p. 775, 215 Cal.Rptr. 1, 700 P.2d 782), unless it is to rebut defense mitigating evidence admitted pursuant to section 190.3, factor (k). (Boyd, supra, at p. 776, 215 Cal.Rptr. 1, 700 P.2d 782.)

The cases cited by respondent do not stand for the proposition that any type of evidence that relates to appellant's attitudes about a general type of crime is admissible. *People v. Guerra, supra,* 37 Cal.4th at p. 1154 involved penalty phase argument by the prosecutor that the guilt phase evidence of the crime, itself, showed defendant was a sexual sadist and enjoyed the killings. This Court rejected appellate counsel's argument that

the fact that sexual sadism could be considered an factor in mitigation precluded its use in the prosecutor's argument.

In *People v. Ramos* (1997) 15 Cal.4th 1133, also cited by respondent, this Court stated that evidence that defendant told his cellmate that he shot the victims and enjoyed hearing them beg for their lives was relevant to factor (a) in that it was relevant to defendant's lack of remorse during the commission of the crime. Respondent also cited to *People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1232 which held similarly that evidence of defendant's boasts to a cellmate about "bagging a cop" who "had it coming" was relevant under 190.3(a). In reaching that holding, this Court held that section 190.3 (a), the circumstances of the offense, encompassed a defendant's callousness and lack of remorse at the time of the murder in that it bears upon the jury's "moral decision whether a greater punishment, rather than a lesser, be imposed."(*Ibid.*)

These referenced cases involve a defendant's remorselessness *during* the actual capital crime. No case decided either by this Court or the United States Supreme has ever tried to extend this limited holding to any general past statement by the defendant that could be argued to show animus against a general class of person of which the victim was a member.

In the instant case the lyrics constituted neither an "act" nor a

"circumstance of the crime."They were statements about fictional events, not about the charged offenses. Following respondent's logic, evidence of any statement that demonstrates animus toward a certain group is admissible as a "circumstance of the offense." Further, any statement articulating disrespect toward a particular person or group of people, regardless of its context could be used to demonstrate callousness during the commission of a capital murder. The ramifications of such an argument would be to destroy the statutory scheme of the penalty trial and a defendant's protections under not only the Eighth Amendment, but also the First Amendment of the United States Constitution. Almost any expression of an anti-social sentiment, heretofore inadmissible under the statutory scheme could be argued to be relevant to a defendant's "attitude" during the actual killing. Such an extension would render the entire statutory scheme meaningless and would inevitably permit the wholesale introduction of statements and opinions attributed to the defendant throughout his life as evidence in aggravation of penalty.

b. The Admission of the Lyrics as Evidence in Aggravation Violated Appellant's First Amendment Right to Free Speech

In his opening brief, appellant argued that the admission of the rap lyrics into evidence violated appellant's First Amendment right to free

speech. Respondent did not mention that in his brief.

Review of the First Amendment violation was not forfeited by trial counsel's failure to object on that ground. (*People v. Lindberg* (2008) 45 Cal.4th 36, fn 12.) It is settled law that constitutional questions may be raised by the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394) Moreover, failure to raise a particular legal theory below will not necessarily bar a claim on appeal where there is a clear factual record upon which the reviewing court may base its decision. (See *Ward v. Taggert* (1959) 51 Cal.2d 736, 742.) The reviewing court has discretion to decide a pure question of law based on undisputed facts. (*People v. Brown* (1996) 42 Cal.App.4th 462, 471.)

As this Court explained in *People v. Lindberg, supra,* the United States Supreme Court has held that "in cases raising First Amendment issues...an appellate court has an obligation to make an independent examination of the whole record" in order to make sure that the "judgment does not constitute a forbidden intrusion on the field of free expression.'" (*People v. Lindberg, supra,* at p. 36, quoting *Bose Corp. v. Consumers Union of U.S., Inc.* (984) 466 U.S. 485, 499.) Thus, this Court should independently review the record in this case to ensure that appellant's free speech rights have not been infringed by the use of constitutionally

protected speech as evidence in aggravation of penalty. (*Lindberg, supra,* at p. 37; *In re George T.* (2004) 33 Cal.4th 620,631-633.) "Independent review is employed "precisely to make certain that what the government characterizes as speech falling within an unprotected class actually does so." (*In re George T., supra,* 33 Cal.4th at p. 633.)

Appellant presented uncontroverted evidence that the lyrics were an example of a musical genre know as "gangsta rap", that for better or worse is a part of popular culture. These types of lyrics are sold on compact discs and as commercial downloads and played on the radio and are an integral part of multi-billion dollar entertainment industry. (12 RT 1967-1968; 13 RT 2111-2112, 2121)

The lyrics at issue were not even written as appellant's own opinions or observations but told a story in the third person, the fictionalized adventures and statements of a young "gangster" called Young Floyd. (12 RT 1962 et seq.) They were a creative work, which like most rap music, contained an element of social commentary, a portrayal in fiction of the anger, alienation, and hopelessness of young black men. Works such as these, though they may be offensive, are as much core free speech as *Pulp Fiction* or *The Sopranos*. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression

of an idea simply because society finds the idea itself disagreeable or offensive." (*Texas v. Johnson* (1989) 491 U.S. 397, 414.)

As stated above, the trial court held these lyrics were admissible to demonstrate appellant's "state of mind, attitude toward the police, his attitude toward crime, attitude toward carrying weapons." (12 RT 1869-1870.) "Attitude," expressed in constitutionally protected speech is not a permissible aggravating factor. As stated in the opening brief, the United States Supreme Court made this very clear in *Delaware v. Dawson* (1992) 503 U.S. 159, 166-168, in which the Court stated that the First Amendment to the Constitution, guaranteeing freedom of speech and association, forbade evidence that a defendant was a member of a violent racist group in the penalty phase of the trial if all that it was relevant to was defendant's abstract beliefs. Further, the Ninth Circuit Court of Appeals also made clear that no further detriment should incur to a capital defendant due to his personal life style and that aggravating factors that allowed such evidence in the penalty phase were unconstitutional under the Eighth and Fourteenth Amendments to the Constitution. (*Beam v. Paskett* (9th Cir 1993) 3 F.3d 1301, 1308-1310 overruled on other grounds by *Lambright v. Stewart* (9th Cir 1999) 191 F.3d 1181.)

The danger of permitting such evidence of abstract ideas or

associations in the penalty phase is that the government will be able to invite juries to punish a defendant for any of his ideas that are offensive and disagreeable to society as a whole. This is expressly forbidden by the United States Constitution. (*Texas v. Johnson* (1989) 491 U.S. 397, 414.) When "circumstances of the crime" is interpreted to encompass every expression that a person has made in his life about a crime, a society is created in which freedom of expression is worse than a myth; it becomes a trap, in which every statement we publish, every piece of creative writing we produce can be turned against us as character evidence.

The trial court's analysis of this issue as an Evidence Code section 352 question was completely inappropriate. (11 RT 1869.) The issues involved are fundamental to the First, Eighth and Fourteenth Amendments and were wrongfully decided.

3. Appellant Suffered Prejudice from the Court's Error

Appellant's jury was allowed to hear evidence from which they were invited to infer that appellant was the character that he had written about in his rap ballad: the stereotype of a black gangster, violent and vengeful, and predatory, with a love of guns and a hatred of the law and the police. It invited the jury to reject any lingering doubt of appellant's guilt in what was, in truth, a weak prosecution case dependent upon an improbable

eyewitness identification and the testimony of informers who had received favors for implicating appellant. It suggested that appellant was guilty of offenses for which no evidence whatsoever was presented: abusing women, trafficking drugs, and, in general, conducting his life in such a way that the jury would surely find repulsive. This constitutionally impermissible evidence, taken with the other constitutionally impermissible aggravating evidence discussed in Argument IV and V of this Reply, rendered appellant's penalty verdict unconstitutional under the First, Eighth and Fourteenth Amendments to the United States Constitution. Therefore, the death judgment must be reversed.

X. THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO PRESENT "VICTIM IMPACT" EVIDENCE THAT FAR EXCEEDED THE LIMITS SET BY THIS COURT

Appellant respectfully relies upon his Arguments in Argument X of the AOB.

XI. APPELLANT'S RIGHT TO SUE PROCESS OF LAW AND A FAIR TRIAL WAS VIOLATED BY THE TRIAL COURT'S IMPROPER ADMISSION OF HEARSAY

A. Summary of Appellant's Argument

At the outset of the penalty phase, defense counsel raised an

objection to the admission to some of the "victim impact" evidence proffered by the prosecution. Specifically, counsel indicated to Court that the prosecutor had shown him an exhibit entitled "Our Weekend with Alex Dunbar."(Exhibit 54.) The district attorney indicated that the exhibit was a poem that a friend wrote to the Dunbar family and that the prosecutor superimposed a photo of Dunbar on it. The exhibit would be introduced through the testimony of Mr. Dunbar's mother. Trial counsel pointed out to the court that the person who wrote this poem would not be at trial and objected on these grounds. The court overruled the objection stating that it was not a valid objection. (12 RT 1872-1873.)

Exhibit 54 was identified by Mr. Dunbar's mother as a photo of the decedent superimposed over a written version of the eulogy given by a friend at the funeral. (12 RT 2008) The written part of the exhibit stated in party "Rarely in life do you meet such a person." It also recounted an April meeting with him. The written part of the exhibit also stated that the decedent was "happily full of life" and that he talked about his dreams and about "relationship, goals, life and love."

On appeal, appellant argued that Exhibit 54 should not have been admitted because it was hearsay (AOB Argument XI) and it exceeded the limits on the victim impact evidence set by this Court and violated

appellant's right to a reliable determination under the United States Constitution. (AOB Argument X.)

B. Summary of Respondent's Argument

Respondent argued that trial counsel never objected to the admission of Exhibit 54 on the ground that it exceeded this Court's limits on victim impact evidence. (RB at pp. 77-78.) In addition, respondent argued that the only objection by trial counsel, that the author of the poem would not be present in court, was insufficiently timely or specific. Therefore, appellant review of this issue should not be available. (RB 76-77.)

Respondent did not argue the issues on the merits.

C. Appellant's Reply

1. Failure to Object

Appellant relies upon his argument made in this Reply, Argument IV, C, 1. Once again, while trial counsel's objection did not expressly mention the word "hearsay" in his objection, there can be no doubt what was intended. By objecting that the author of the eulogy would not be in court, counsel was clearly making a hearsay objection. Further, Penal Code section 1259 allows this Court to consider the merits of this argument as it involves appellant's substantial right to receive a penalty phase trial based solely on properly received aggravating and mitigating evidence.

As stated in this Reply, Argument IV, C, 1, this Court in *People v. Partida* stated that Evidence Code section 353 does not exalt form over substance and does not require any particular form of objection. The objection must simply be "made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis upon which exclusion is sought, and to afford the People an opportunity to establish its admissibility. (*People v. Partida, supra,* at p.435 quoting from *People v. Williams* (1988) 44 Cal.3d 883, 906.)

The trial court obviously knew what trial counsel was trying to say. It was abundantly clear that the prosecutor presented a written statement in the place of in-court testimony that would have been subject to cross-examination.

The trial court has an affirmative duty to see that justice is done. "Court's are established to discover where lies the truth when issues are contested and the final responsibility to see that justice is done rests with the judge" (*People v. Carlucci* (1979) 23 Cal.3d 249, 256.) As such, the court's dismissive response to counsel's objection did not serve the interests of justice and the issue is not forfeited in this Court for failure to state a technically perfect objection.

2. Substantive Reply

Respondent did not respond to appellant's substantive argument in its response brief other than to touch upon the basic rationale that victim impact evidence is permissible to show the victim's uniqueness as a human being.

However, Exhibit 54 went too far and encouraged an emotional rather than a rational response from the jury. It essentially created a shrine for the victim.

Further, it substituted this shrine for testimony. As stated in Appellant's Opening Brief, the penalty phase is not a free-for-all, where rules of evidence can be disposed of for the sake of showmanship. Exhibit 54 was a testimonial to the victim by what should have been a percipient witness subject to the same cross examination as any other witness. Instead, the trial court simply accepted everything on Exhibit 54 as the undisputed gospel truth and dispensed with the need for actual testimony, as required by the Sixth and Fourteenth Amendments to the United States Constitution.

XII. THIS COURT'S DECISION IN *PEOPLE V. EDWARDS* MISCONSTRUED THE TERM "CIRCUMSTANCES OF THE OFFENSE" VIS A VIS PENAL CODE SECTION 190.3(A) AND ITS HOLDING SHOULD BE RECONSIDERED

Appellant respectfully relies on his Argument as stated in his

opening brief.

XIII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD.

Appellant demonstrated in his opening brief that California's statute violated the Eighth and Fourteenth Amendments because the statute does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB, Argument XV.) Appellant also demonstrated that long established United States Supreme Court precedent holds that to avoid the Eighth Amendment's proscription against cruel and unusual punishment the state must rationally and objectively narrow the class of murderers eligible for the death penalty. (AOB Argument XV, citing *Zant v. Stephens* (1983) 462 U.S.862, 878.)

This core constitutional principle was most recently reiterated in *Kansas v. Marsh* (2006) 548 U.S. 163, where in an opinion by Justice Thomas, the High Court held that while states had wide discretion to determine the parameter's of their death penalty laws, a death penalty scheme must at an absolute minimum ensure that the procedure "rationally narrow[s] the class of death-eligible defendants." (*Id.* at pp. 173-174.)

This Court has not considered whether Penal Code section 190.2's all embracing special circumstances, together with the Court's ever more

expansive interpretation of those special circumstances, fails to rationally narrow the eligibility pool. In light of the increasing role the United States Supreme Court has given narrowing in its death penalty jurisprudence, it is time this Court did so.

XIV. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant respectfully relies on his Argument as stated in his opening brief.

XV. THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

Appellant proved his death verdict is unconstitutional because it was not premised on findings beyond a reasonable doubt by unanimous jury. (AOB, Argument XVII.) Respondent relied on this Court's precedent in the argument that his claim should be rejected. Appellant writes here only to urge that his claim must be considered in light of *Cunningham v. California* (2007) 127 S.Ct. 856. This case, supports appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be

found true by the jury beyond a reasonable doubt and by unanimous decision of the jury. Because of *Cunningham*, this Court's effort to distinguish *Ring v. Arizona* (2002) 536 U.S. 584 and *Blakely v. Washington* (2004) 542 U.S. 296 should be re-examined. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People v. Morrison* (2004) 34 Cal.4th 698, 731 [same].)

The *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. The Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington*, *supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California*, *supra,* the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law. The question was does the Sixth Amendment

right to a jury trial require that the aggravating facts used to sentence a noncapital defendant to the upper term (rather than to the presumptive middle term) be proved beyond a reasonable doubt? The High Court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p. 868, citing *People v. Black* (2005) 35 Cal.4th 1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular

case, does not shield a sentencing system from the force of our decisions." (*Id.* at p. 869)

Justice Ginsburg's majority opinion held that there was a bright line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. (*Ibid.* citing to *Blakely*, *supra,* 542 U.S., at 305, and n. 8.)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (*People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi.*

In *People v. Prieto* (2003) 30 Cal.4th 226, 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty

sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the fact finding was something "traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham v. California, supra,* 127 S.Ct. at p. 869.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto, supra*, 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "as reflects whether defendant should be sentenced to death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Brown* (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.) None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation,

have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point.

Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not have to consider aggravation if in the juror's moral judgement the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to found beyond a reasonable doubt.

The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. As Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment

increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 542 U.S. at p.328.) Merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona, supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi*: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt."

Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

A second recent United States Supreme Court case also supports appellant's argument that a sentence must be based on the findings beyond a reasonable doubt by a unanimous jury. In *Brown v. Sanders* (2006) 546 U.S. 212, the High Court clarified the role of aggravating circumstances in California's death penalty scheme: "Our cases have frequently employed the terms 'aggravating circumstance' or 'aggravating factor' to refer to those statutory factors which determine death eligibility in satisfaction of

Furman's narrowing requirement.(See, e.g., *Tuilaepa v. California,* 512 U.S., at 972.) This terminology becomes confusing when, as in this case, a State employs the term 'aggravating circumstance' to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 216, fn. 2, italics in original.) There can now be no question that one or more aggravating circumstances above and beyond any findings that make the defendant eligible for death must be found by a California jury before it can consider whether or not to impose a death sentence. (See CALJIC No. 8.88.) As Justice Scalia, the author of *Sanders,* concluded in *Ring:* "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 612.)

In light of *Brown* and *Cunningham,* this Court should re-examine its decisions regarding the applicability of *Ring v. Arizona* to California's death penalty scheme.

XVI. THE DIRECTIVE OF CALJIC NO. 8.84.1 AND 8.85 TO THE JURY VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO LIMIT THE AGGRAVATING CIRCUMSTANCES TO SPECIFICALLY LEGISLATIVELY DEFINED FACTORS

Appellant respectfully relies upon his argument as stated in his opening brief.

XVII. THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTINOAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

Appellant respectfully relies upon his argument as stated ihis opening brief.

XVIII. EVEN IF THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAW

Appellant respectfully relies upon his argument as stated in his opening brief.

XIX. CALIFORNIA'S USE OF THE DEATH PENALTY FALLS SHORT OF INTERNATIONAL STANDARDS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant respectfully relies upon his argument as stated in his opening brief.

XX. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

Appellant respectfully relies upon his argument as stated in his opening brief.

October 16, 2008

Respectfully submitted,

Glen Niemy
Attorney for Appellant

CERTIFICATION OF COMPLIANCE

I certify that the attached Appellant's Reply Brief uses a 13 point Times New Roman type and is 14894 words in length.

October 16, 2008

Respectfully submitted,

Glen Niemy

DECLARATION OF SERVICE

Re: People v. Bernard Nelson
S085193

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Reply Brief**, on each of the following by placing the same in an envelope addressed (respectively)

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Each envelope was then on October 17, 2008, sealed and placed in the United States mail, mailed priority, at Bridgton Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of California and Maine that the foregoing is true and correct this October 17, 2008, at Bridgton, ME

Glen Niemy